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Jurisdiction as Competition Promotion: A Unified Theory of the FCC's Ancillary Jurisdiction

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JURISDICTION AS COMPETITION PROMOTION: A UNIFIED THOERY OF THE FCC'S ANCILLARY JURISDICTION

John Blevins

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JURISDICTION AS COMPETITION PROMOTION: A UNIFIED THEORY OF THE FCC'S ANCILLARY JURISDICTION

JOHN BLEVINS*

ABSTRACT

The FCC's "ancillary jurisdiction" refers to the agency's residual authority to regulate matters over which it lacks explicit statutory authority under the Communications Act of 1934. Because many of today's most controversial and consequential policy debates involve new technologies not explicitly covered by that statute, the scope of the FCC's ancillary jurisdiction has taken on a critical new importance in recent years. In particular, the future of Federal Internet policy depends on resolving the questions surrounding ancillary jurisdiction. In this Article, I provide a new theory of the FCC's ancillary jurisdiction, arguing that it is best understood as an authority to promote market competition. More specifically, ancillary jurisdiction has primarily addressed and promoted competition in markets where vertical leveraging is a concern—particularly those involving legacy network infrastructure. My argument has both a positive and normative dimension. Descriptively, I argue that the competition-promotion framework provides the most persuasive and coherent account of the seemingly incoherent line of cases reviewing the FCC's ancillary jurisdiction. Normatively, I argue that the FCC's ancillary jurisdiction should be exercised in this manner, in large part to protect the doctrine's viability in the face of increasing criticism and to shape it in a way that both promotes competition and limits agency capture.

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I. INTRODUCTION

In 1965, the Federal Communications Commission (FCC) had a problem. Cable television, a relatively new service, was wreaking havoc on the FCC's established regulatory order. The FCC, it seemed, was powerless to stop it.

The problem traced back several decades to the Communications Act of 1934 (Communications Act), which created the FCC but gave it limited regulatory authority.[1] Everyone agreed that the Communications Act authorized the FCC to regulate contemporary communications providers, such as telephone companies and radio broadcasting stations. But cable service was a different animal—it was a regulatory platypus that defied the FCC's traditional regulatory classifications. Because this strange new technology did not exist in 1934 when the Communications Act was enacted, the FCC lacked explicit authority to regulate it. Further, Congress declined to enact new legislation granting this authority to the FCC.[2] In short, the FCC had a problem.

It soon, however, found a solution—a novel and controversial solution whose repercussions continue to be felt more than forty years later. With the courts' eventual blessing, the FCC announced a new

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1. Communications Act of 1934, Pub. L. No. 73-16, 48 Stat. 1064; *see also* 47 U.S.C. § 151 (2006).

2. *See* Amendment of Parts 21, 74 (Proposed Subpart J), and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters, 30 Fed. Reg. 6078 (proposed Apr. 29, 1965) (codified at 47 CFR pts. 21, 74) (notice of inquiry and notice of proposed rulemaking) (providing an overview of proposed legislation over various congressional sessions to regulate cable service and reaching tentative conclusion that FCC had jurisdiction over cable service).

type of authority which came to be known as the FCC's "ancillary jurisdiction."[3] Under this authority, the FCC could regulate services that were merely related (or "ancillary") to regulatory objectives explicitly referenced in the Communications Act.[4] As applied to cable, the Supreme Court eventually affirmed that the FCC could exercise ancillary jurisdiction over cable service because the new regulations were "reasonably ancillary" to the FCC's existing television broadcasting regulations.[5] Problem solved . . . sort of.

As it turned out, the FCC's solution soon created new problems of its own. These problems remain with us today and lie at the heart of some of our most contentious and consequential policy debates. In particular, the future of Federal Internet policy depends on resolving the questions surrounding ancillary jurisdiction.

Analyzing the FCC's ancillary jurisdiction has been an exercise in confusion. Courts and scholars have criticized this authority as being vague and incoherent.[6] Others have criticized it as a virtually limitless authority.[7] Despite these criticisms, it is clear that ancillary jurisdiction is a critically important foundation of modern communications policy. Indeed, several of the FCC's most important decisions have been based on this authority.[8]

Looking ahead, determining the proper scope of the FCC's ancillary jurisdiction will grow even more important as the agency decides whether and how to regulate emerging Internet-related services over which it lacks explicit jurisdiction.[9] In fact, these debates are already raging at the FCC and in the courts. In October 2009, for instance, the FCC proposed historic new regulations—based entirely on its ancillary jurisdiction—that would prohibit various forms of discrimination by broadband access providers.[10] At the same time, the D.C. Circuit is currently hearing a challenge to the FCC's 2008 order finding

3. *See* Amendment of Parts 21, 74, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters, 2 F.C.C.2d 725, ¶ 19 (1966) (second report and order) (concluding that FCC had jurisdiction over cable service).

4. *See id.*

5. United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968).

6. *See infra* text accompanying notes 92-95.

7. *See infra* text accompanying notes 89-91.

8. See *infra* text accompanying notes 55-75 for examples of these proceedings.

9. With respect to many of these services, the jurisdiction is not clear because those services have been formally deregulated under Title I of the Communications Act. JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 220-21 (2005) ("The precise dimensions of the FCC's ancillary authority will assume increasing importance as the Commission folds within the deregulatory scope of Title I the growing number of applications-layer IP products that resemble [traditionally regulated] services . . . .").

10. Preserving the Open Internet: Broadband Industry Practices, GN Docket No. 09-191, FCC 09-93, ¶¶ 16, 83 (Oct. 22, 2009) (notice of proposed rulemaking) [hereinafter 2009 Notice], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf.

that Comcast (a cable broadband access provider) violated federal policy by blocking peer-to-peer applications.[11] This order, which also relied entirely on the FCC's ancillary jurisdiction, is currently being challenged in court on jurisdictional grounds.[12] If the order is reversed, it will likely jeopardize the FCC's authority to enact any form of broadband regulations, including its most recent proposed rules.

Given the importance of ancillary jurisdiction to modern policy, the literature has been surprisingly silent about it, offering mostly superficial summaries or limited analyses buried within larger pieces.[13] These relatively limited analyses do not provide convincing descriptive accounts of when courts have upheld the FCC's exercises of its ancillary jurisdiction. For instance, some argue that there is no logic at all to the courts' decisions, while others contend that the cases turn on the existence of specific factors such as the presence of new technology or the regulations' relationship with preexisting legislation.[14] While superficially appealing, none of these descriptions withstand scrutiny.

In this Article, I provide a new unified theory of the FCC's ancillary jurisdiction. Specifically, I argue that ancillary jurisdiction is best understood as an authority to promote market competition. Admittedly, "competition" is a broad term that encompasses several diverse concepts.[15] Accordingly, my analysis focuses primarily upon promoting competition (and limiting anticompetitive conduct) within markets where vertical leveraging concerns exist—particularly those markets involving dominant infrastructure providers such as legacy incumbent telephone companies.[16]

My argument has both a positive and normative dimension. Descriptively, I argue that the competition-promotion framework provides the most persuasive and coherent account of the seemingly incoherent line of cases reviewing the FCC's ancillary jurisdiction. As I show, the best predictor of whether courts will uphold the FCC's ex-

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11. In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13028 (Aug. 20, 2008) (memorandum opinion and order) [hereinafter Comcast Order], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf.

12. *See infra* text accompanying notes 79-82. Specifically, Comcast has challenged the order on both jurisdictional and procedural grounds, and the case is currently pending before the D.C. Circuit Court of Appeals. *See Cable,* CABLE COMM. DAILY, Sept. 10, 2008.

13. *See infra* note 109.

14. *See infra* Part III.

15. *See, e.g.*, John Blevins, *A Fragile Foundation—The Role of "Intermodal" and "Facilities-Based" Competition in Communications Policy*, 60 ALA. L. REV. 241 (2009) (outlining various theories of competition underlying modern communications policy).

16. Vertical leveraging generally refers to using market power in an input market to affect a downstream market. *See* Pietro Crocioni, *Leveraging of Market Power in Emerging Markets: A Review of Cases, Literature, and a Suggested Framework*, 4 J. COMPETITION L. & ECON. 449, 452-55 (2008).

ercises of ancillary jurisdiction is whether the regulation attempts to facilitate market competition, largely in the sense of limiting potential vertical leveraging by dominant providers.

Normatively, I argue that the FCC's ancillary jurisdiction *should* be exercised in this manner—that is, courts or Congress should limit the FCC's authority in this context to facilitating market competition in this manner. Likewise, courts should reject the use of ancillary jurisdiction for other objectives, particularly social goals that are theoretically appealing, but are often nothing more than incumbent protections in disguise.

Limiting the scope of ancillary jurisdiction in this manner offers a number of benefits that will help protect the doctrine's viability in the face of increasing criticisms. First, it adds both coherence and concrete limits to a notoriously vague and potentially unlimited doctrine. Second, it allows courts and other policymakers to shape ancillary jurisdiction as a market-promoting tool that will help prevent agency capture by providing a powerful ex ante constraint on the FCC's ability to benefit entrenched incumbents through its ancillary jurisdiction authority. In essence, my proposal would maximize the FCC's power in regulatory contexts where it is least likely to be acting for the benefit of entrenched providers. Finally, the framework that I propose confers legitimacy on the ancillary jurisdiction doctrine by aligning it closely with decades of precedent.

Part II provides an overview of ancillary jurisdiction, listing both examples of—and problems with—the doctrine. Part III illustrates why existing descriptive accounts of the cases that uphold or reject the FCC's ancillary regulations are unpersuasive. Part IV provides a new descriptive account, arguing that ancillary jurisdiction is best understood as a competition-promotion authority, in the sense described above. Part V provides a normative proposal and describes the policy benefits of conceptualizing ancillary jurisdiction through a competition-promotion framework.

II. ANCILLARY JURISDICTION AND ITS DISCONTENTS: AN OVERVIEW

This Part provides an introduction to the ancillary jurisdiction doctrine, arguing that it arose in response to specific structural gaps in the Communications Act. It next provides examples of how the FCC has used (and proposes to use) ancillary jurisdiction, thereby illustrating the doctrine's importance to modern communications policy. Finally, it outlines the problems and criticisms that surround the doctrine; specifically, that it is a vague and limitless authority.

A. The Problem: Structural Gaps in the Communications Act of 1934

The story of ancillary jurisdiction begins with the birth of cable television. In 1934, when President Roosevelt signed the Communications Act into law, no one had ever heard of cable television.[17] Years later, however, someone got the idea of capturing over-the-air television broadcast signals on antennae and transmitting them to rural communities over cable wires.[18] From these humble beginnings, cable television was born. And it grew quickly, eventually drawing the attention of television broadcast interests who saw it as a competitive threat.[19]

The growth of cable service almost immediately created regulatory headaches for the FCC.[20] These headaches stemmed from the original structure of the Communications Act and, more specifically, from the Act's "silo-based" structure, which remains with us even today. A brief overview of the structure and history of the Act is critical to understanding why ancillary jurisdiction ultimately emerged in the late 1960s.

The structure of the Communications Act is a product of a technologically bygone era. It consists of a series of titles that divide the world into *providers* rather than *functions*.[21] The individual titles

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17. Communications Act of 1934, Pub. L. No. 73-16, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.). Cable television was first used in the late 1940s. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 627 (1994) ("The earliest cable systems were built in the late 1940's to bring clear broadcast television signals to remote or mountainous communities.").

18. *See* Robert W. Crandall, J. Gregory Sidak & Hal J. Singer, *Does Video Delivered over a Telephone Network Require a Cable Franchise?*, 59 FED. COMM. L.J. 251, 259 (2007) ("Cable television began in the late 1940s as shared noncommercial community antenna television ("CATV") services to improve signal reception in areas where it was poor.").

19. *See, e.g.*, Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 312 (2004) ("[B]y the late 1950s, . . . broadcasters realized cable's threat as a successor industry.").

20. For instance, in 1949, an FCC secretary wrote to Ed Parsons in Astoria, Oregon, "asking him to explain his community-antenna television system." Randy Alfred, *Aug. 1, 1949: FCC Gets in on Cable TV*, WIRED, Aug. 1, 2008, http://www.wired.com/science/discoveries/news/2008/08/dayintech_0801.

21. Scholars are almost uniformly critical of the silo structure. Rather than lumping providers into a specified title or "bucket," an alternative regulatory structure (one that most scholars recommend) would be to regulate "horizontally" by *network layer*. *See, e.g.*, Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. ON TELECOMM. & HIGH TECH. L. 15, 19-22 (2006). Regulations, they argue, should focus on the network layer where a given activity takes place, not upon the label given to the provider or the infrastructure. *Id.* For instance, a Title III wireless company providing broadband *access* at the transport layer should not be subject to an entirely different set of regulations than a Title II wireline telephone company offering the same service at the same network layer. Although a comprehensive review of the "layers" proposals is beyond the scope of this Article, see generally Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L.J. 207 (2003); John T. Nakahata, *Regulating Informa-*

correspond to—and regulate—a specific type of provider or network. For instance, Title II covers only common carriers (telephones, telegraphs), while Title III covers only "radio" providers (radio, TV, wireless—all of which use radio spectrum). Congress eventually added Title VI in 1984 to cover cable providers.[22]

Under this framework, the appropriate regulation depends not on the function of the service, but on the label the FCC chooses to apply to the provider or to the network infrastructure over which service is provided. In fact, the FCC often regulates identical services differently if the providers or infrastructure have different "labels" (e.g., wireline telephone voice service falls within Title II, while wireless voice service over radio spectrum falls within Title III).[23] As the below diagram illustrates, this traditional approach creates vertical regulatory "silos."[24]

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tion Platforms: The Challenge of Rewriting Communications Regulation from the Bottom Up, 1 J. ON TELECOMM. & HIGH TECH. L. 95 (2002); Douglas C. Sicker & Lisa Blumensaadt, *Misunderstanding the Layered Model(s)*, 4 J. ON TELECOMM. & HIGH TECH. L. 299 (2006); Douglas C. Sicker & Joshua L. Mindel, *Refinements of a Layered Model for Telecommunications Policy*, 1 J. ON TELECOMM. & HIGH TECH. L. 69 (2002); Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815 (2004); Philip J. Weiser, *Law and Information Platforms*, 1 J. ON TELECOMM. & HIGH TECH. L. 1 (2002); Kevin Werbach, *Breaking the Ice: Rethinking Telecommunications Law for the Digital Age*, 4 J. ON TELECOMM. & HIGH TECH L. 59 (2005); Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. ON TELECOMM. & HIGH TECH. L. 37, 39-40 (2002); and Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587 (2004). *But see* David P. Reed, *Critiquing the Layered Regulatory Model*, 4 J. ON TELECOMM. & HIGH TECH. L. 281 (2006).

22. For an overview of these titles, see J. Scott Marcus, *The Potential Relevance to the United States of the European Union's Newly Adopted Regulatory Framework for Telecommunications* 3-4 (FCC Office of Plans and Policy, Working Paper No. 36, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-224213A2.pdf.

23. Whitt, *supra* note 21, at 596-97.

24. Richard Whitt also refers to these as "buckets." *Id.* at 590-91 ("The Communications Act and implementing rules divide up the landscape based on traditional service, technology, and industry labels . . . . These divisions assume clear, unwavering distinctions, with different categories defined by the assumed static characteristics of discrete services or networks. The result is an inflexible approach of isolated 'buckets' or 'silos' governed by black-and-white, all-or-nothing thinking.").

FIGURE 1

"Silo" Regulation

Title II	Title III	Title VI
• Common Carriers	• Radio Broadcasters • Wireless	• Cable

The Communications Act, however, also includes other titles that are not specifically linked to a type of communications service provider or network infrastructure. These are generally administrative and penal provisions.[25] The most important one for purposes here, Title I,[26] belongs in a class of its own. It is the introductory title that lists the FCC's purposes,[27] outlines the agency's general jurisdiction,[28] establishes internal procedures,[29] and includes a "necessary and proper" clause.[30] Critically, it is Title I that ultimately (and controversially) becomes the foundation of the FCC's ancillary jurisdiction.

Congress structured the Communications Act in this manner for specific historical reasons. Prior to the Act, both common carriers and radio broadcasters were federally regulated, albeit by different agencies. The Federal Radio Commission (FRC) regulated radio broadcasting under the Radio Act of 1927,[31] and the Interstate Commerce Commission (ICC) regulated common carriers (railroads, telephones, telegraphs) under the Interstate Commerce Act (ICA).[32] Con-

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25. Title IV, for instance, includes various administrative and procedural provisions. 47 U.S.C. §§ 401-416 (2006). Title V includes penal provisions. 47 U.S.C. §§ 501-510; *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 517-18 (2002) (providing overview of statutory titles).

26. 47 U.S.C. §§ 151-161.

27. *Id.* § 151.

28. *Id.* § 152.

29. *Id.* § 154.

30. *Id.* § 154(i).

31. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934) (creating FRC). The 1927 Act expanded upon the Radio Act of 1912, which had originally established federal jurisdiction over radio transmissions. *See* Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912).

32. Mann-Elkins Act, Pub. L. No. 61-218, 36 Stat. 539 (1910) (amending ICA to encompass telephone and telegraph services).

gress, however, eventually grew concerned that the ICC was too preoccupied with railroads to give communications services proper attention.[33] When drafting the new legislation, Congress therefore carved out these services from the ICC's jurisdiction, which allowed the agency to focus on railroads.[34]

The Communications Act of 1934 combined these two categories of communications services (common carriers and broadcasters) under one roof and created the FCC to govern them.[35] The Act's ultimate structure reflected this merger. Title II became the common carrier section, while Title III became the broadcasting section. In drafting the new law, Congress essentially copied the older laws, usually verbatim, and inserted them into the new Act.[36] For instance, Title II came directly from the ICA, while Title III is more or less the Radio Act of 1927.[37]

The problem with this structure is that it reflected the technological conditions of 1934. The FCC's authority over common carrier and radio providers was clear enough, but what happened if a new type of communications provider appeared? Would the Communications Act apply?

When cable service appeared on the scene years later, these questions became more than academic. Indeed, the FCC struggled with them for years.[38] Because cable service was neither a common carrier nor a broadcaster, it did not fit cleanly into any of the existing

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33. Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, *in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 3, 5 (Max D. Paglin ed., 1989).

34. *Id.* at 4.

35. PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 359-60 (2004) (discussing origins of "proposal to create a unified communications commission that would assume the FRC's functions as well as the responsibilities of the Interstate Commerce Commission for regulating the telephone industry").

36. Robinson, *supra* note 33, at 3; STARR, *supra* note 35, at 360 ("Although it formally repealed the Radio Act of 1927, the new measure reenacted nearly all the provisions of the earlier legislation, much of it verbatim.").

37. *See* Robinson, *supra* note 33, at 3; *see also* Kenneth A. Cox & William J. Byrnes, *The Common Carrier Provisions—A Product of Evolutionary Development, in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 25, 30 (Max D. Paglin ed., 1989); STARR, *supra* note 35, at 360; J. Roger Wollenberg, *The FCC as Arbiter of "The Public Interest, Convenience, and Necessity," in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 61, 70-71 (Max D. Paglin ed., 1989); James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 263 (2002) ("The common carrier provisions of the Act largely copied the ICA.").

38. For one of the best overviews of the FCC's initial regulatory struggles with cable, see Thomas G. Krattenmaker & A. Richard Metzger, Jr., *FCC Regulatory Authority over Commercial Television Networks: The Role of Ancillary Jurisdiction*, 77 NW. U. L. REV. 403, 433-37 (1982).

titles.[39] Thus, the FCC arguably had no jurisdiction over cable service at all.[40]

The regulatory quandary that cable posed, however, was merely symbolic of a larger problem, one made more pressing by the eventual growth of data processing and computer services in the 1960s and 1970s (services that were similarly unknown in 1934). The problem was that technology changed quickly, while the FCC's statutory delegation did not. Plus, Congress has been notoriously reluctant and slow to amend the Act throughout its history.[41] Thus, to effectively regulate American communications services, the FCC needed flexibility. Yet, at the same time, it needed to act within the bounds of its statutory delegation of authority.

The Act's unique statutory structure, however, made it difficult for the FCC to strike this balance between flexibility and legality. The FCC's most obvious obstacle was that the silo-based titles did not explicitly contemplate new services like cable and data processing. Indeed, opponents of expanded FCC jurisdiction could make a strong *expressio unius* argument against agency jurisdiction.[42] Congress, the opponents could argue, not only specifically listed the types of providers the FCC could regulate, but it imposed exceedingly specific requirements upon them. This level of detail arguably excluded by implication any nonlisted services.

In sum, the FCC had to thread a delicate needle. It needed flexibility to address the challenges of new technology, but it also needed

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39. For instance, cable service used wires like carriers did, but the transmissions were only one way. At the same time, cable providers transmitted video programming like broadcasters did, but generally not over radio spectrum. That said, some early cable companies, however, used microwave facilities for transmissions or parts of the transmission, and, because they used spectrum, the FCC had extended regulations to them before extending to all cable service. *See* Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 38 F.C.C. 683, 683-84 (1965) (first report and order).

40. For instance, in 1958, the FCC concluded internally in *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958), that cable was beyond the reach of both Title II and Title III jurisdiction. Krattenmaker & Metzger, *supra* note 38, at 434-35. Interestingly, just a few years earlier in 1952, the FCC had internally concluded that it could regulate cable as a common carrier under Title II. *Id.* at 433-34. Quite clearly, the rise of cable caused regulatory confusion.

41. The first, and only, comprehensive amendment was the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). Other significant amendments in 1984 and 1992 primarily related to cable services. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. (2006)); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.).

42. The full interpretative canon is *expressio unius est exclusio alterius*, which means the "expression of one thing is the exclusion of another." Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086-87 (2002).

to remain within the confines of its authority. The FCC eventually found a solution: ancillary jurisdiction.

B. The Solution: The Rise of Ancillary Jurisdiction

1. Overview of the Doctrine

Ancillary jurisdiction refers to the FCC's power to regulate matters (e.g., services, providers) not explicitly listed in the Communications Act. For practical purposes, it is a "catch-all" residual jurisdiction that is used when the FCC lacks more explicit statutory authority.[43] This Section briefly introduces the ancillary jurisdiction doctrine, with an eye toward how it navigates the FCC's challenge of maintaining flexibility while simultaneously remaining within its statutory authority.

In 1968, the Supreme Court first endorsed the concept of ancillary jurisdiction in *United States v. Southwestern Cable Co.*[44] In this seminal case, the Court concluded that the FCC has the authority to issue regulations "*reasonably ancillary* to the effective performance of the Commission's various responsibilities."[45] (Thus the name "ancillary jurisdiction.") In plain language, the FCC's regulations must be related to *something else*—i.e., some other provision or regulatory scheme.

Southwestern Cable Co. remains good law, and its holding has since solidified into a more formal two-pronged test.[46] First, ancillary jurisdiction exists if the regulation falls within the FCC's general jurisdiction under 47 U.S.C. § 152.[47] That is, the regulation must address an "interstate [or] foreign communication by wire or radio."[48]

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43. Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 50-51 (2003) ("To regulate outside of its direct mandate, the FCC must rely on its 'Title I' or 'ancillary jurisdiction' authority. The justification for this form of FCC action stems from a catch-all provision—contained in Title I of the Communications Act [at § 154(i)] . . . .").

44. 392 U.S. 157, 178 (1968). Admittedly, the Supreme Court had held much earlier that the FCC had "expansive powers" under the Communications Act. Nat'l Broad. Co. v. United States (*NBC*), 319 U.S. 190, 219 (1943). As explained *infra* in Part III.A, although *NBC* provided important groundwork for *Southwestern Cable Co.*, it did not establish ancillary jurisdiction in the modern sense of the doctrine. Crucially, the regulations at issue in *NBC* were applicable to broadcasting *stations*, which clearly fell within Title III of the Communications Act. Although the regulations were a backdoor attempt to regulate *networks* (which were also technically outside the scope of the Communications Act), the regulations were tailored—for jurisdictional purposes—to apply to only the stations actually broadcasting signals. *See* Krattenmaker & Metzger, *supra* note 38, at 429-32.

45. *Sw. Cable Co.*, 392 U.S. at 178 (emphasis added).

46. *See* Am. Library Ass'n v. FCC, 406 F.3d 689, 699-700 (D.C. Cir. 2005).

47. *Id.* at 700.

48. 47 U.S.C. § 152(a) (2006).

Second, the regulation must be "reasonably ancillary" to the performance of other FCC objectives and responsibilities.[49]

Together, the two prongs help the FCC strike a balance between regulatory flexibility and legality. With respect to the former, the two-pronged standard ensures flexibility by incorporating broad language. For instance, the first prong defines the FCC's general jurisdiction expansively to cover any communication by "wire or radio." Similarly, the second prong gives the FCC wide latitude by incorporating a broad "reasonableness" standard. This flexibility is particularly important to the FCC in light of the uniquely rapid evolution of communications technologies.[50]

At the same time, however, both prongs of the doctrine require the FCC to remain within the statutory confines of the Communications Act. To validly exercise ancillary jurisdiction, the regulated subject must first fall within § 152's general jurisdiction.[51] Next, the FCC must not only identify an explicit statutory foundation (a "hook"), it must also show that its new regulation is sufficiently related to the statutory hook.[52]

For this reason, it is inaccurate to characterize ancillary jurisdiction as an authority to reach *beyond* the Communications Act. Doctrinally speaking, ancillary regulations are part and parcel of the FCC's delegated statutory authority—just as congressional actions deemed "necessary and proper" to enumerated constitutional powers are also deemed valid.[53]

2. Examples: Ancillary Jurisdiction, Past and Present

Ancillary jurisdiction has played—and continues to play—a critical role in modern communications policy. Many of the FCC's most important—and most controversial—regulatory schemes have been based upon its ancillary authority. Below, I provide a partial list of important FCC regulatory actions that were both based upon the agency's ancillary jurisdiction and reviewed by courts. (A more com-

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49. *Am. Library Ass'n,* 406 F.3d at 700.

50. *See* Gen. Tel. Co. v. FCC, 449 F.2d 846, 853 (5th Cir. 1971) ("The Communications Act was designed to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.").

51. *Id.*

52. *Id.*

53. Courts have repeatedly referred to § 154(i)—the textual foundation of ancillary jurisdiction—"as the 'necessary and proper clause.' " *See, e.g.*, Mobile Commc'ns Corp. of Am. v. FCC, 77 F.3d 1399, 1404 (D.C. Cir. 1996); New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1108 (D.C. Cir. 1987); N. Am. Telecomms. Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985).

prehensive list that includes lesser-known cases is provided in the footnotes.[54]) These proceedings include the following:

- *Computer Inquiry II.* In the *Computer Inquiry* decisions (*Computer I, II,* and *III*),[55] the FCC grappled with the regulatory status of new "advanced" data-processing services—which ultimately included computer services.[56] The most famous of these decisions—*Computer II* in 1976—has been hailed as one of the FCC's greatest regulatory successes, creating the conditions for the Internet's phenomenal growth.[57] In this proceeding, the FCC erected a regulatory wall between "basic" transport services and newer "enhanced" computer services.[58] Critically, although the FCC allowed incumbent carriers to enter the enhanced services market, it imposed various regulatory requirements to prevent those carriers from leveraging their subsidized legacy infrastructure to gain an unfair competitive advantage. These requirements included various structural separations

54. *See* cases cited *infra* notes 76-77. Note, however, that the examples I provide in this section consist of *cases* reviewing the FCC's ancillary jurisdiction. It is not a comprehensive list of every FCC order or adjudication that cites ancillary jurisdiction as authority. The focus on cases rather than regulatory orders will be addressed at length in a later section. *See infra* Part IV.

55. Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities (*Computer I*), 28 F.C.C.2d 291 (1970) (tentative decision of the commission); Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) (*Computer II*), 77 F.C.C.2d 384 (1980) (final decision); Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) (*Computer III*), 104 F.C.C.2d 958 (1986) (report and order). Collectively known as the *Computer Inquiries*, these are only the final orders—the proceedings themselves included notices of inquiries and of proposed rulemakings, which generated thousands of comments.

56. For a good overview of the decisions, see generally Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED. COMM. L.J. 167 (2003).

57. *See, e.g.*, *id.* at 169 (arguing that *Computer Inquir*ies "were a necessary precondition for the success of the Internet"); 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, 130 (2003) ("Of the actions taken in the Computer Inquiries, Computer II's open access rules . . . were the most successful and enduring."); Whitt, *supra* note 21, at 599 (explaining that *Computer Inquiries* "contributed strongly towards the commercial introduction, rise, and incredible success of the Internet" (quoting Letter from Vinton G. Cerf, Senior Vice-President, WorldCom, Inc., to the Honorable Donald Evans, Sec'y, U.S. Dep't of Commerce, and the Honorable Michael Powell, Chairman, FCC (May 20, 2002))); Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. ON TELECOM. & HIGH TECH. L. 15, 17 n.5 (2006) (calling *Computer Inquiries* one of "U.S. telecommunications law's greatest successes").

58. *Computer II*, 77 F.C.C.2d ¶¶ 2-9. The "basic/enhanced" division remains with us today, although the Telecommunications Act of 1996 renamed them as "information" and "telecommunications" services, respectively. 47 U.S.C. § 153(20), (46) (2006).

and unbundling mandates.[59] The courts ultimately upheld these requirements as exercises of ancillary jurisdiction.[60]

- *Cable Regulation*. Ancillary jurisdiction provided the sole basis for cable regulation prior to 1984, when Congress finally added Title VI to the Communications Act, thus providing the FCC with explicit authority to regulate cable.[61] The pre-Title VI regulations, however, were comprehensive and often quite intrusive. They included access requirements, must-carry provisions, and even mandates that cable companies originate their own programming content.[62] As explained more fully in Part IV, courts upheld some of these regulations, but rejected others.

- *Television Network Regulation*. Following *Southwestern Cable*, the FCC extended its regulatory regime to television networks.[63] While Title III clearly covered broadcast station affiliates, the FCC had to rely on ancillary jurisdiction to reach the networks themselves because they technically did not *broadcast* anything.[64] These regulations were often quite intrusive, sharp limits on the ability of network corporations to enter the syndication market and to obtain financial interests in video programming production.[65]

- *Carterfone*. In a famous series of proceedings that included the 1968 *Carterfone Order*, the FCC established the right of consumers to attach any nonharmful device to the telephone network.[66] Prior to these decisions, incumbent telephone carriers had strictly limited the types of communication devices consumers could attach. The *Carterfone* regime has also been hailed as a success—credited for unleashing innovative devices such as modems, faxes, and answering ma-

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59. *See* Cannon, *supra* note 56, at 192-94.

60. *Computer II* was upheld by *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 202-03, 212-14 (D.C. Cir. 1982). The most significant *Computer I* regulations were upheld by *GTE Service Corp. v. FCC*, 474 F.2d 724, 732 (2d Cir. 1973). Part IV.B. will address the aspects of *Computer I* that the court reversed.

61. Kyle D. Dixon & Philip J. Weiser, *A Digital Age Communications Act Paradigm for Federal-State Relations,* 4 J. ON TELECOMM. & HIGH TECH. L. 321, 349-50 (2006).

62. *See, e.g.*, FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689, 696-700 (1979) (providing an overview of cable regulations predating Title VI).

63. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 489 (2d Cir. 1971) (affirming television network regulations).

64. *See* Krattenmaker & Metzger, *supra* note 38, at 428-29.

65. *See* Tamber Christian, *The Financial Interest and Syndication Rules—Take Two*, 3 COMMLAW CONSPECTUS 107, 107-09 (1995).

66. Use of the Carterfone Device in Message Toll Telephone Service (*Carterfone*), 13 F.C.C.2d 420, 423-24 (1968) (decision).

chines.[67] When states tried to reregulate terminal equipment following *Carterfone*, the FCC preempted state regulation under its ancillary jurisdiction, and courts upheld the action.[68]

- *Universal Service Fund*. The Universal Service Fund (USF) is essentially a tax that subsidizes telephone and wireless service in rural areas, where such service might otherwise be prohibitively expensive. (It shows up as a line item on your monthly telephone bill.) Although Congress formally authorized the USF under the Telecommunications Act of 1996,[69] the FCC first proposed the USF in 1983, and courts upheld it as a valid exercise of the agency's ancillary jurisdiction.[70]

- *Broadcast Flag*. The so-called "broadcast flag" is a digital code that prevents the unauthorized redistribution of digital broadcasts.[71] Fearing that the looming transition from analog to digital television would enable copyright infringement, the FCC in 2003 controversially required manufacturers of "devices capable of receiving digital television broadcast signals"[72] to recognize the flag, which would prevent retransmission.[73] The FCC based these regulations upon its ancillary jurisdiction authority,[74] but the D.C. Circuit rejected the argument and vacated the regulations.[75]

Moving beyond this partial list to the ancillary jurisdiction cases as a whole, courts have upheld the FCC's ancillary authority in the overwhelming majority of cases.[76] Courts have, however, rejected the

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67. C. Scott Hemphill, *Network Neutrality and the False Promise of Zero-Price Regulation*, 25 YALE J. ON REG. 135, 176 (2008) (conceding that *Carterfone* helped unleash "applications such as modems and fax machines"); Weiser, *supra* note 43, at 68 (calling *Carterfone* "universally praised"); Tim Wu, *Wireless* Carterfone*,* 1 INT'L J. COMM. 389, 397 (2007) (crediting *Carterphone* for "mass consumer versions of the fax machine, the answering machine, and, perhaps most importantly, the modem").

68. N.C. Utils. Comm'n v. FCC, 552 F.2d 1036, 1050-52 (4th Cir. 1977) (upholding preemption of state regulation of terminal equipment despite "absence of explicit statutory authorization"); *see also* Weiser, *supra* note 43, at 66 ("These rules, which govern the equipment that can be used in connection with the telecommunications network, were ultimately upheld as a legitimate use of the FCC's Title I authority.").

69. Pub. L. No. 104-104, 110 Stat. 56 (1996); *see also* 47 U.S.C. § 254 (2006).

70. *See, e.g.*, Rural Tel. Coal. v. FCC, 838 F.2d 1307, 1310-12, 1315 (D.C. Cir. 1988).

71. Am. Library Ass'n v. FCC., 406 F.3d 689, 691 (D.C. Cir. 2005).

72. *Id.*

73. *Id.*; Digital Broadcast Content Protection, 18 F.C.C.R. 23550 (2003) (report and order and further notice of proposed rulemaking) (adopting broadcast flag requirements).

74. *Am. Library Ass'n*, 406 F.3d at 691.

75. *Id.* at 692, 705.

76. In addition to the cases already cited above, courts also upheld the FCC's ancillary regulations in the following cases. United States v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649, 670 (1972) (upholding various ancillary regulations of cable service); City of

FCC's assertions of ancillary jurisdiction in a handful of significant cases, many of them involving pre-1984 cable regulations.[77] Interestingly, some of these rejections have been quite recent. For instance, in 2002 and 2005 respectively, the D.C. Circuit rejected and sharply critiqued the FCC's attempts to rely on ancillary jurisdiction to impose video description (i.e., "closed captioning") and broadcast flag requirements.[78] The D.C. Circuit's growing hostility to ancillary jurisdiction raises the question of whether the FCC's authority will survive or at least be significantly pared back in the near future.

These new questions about the scope of the FCC's authority come at a critical time. The FCC, policymakers, and scholars are currently debating a series of proceedings that will potentially have enormous influence on the future of advanced communications services (i.e., IP-based services). In several of these proceedings, if the FCC chooses to act, it will have to rely on its ancillary jurisdiction to issue regulations.

One example of these proceedings is the recent controversy over Comcast's alleged blocking of BitTorrent traffic, a case which has enormous policy implications in the larger network neutrality—or "open networks"—debate.[79] Briefly, the FCC—acting upon complaints filed by parties such as the public interest organization Free

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Dallas v. FCC, 165 F.3d 341, 351-52 (5th Cir. 1999) (upholding ancillary regulations that allowed nonlocal exchange carriers to be "open video system" operators); Mobile Commc'ns Corp. of Am. v. FCC, 77 F.3d 1399, 1404-07 (D.C. Cir. 1996) (upholding ancillary authority to require wireless license payment); Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (*NARUC II*), 880 F.2d 422, 429-30 (D.C. Cir. 1989) (confirming that FCC has ancillary authority to preempt state regulation of "inside wiring" for telephone service); New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1107-08 (D.C. Cir. 1987) (upholding ancillary authority to require rate reimbursements); N. Am. Telecomms. Ass'n. v. FCC, 772 F.2d 1282, 1293-94 (7th Cir. 1985) (upholding ancillary requirement that newly formed regional Bell operating companies submit capitalization plans as condition of re-entering equipment market); Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981) (upholding ancillary authority to require interim interconnection tariffs); N.C. Utils. Comm'n v. FCC, 552 F.2d 1036, 1051 (4th Cir. 1977) (upholding preemption of state regulation of terminal equipment despite "absence of explicit statutory authorization"); Nader v. FCC, 520 F.2d 182, 203-05 (D.C. Cir. 1975) (upholding authority under § 154(i) to prescribe rates of return); Gen. Tel. Co. of the Sw. v. FCC, 449 F.2d 846, 850 (5th Cir. 1971) (upholding ancillary regulations prohibiting telephone carriers from providing cable service in local areas); United Tel. Workers, v. FCC, 436 F.2d 920, 923-25 (D.C. Cir. 1970) (upholding ancillary authority to approve tariff of experimental service by Western Union and Post Office).

77. *See Midwest Video II*, 440 U.S. 689, 695-96 (1979) (reversing access requirements for cable providers); *Am. Library Ass'n*, 406 F.3d at 692, 705 (vacating broadcast flag regulations); Motion Picture Ass'n of Am., Inc. v. FCC (*MPAA*), 309 F.3d 796, 798-99 (D.C. Cir. 2002) (vacating video description requirements); Home Box Office, Inc. v. FCC (*HBO*), 567 F.2d 9, 17-18 (D.C. Cir. 1977) (vacating programming restrictions on cablecasting); Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (*NARUC I*), 533 F.2d 601, 620-21 (D.C. Cir. 1976) (rejecting FCC's preemption of nonvideo cable transmissions).

78. *See Am. Library Ass'n*, 406 F.3d at 691-92, 705; *MPAA*, 309 F.3d at 798-99.

79. Comcast's actions—also often referred to as "throttling"—consisted of interfering with peer-to-peer file uploads by sending "reset" packets that gave a false error signal. Brad Reed, *Comcast Reshapes Traffic Management*, NETWORK WORLD, June 9, 2008, at 17; *see also* Comcast Order, *supra* note 11, at 2-6.

Press[80]—ultimately held that Comcast violated Federal policy by blocking applications such as BitTorrent that used peer-to-peer protocols. The FCC also ordered Comcast to verify that it had stopped such actions.[81] Comcast has since challenged the FCC's authority to issue the order, and litigation (*FCC v. Comcast*) is pending in the D.C. Circuit Court of Appeals.[82] One of the most contentious issues in this case is whether the FCC can validly exercise ancillary jurisdiction over Comcast's broadband service.

The stakes of the Comcast litigation are high because of their implications on the FCC's authority to regulate broadband access services more generally. Indeed, the FCC has recently proposed several new regulations of broadband access that are intended to "preserve the openness of the Internet" and to help "address emerging challenges to the open Internet."[83] These proposed regulations would codify the four "principles" of the FCC's 2005 Broadband Policy Statement, which provided that Federal policy protect the rights of broadband users in various ways.[84] The FCC also proposed two new principles that would require broadband access providers to offer service in a "nondiscriminatory manner" and to disclose network management practices.[85]

These proposed regulations collectively encompass many of today's most important and controversial broadband policy debates, including everything from network neutrality to "wireless *Carterfone*."[86] Further, the FCC's only valid authority to enact these new rules is its ancillary jurisdiction.[87] In this respect, *FCC v. Comcast* will determine whether the FCC has any authority whatsoever over broadband access services.

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80. Petition for Declaratory Ruling of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement, WC Docket No. 07-52 (Nov. 1, 2007); Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, File No. EB-08-IH-1518 (Nov. 1, 2007) (cited in Comcast Order, *supra* note 11, at 5 n.33).

81. Press Release, FCC, Commission Orders Comcast to End Discriminatory Network Management Practices 1 (Aug. 1, 2008) [hereinafter FCC Press Release].

82. Comcast Corp. v. FCC, *appeal docketed*, No. 08-1291 (D.C. Cir. 2008).

83. 2009 Notice, *supra* note 10, ¶ 5, 16 (codifying principles in Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14986 (2005) (policy statement) [hereinafter 2005 Policy Statement]).

84. The 2005 Policy Statement included four "principles" and provided that users are entitled to: (1) access the content of their choice; (2) access the services and applications of their choice; (3) connect the legal devices of their choice to the network; and (4) enjoy competition among broadband access, content, and application providers. 2005 Policy Statement, *supra* note 83, at 14987-88.

85. 2009 Notice, *supra* note 10, ¶ 16.

86. "Wireless *Carterfone*" refers to Professor Tim Wu's recent proposal that the FCC adopt an open attachment rule for wireless devices. *See* Wu, *supra* note 67.

87. 2009 Notice, *supra* note 10, ¶ 83-87.

In short, determining the scope of ancillary jurisdiction is increasingly important in light of the new, ever-changing IP-based services that are competing with legacy services such as circuit-based telephone service or traditional cable video service.[88] Because these new services and developments are not explicitly addressed in the Communications Act, FCC action in these areas will necessarily depend upon the scope of its ancillary jurisdiction authority. As the next section illustrates, however, ancillary jurisdiction has several lingering problems that call this authority into question.

C. The Problems with the Solution: Criticisms of Ancillary Jurisdiction

The benefits that ancillary jurisdiction provides are also the source of the criticisms surrounding it. Recall that the doctrine arose in response to a specific challenge—the need to expand the FCC's flexibility while remaining within its statutory authority. Virtually no one feels that the doctrine has proven too constraining. The criticisms have instead focused primarily on the doctrine's flexibility or—more precisely—on its alleged *excessive* flexibility.

For instance, Professor Susan Crawford has argued that ancillary jurisdiction has become a potentially unlimited authority. She writes that the current doctrine "give[s] the FCC almost unlimited power over anything concerning a wire or a radio signal."[89] Professor James B. Speta has similarly referred to the doctrine as "untethered."[90] Even Justice Scalia has criticized this "undefined" authority and expressed doubt that the doctrine "constrains the agency in any meaningful way."[91]

A second common critique is that the doctrine is simply vague and "amorphous."[92] Professor Phillip Weiser has written that the doctrine "is hardly a model of clarity or consistency."[93] On the question of the types of circumstances in which the FCC may invoke its Title I ancillary jurisdiction, Professors Jonathan Nuechterlein and Philip Weiser posit that "[t]he answer to this question is as unclear as it is con-

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88. *See* NUECHTERLEIN & WEISER, *supra* note 9, at 220.

89. Susan P. Crawford, *The Ambulance, the Squad Car, & the Internet*, 21 BERKELEY TECH. L.J. 873, 925-26 (2006) (calling for Congress to limit the FCC's ancillary authority).

90. James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 26 (2003). Thomas Merrill has called the *Midwest Video I* and *Southwestern Cable* decisions, which recognized ancillary jurisdiction over cable, "spectacular breaches of principle." Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2169-70 (2004).

91. Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs., 545 U.S. 967, 1014 (2005) (Scalia, J., dissenting).

92. *See, e.g.*, Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005).

93. Weiser, *supra* note 43, at 48-49.

sequential."[94] They add that this uncertainty, coupled with the relatively limited number of cases, makes "confident predictions" impossible regarding when courts will uphold ancillary jurisdiction.[95]

A related aspect of the doctrine's alleged vagueness is that its textual foundations are not altogether clear.[96] This textual dispute extends to both (1) the authority to enact "ancillary" regulations in the first place and (2) the types of statutory provisions that can serve as "hooks" for those new regulations.

With respect to the former, the most widely accepted statutory source for ancillary jurisdiction is § 154(i), which has been called the FCC's " 'necessary and proper clause.' "[97] This statutory provision authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[98] Courts have widely embraced this interpretation, although not all scholars have.[99]

With respect to the latter, parties have also disputed whether certain statutory "hooks" provide a sufficient foundation for the exercise of ancillary jurisdiction. Under *Southwestern Cable Co.*, the FCC must identify a foundational statutory source upon which to base its ancillary regulations.[100] For instance, in that case, the Court upheld cable regulations as ancillary to the FCC's explicit statutory authority to regulate broadcasters.[101]

One of the most important controversies on this issue is whether Title I *itself* can provide the independent "hook" for the ancillary regulations authorized by § 154(i).[102] The controversy stems from the

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94. NUECHTERLEIN & WEISER, *supra* note 9, at 217.

95. *Id.* at 219-20; *see also* Speta, *supra* note 90, at 22 (calling Title I ancillary authority "at best, uncertain").

96. For example, in the recent Comcast throttling case, the parties disagreed about the precise textual provisions that authorized the FCC to exercise ancillary jurisdiction in the first place. *Compare* Letter from Kathryn A. Zachem, In the Matter of Broadband Industry Practices, WC Docket No. 07-52, at 29-31 (July 10, 2008) [hereinafter Comcast Memorandum] (arguing that Title I cannot provide an independent source of authority), *with* Letter from Marvin Ammori, Free Press, Notice of *Ex Parte* Presentation, Petition for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," WC Docket No. 07-52, at 9-11 (June 12, 2008) (attaching legal memorandum) (arguing that Title I does provide independent authority), *available at* http://www.freepress.net/files/FP_et_al_Petition_Ex_Parte_Filing.pdf.

97. *See, e.g.*, Mobile Commc'ns Corp. of Am. v. FCC, 77 F.3d 1399, 1404 (D.C. Cir. 1996).

98. 47 U.S.C. § 154(i) (2006).

99. For example, Thomas Merrill and Kathryn Tongue Watts have recently argued that §154 should be understood merely as an authorization to enact internal housekeeping procedures. Merrill & Watts, *supra* note 25, at 517-20. Courts, however, have never endorsed their argument.

100. *See* United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968).

101. *Id.*

102. *See, e.g.*, Comcast Memorandum, *supra* note 96, at 27-31.

fact that Title I does not cover a specific type of network in the way that Titles II and III do. Instead, Title I includes a laundry list of general statements regarding the FCC's jurisdiction,[103] its purposes,[104] and its internal procedures.[105] Section 151 specifically explains that the FCC's purposes include "mak[ing] available . . . rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[106]

Thus, the precise question is whether the FCC can enact regulations ancillary to the specific policy goals outlined in § 151, such as promoting "reasonable charges" or "rapid" service. Because terms like "reasonable" and "rapid" are potentially vague, "stand-alone" Title I ancillary jurisdiction is potentially the most expansive authority, relying as it does on the broad purposes listed in § 151 rather than on the more specific statutory requirements in the other titles. Historically speaking, however, courts have generally found that Title I is a sufficient and independent foundation of authority. Indeed, courts in several cases have upheld the FCC's exercises of ancillary jurisdiction citing Title I alone.[107]

The broader point is that the ancillary jurisdiction doctrine remains controversial, and it includes a number of unsettled questions. The confusion surrounding the doctrine is arguably jeopardizing the future of ancillary jurisdiction altogether. The D.C. Circuit in particular has grown increasingly skeptical of the doctrine in recent years.[108]

For these reasons, the controversy surrounding ancillary jurisdiction threatens to deprive the FCC of a vital power to address the challenges of new technologies and convergence. Given that this threat arguably stems from the doctrine's perceived incoherence, I argue in Part III that this "vague" and "unlimited" authority has, to the contrary, been relatively constrained and coherent. Before introducing this new descriptive account, however, it is important to more fully address why the literature's current descriptions of ancillary jurisdiction are ultimately unpersuasive and inconsistent with case law.

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103. 47 U.S.C. § 152.

104. *Id.* § 151.

105. *Id.* § 154.

106. *Id.* § 151.

107. For a list of these cases, see Ex Parte Letter of John Blevins Regarding the Commission's Ancillary Jurisdiction, *Broadband Industry Practices*, WC Docket No. 07-52, at 3-5 (Jul. 17, 2008) [hereinafter Blevins Ex Parte].

108. Jeffrey Silva, *Appeals Court Questions FCC's Authority on Backup Power Rule*, RCRWIRELESS (May 9, 2008), http://www.rcrwireless.com/article/20080509/FREE/354444178/-1/appeals-court-questions-fcc-s-authority-on-backup-power-rule.

III. THE WEAKNESS OF CURRENT DESCRIPTIONS OF ANCILLARY JURISDICTION

In this Part, I argue that current positive accounts of the ancillary jurisdiction doctrine are inadequate. As explained above, few scholars have attempted to provide a positive account of when courts will uphold the FCC's ancillary regulations.[109] The few that have attempted to provide such an account contend that ancillary jurisdiction can be understood in terms of (1) addressing the challenges of new technology; (2) the closeness of the regulations' relationship to the underlying "hook"; or (3) whether the regulations contradict other provisions of the Act. While these narrative frameworks explain certain cases, they do not adequately describe the line of ancillary jurisdiction cases as a whole.

A. New Technology

One of the more potentially persuasive arguments is that courts uphold ancillary jurisdiction when the FCC is addressing new dynamic technologies. Professors Nuechterlein and Weiser, for instance, write that courts are relatively more deferential to the FCC's assertion of Title I ancillary jurisdiction when it involves "dealing sensibly with emerging and congressionally unanticipated technologies."[110] Courts too have repeatedly emphasized the challenges that new technologies pose in upholding broad interpretations of ancillary jurisdiction. For instance, in *Midwest Video I* (which upheld intrusive regulations requiring cable companies to originate video programming),[111] Chief Justice Burger reluctantly concurred, explaining that "dynamic" technology created the need for a "flexible and virtually open-ended" regulatory scheme.[112]

At first glance, linking ancillary jurisdiction with new dynamic technologies seems quite reasonable. After all, the doctrine was largely created in response to the unanticipated rise of cable television. Further, the Communications Act grants the FCC expansive authority over a wide range of technological services that were

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109. The most significant recent discussion of the FCC's ancillary jurisdiction is contained in Weiser, *supra* note 43. The few other articles that discuss ancillary jurisdiction at any length generally confine it to one section of a larger discussion. *See, e.g.*, Crawford, *supra* note 89, at 925-31; Speta, *supra* note 90, at 22-30. One notable exception is the 1982 article by Krattenmaker and Metzger, which provides a thorough analysis of the origins of ancillary jurisdiction and its application to television networks. *See* Krattenmaker & Metzger, *supra* note 38. This article, however, is now over twenty-five years old, and its applicability is therefore limited because of recent developments.

110. NUECHTERLEIN & WEISER, *supra* note 9, at 219-20. The authors include a normative dimension in this point as well, and they add that the doctrine is uncertain. *Id.* at 219-23.

111. *Midwest Video I*, 406 U.S. 649 (1972).

112. *Id.* at 675-76. He also noted, though, that the FCC had reached the "outer limits" of its authority. *Id.* at 676.

changing rapidly even in 1934. Extending the doctrine to cover new technologies therefore seems consistent with the purpose and spirit of the Act.

The problem, however, is that the relative age of the technology at issue does not adequately predict when a court will uphold the FCC's regulations. While courts have clearly upheld regulations in several cases involving unforeseen technologies, they have also upheld several others that involved traditional technologies that were well known even in 1934. In short, ancillary jurisdiction has been applied to both old and new technologies. One example is the FCC's direct regulation of television networks. While Title III of the Act explicitly covered broadcast *stations*, it did not cover the networks themselves.[113] The reason is that the networks did not actually broadcast anything; instead, they provided content for their affiliate stations to broadcast. There is no reason, though, that Title III could not have been drafted to cover networks as well. After all, networks would have been familiar to contemporary policymakers—NBC was founded in 1926[114] and CBS was founded just one year later.[115]

Because of jurisdictional concerns, the FCC had, for decades, strenuously avoided regulating networks directly.[116] Things changed, however, when *Southwestern Cable Co.* opened a new door, allowing the FCC to reach beyond the explicit text of Title III.[117] Immediately recognizing the logical implications of the *Southwestern Cable Co.* decision, the FCC proceeded to regulate networks directly under its new jurisdictional powers.[118]

Another example of "regulating the old" is the FCC's ancillary regulation of traditional wireline telephone networks. While several telephone-related cases clearly involved new technologies (e.g., *Computer II*), several others did not. For instance, courts have recognized the FCC's ancillary authority to preempt state regulation of "inside wiring" for telephone service,[119] to require AT&T to refund proceeds from excessive rates of return,[120] and to create the Universal Service

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113. Krattenmaker & Metzger, *supra* note 38, at 426.

114. Patrick M. Fahey, Comment, *Advocacy Group Boycotting of Network Television Advertisers and Its Effects on Programming Content*, 140 U. PA. L. REV. 647, 696 (1991).

115. Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. & TECH. L. REV. 285, 302 n.89 (2004).

116. *See* Krattenmaker & Metzger, *supra* note 38, at 429-33. The authors illustrate how the FCC crafted its regulations to apply only to stations, even if the ultimate effect was a backdoor regulation of the networks. It was precisely this type of regulations at issue in *NBC* in 1943.

117. *See supra* notes 44-45 and accompanying text.

118. *See* Krattenmaker & Metzger, *supra* note 38, at 440-45.

119. *See NARUC II*, 880 F.2d 422, 429-30 (D.C. Cir. 1989).

120. *See* Rural Tel. Coal. v. FCC, 838 F.2d 1307, 1310, 1315 (D.C. Cir. 1988).

Fund.[121] None of these regulations covered "new" technologies in the sense that cable was "new."

Another weakness of the technology narrative is that courts also have rejected several ancillary regulations of new technologies. For instance, although courts initially accepted the FCC's regulation of cable (an unforeseen technology), they grew increasingly skeptical of the FCC's actions and ultimately vacated several cable regulations in the mid- to late 1970s.[122] Similarly, the more recent broadcast flag regulations quite clearly involved new dynamic technology.[123] The D.C. Circuit, however, also rejected these regulations.[124]

To be clear, new dynamic technologies have played an important role in the evolution of the ancillary jurisdiction doctrine. In fact, several cases can best be understood in those terms.[125] *My* point, however, is that the technology narrative does not provide the most persuasive description of the cases taken as a *whole*.

B. Closeness of the Relationship

Another common descriptive narrative is that courts uphold ancillary regulations when they are sufficiently close to the underlying jurisdictional hook. Under this view, the best predictor of a court's behavior is the closeness of the relationship between the ancillary regulation and its statutory foundation. Professor Speta explains that following *Midwest Video II* in 1979, where the Supreme Court rejected various cable regulations, "[a]ll subsequent affirmances of FCC Title I regulatory authority have depended upon showing a close relationship between the regulation and the FCC's authority over common carriers or broadcasters."[126] Other scholars have offered similar arguments.[127]

Similar to the technology narrative, however, the "closeness" narrative also lacks descriptive, and thus predictive, power. To begin, the standard is rather nebulous. What exactly makes a given

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121. *See* New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1108 (D.C. Cir. 1987); *supra* notes 69-70 and accompanying text.

122. *See, e.g.*, *Midwest Video II*, 440 U.S. 689, 695-96 (1979); *HBO*, 567 F.2d 9, 17-18 (D.C. Cir. 1977); *NARUC I*, 533 F.2d 601, 620-21 (D.C. Cir. 1976); *supra* note 77 and accompanying text.

123. *See supra* text accompanying notes 71-73.

124. *See* Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005).

125. The early regulation of cable, for instance, was largely driven by the emergence of new unforeseen technologies.

126. Speta, *supra* note 90, at 24-25. Professor Speta, along with Professor Glen Robinson, made a similar argument in the amicus brief they filed in *FCC v. Comcast*. Brief Amicus Curiae of Professors James B. Speta and Glen O. Robinson and the Progress and Freedom Foundation in Support of Petitioner Comcast Corporation and Urging that the FCC's Order be Vacated, at 11-15, Comcast Corp. v. FCC, No. 08-1291 (D.C. Cir. Aug. 10, 2009).

127. *See, e.g.*, Weiser, *supra* note 43, at 63 ("[F]or a regulatory measure enacted under Title I to withstand judicial review, it must relate closely to an express statutory policy.").

regulatory scheme "close" to the underlying statutory authority? Are there any objectively verifiable ways to assess it? The danger is that this type of descriptive account can easily become circular, allowing observers to find "closeness" wherever courts happen to uphold the authority.

The closeness narrative is also undermined by the case law. Indeed, several cases arguably contradict the notion that the closeness of the relationship is the key factor in the courts' decisions. For instance, it is difficult to reconcile the cable cases of the 1970s, *Midwest Cable I* and *II*, under the closeness narrative. In 1972, in *Midwest Video I*, the Court upheld extremely burdensome regulations forcing cable companies to produce content.[128] In 1979, in *Midwest Video II*, by contrast, the Court rejected relatively less-onerous replacement regulations requiring cable companies simply to make some channels available for public access.[129]

More recently, the broadcast flag case, *American Library Ass'n*, also undermines this narrative. Formally speaking, the court did not even consider the relative closeness of the relationship because it concluded that the broadcast flag regulations did not relate to a "radio communication" and thus fell outside the FCC's general jurisdiction under the first prong of the analysis.[130] The court's conclusion, though, seems strained given that the FCC has explicit jurisdiction not merely over transmissions, but over devices that can receive *and forward* broadcast transmissions. Section 153(33) makes clear that the "radio communications" over which the FCC has authority includes "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, *forwarding*, and delivery of communications) incidental to such transmission."[131]

Assuming then that a perceived lack of "closeness" is what actually motivated the court's conclusion, it is still difficult to find a coherent rationale for why the broadcast flag regulation was not sufficiently close to the FCC's statutory objectives. For instance, the FCC has an explicit statutory responsibility to facilitate the digital television transition.[132] Without copyright protections, the FCC feared that "content providers [would] be reluctant to provide quality digital pro-

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128. *Midwest Video I*, 406 U.S. 649, 670 (1972).

129. *Midwest Video II*, 440 U.S. 689, 695-96 (1979).

130. Am. Library Ass'n v. FCC, 406 F.3d 689, 702-03 (D.C. Cir. 2005). Although the analysis is not altogether clear, it appears that the court rejected the close-captioning requirements in *MPAA* under the same theory—namely, that "programming content" fell outside the FCC's general jurisdiction. *MPAA*, 309 F.3d 796, 802-06 (D.C. Cir. 2002).

131. 47 U.S.C. § 153(33) (emphasis added).

132. STUART MINOR BENJAMIN, DOUGLAS GARY LICHTMAN, HOWARD SHELANSKI & PHILIP J. WEISER, TELECOMMUNICATIONS LAW AND POLICY 652-53 (2d ed. 2006) ("[T]he [FCC] further asserted that the broadcast flag is integral to the success of the DTV transition.").

gramming."[133] Accordingly, it seems difficult to devise any objective metrics by which these regulations were insufficiently "close" in comparison to other valid ancillary regulations.[134]

A variation of the closeness argument is that courts uphold ancillary jurisdiction when the underlying hook comes from somewhere other than Title I. For instance, in the recent throttling proceeding, Comcast made this very argument in its legal memorandum disputing FCC jurisdiction over broadband network practices.[135] To be a valid exercise of ancillary jurisdiction, Comcast contended, the FCC must provide a non-Title I statutory hook.[136]

Here too, though, the case law contradicts the narrative. As noted above, courts have upheld numerous exercises of ancillary jurisdiction that were based on Title I alone, including the *Computer II* regulations.[137] In sum, while the closeness narrative is reasonable in certain instances, it fails to provide a persuasive comprehensive account of the courts' actions.

C. *Inconsistency with Other Provisions*

A third descriptive narrative is that courts reject ancillary regulations when they are inconsistent with other provisions in the Act. Under this view, ancillary jurisdiction can be used to fill unforeseen gaps, but cannot contradict or supplement explicit statutory requirements. Under this view, ancillary jurisdiction might extend to unanticipated technologies, but not to areas where Congress has already explicitly spoken. Professors Nuechterlein and Weiser, for instance, write that courts look disfavorably upon attempts to "supplement[] the established statutory schemes."[138]

The case law, however, illustrates that courts have upheld ancillary regulations that essentially rewrite, and even blatantly contradict, existing statutory schemes. In some cases, the regulations simp-

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133. Digital Broadcast Content Protection, 18 FCC Rcd 23,550, 23,565-66 (2003) (report and order and further notice of proposed rulemaking).

134. The D.C. Circuit relied heavily on the claim that it was the FCC's first use of ancillary jurisdiction over equipment manufacturers. *See Am. Library Ass'n*, 406 F.3d at 695. In addition to being inconsistent with the language of § 153(33) noted above, it also appears inconsistent with the FCC's prior regulations of equipment. *See* 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, 919-20 (2005) (providing examples of equipment FCC has historically regulated).

135. *See* Comcast Memorandum, *supra* note 96, at 27-31.

136. *See, e.g.*, *id.*

137. *See* Blevins Ex Parte, *supra* note 107, at 3-5.

138. NUECHTERLEIN & WEISER, *supra* note 9, at 219-20 ("[C]ourts have enforced [limits on the jurisdiction] mostly when those rules are in tension with other legal principles codified elsewhere.").

ly supplement existing requirements.[139] In several others, however, the FCC's regulations are hard to describe as anything other than end-runs around the Act's explicit requirements. In short, some ancillary regulations supplant more explicit statutory provisions rather than merely supplementing them.

One good example of this dynamic is a line of cases involving rate-of-return and interconnection regulations on telephone carriers. In the first of these, *Nader v. FCC*, the court considered whether the FCC had the authority to impose rate of return provisions.[140] While § 205 of the Communications Act authorizes the FCC to prescribe "reasonable charge[s],"[141] it does not mention "rates of return," which limit the amount of fees that a regulated telephone carrier may charge its customers. For instance, the FCC might set a maximum rate of return of eight percent, which means that a carrier can recover from customers the amount of the carrier's costs *plus* an additional eight percent return on those costs. While courts have acknowledged that § 205 of the Communications Act does not explicitly authorize the FCC to establish rates of return, they nonetheless allowed the FCC to enact them under its § 154 ancillary authority.[142]

While rate of return regulations are best understood as statutory supplements, other FCC ancillary regulations in this area more clearly contradict the Act. For instance, in *Lincoln Telephone & Telegraph Co. v. FCC*, the FCC had ordered the incumbent carrier (Lincoln) to file a tariff outlining the interconnection charges that would apply to MCI, its new competitor.[143] Section 203, however, explicitly stated that "connecting carriers" like Lincoln did not have to file interconnection tariffs.[144] Despite this fairly clear statutory exemption from tariff requirements, the court nonetheless concluded that the FCC had ancillary jurisdiction to impose the tariff requirement upon Lincoln: "[W]hile Section 203(a) did not grant the Commission the requisite authority for its action, Section 154(i) did."[145] Section 203, however, did more than simply fail to grant power. It explicitly

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139. Even in this situation, the ancillary regulations would theoretically be subject to an *expressio unius* argument. *See supra* note 42.

140. Nader v. FCC, 520 F.2d 182, 203-05 (D.C. Cir. 1975).

141. 47 U.S.C. § 205 (2006).

142. *See, e.g.*, *Nader*, 520 F.2d at 203 ("Although section 205 does not authorize the Commission to prescribe rates of return, we think that any literal interpretation would be overly simplistic. . . . [O]ur inquiry is whether the . . . rate of return prescription is proper under section 4(i).").

143. Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092, 1097-98 (D.C. Cir. 1981).

144. *Id.* at 1108.

145. *Id.* at 1108-09.

stated the opposite—§ 203 flatly exempted connecting carriers from this requirement.[146]

Another example comes from *New England Telephone & Telegraph Co. v. FCC*.[147] In this case, the FCC ordered carriers to issue refunds to customers for excessive rate of return charges that had been in place for years.[148] Arguing that the FCC was acting illegally, the carriers asserted that § 204 was the only provision that authorized refunds and that it applied only to "new" or "revised" rates, not to longstanding ones (thus, they claimed applying ancillary jurisdiction would contradict § 204).[149] Conceding that § 204 did not apply,[150] the court nonetheless upheld the refund under the FCC's ancillary authority.[151]

D. *Unlimited Power*

Although it merits only a brief discussion, any argument that the FCC's ancillary jurisdiction is best described as an unlimited power is also inaccurate. Courts have rejected the FCC's ancillary regulations on several occasions, particularly the older cable regulations.[152]

A related but potentially stronger argument is that there is simply no logic to the ancillary jurisdiction cases. Admittedly, the courts' inconsistent approach to the FCC's cable regulations can give the appearance that the doctrine is wholly inconsistent. The next Part, however, refutes this characterization and provides a coherent descriptive account of the ancillary cases as a whole.

IV. ANCILLARY JURISDICTION AS COMPETITION PROMOTION: A NEW DESCRIPTIVE FRAMEWORK

This Part provides a new comprehensive account of the FCC's ancillary jurisdiction as interpreted by courts. Specifically, I argue that ancillary jurisdiction is best understood as a *competition-promotion* doctrine. The precise "competition" analyzed here is primarily in

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146. *Id.* at 1108; *see also* 47 U.S.C. § 203(a) (1976). Another example of an inconsistency is *Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), discussed *infra* in Part IV. Briefly, the FCC in that case required a carrier to pay for a license it had previously allocated for free despite the tension with more explicit statutory licensing provisions. *See infra* notes 177-83 and accompanying text.

147. 826 F.2d 1101 (D.C. Cir. 1987).

148. *Id.* at 1103-04.

149. *Id.* at 1107-08 ("Petitioners nevertheless insist that a refund remedy is inconsistent with the Act, and therefore an inappropriate exercise of power under section 4(i), because it amounts to retroactive ratemaking.").

150. *Id.* at 1107 ("As petitioners observe, section 204 is the only provision of the Act explicitly to mention refunds, and it does not apply to the circumstances of this case.").

151. *Id.* at 1107-08.

152. *See, e.g.*, *Midwest Video II*, 440 U.S. 689 (1979); *HBO*, 567 F.2d 9 (D.C. Cir. 1977); *NARUC I*, 533 F.2d 601 (D.C. Cir. 1976).

markets where vertical leveraging concerns exist. As I illustrate below, courts generally defer to the FCC's ancillary regulations when the regulations are designed to facilitate market competition in this context, particularly when the FCC acts to prevent owners of underlying physical facilities from leveraging that control to affect adjacent markets that depend upon access to those facilities. Courts have given the FCC less deference, however, when the FCC acts to promote other goals, such as social ones.

In this Part, I first examine cases where courts have upheld the FCC's ancillary regulations, arguing that the competition framework best explains the greatest number of them. I next examine cases where courts have rejected the FCC's ancillary regulations, noting that these regulations primarily served goals other than competition promotion. Next, using cable as a case study, I illustrate how the competition framework best explains the seemingly incoherent line of cable regulation cases from the 1970s.[153] Finally, I examine the few cases that arguably do not fit within this descriptive framework. While no framework can persuasively reconcile every single case, I argue that the competition-promotion framework provides significantly more descriptive power than any of the frameworks listed in Part III.

A. Cases Upholding Ancillary Jurisdiction

This Section illustrates why the competition-promotion framework best explains most of the cases where courts have upheld ancillary regulations. Rather than tediously describing each individual case, I have grouped them thematically into two categories—specifically, cases where the FCC acted (1) to prevent providers from leveraging perceived market power in one market to act anticompetitively in another and (2) to level the competitive playing field among parties that did not have market power. In both categories, the courts used market-promotion language and rationales in upholding the FCC's ancillary regulations.

1. Preventing Vertical Leveraging

In this first category of cases, the FCC's ancillary jurisdiction regulations were aimed primarily at providers with perceived market power—namely, incumbent telephone carriers and national television networks. Turning first to the telephone cases, one of the FCC's animating concerns here involved the fear that telephone carriers

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153. To preview the argument, I will contend that courts initially upheld the cases because of concerns about cable's perceived "unfair" competitive advantage. Later, however, when the regulations became more socially focused (and more flagrantly anti-cable), courts became more skeptical.

would leverage control of either their underlying physical facilities or their monopoly status to act anticompetitively in adjacent markets.

The *Computer Inquiry* cases illustrate these concerns well.[154] The rise of data processing and computer services created at least two regulatory problems for policymakers. First, these services depended upon access to the incumbent carriers' network facilities.[155] If the carriers limited that access or significantly raised access costs, it could slow the growth of these new services. Second, carriers entering these new data markets themselves could potentially gain a competitive advantage by exploiting their monopoly to cross-subsidize their service offerings.[156] In other words, carriers could raise rates in the regulated, noncompetitive voice markets to slash prices in the more competitive data-processing markets.

The FCC's *Computer I* and *II* decisions specifically responded to these concerns. *Computer I* imposed a structural separation requirement, forcing carriers that offered data-processing services to create a wholly separate subsidiary with separate equipment and accounting procedures.[157] *Computer II* refined and clarified this requirement, and it also divided communications services into "basic" common carrier services and "enhanced" unregulated ones.[158] This division helped ensure that emerging "enhanced" services would enjoy guaranteed access to "basic" transport services. As Robert Cannon has explained, the promotion of markets and the protection from vertical leveraging was the FCC's animating concern throughout:

> The first principles laid down in *Computer I* are consistently followed throughout the entire proceeding. How these first principles are applied and the outcome that is produced may be different, but the Computer Inquiries are consistently concerned about markets. The data processing market is highly competitive and innovative and demonstrates no need for regulation. The data processing market, however, is dependent upon the communications market. The communications companies are both a bottleneck supplier of services and a competitor in the data processing market. Therefore, strict safeguards were put into place in order to restrain the

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154. *See supra* note 55.

155. *See, e.g.*, *Computer II*, 77 F.C.C.2d 384, 428 (1980) (final decision) (noting "ever increasing dependence upon common carrier transmission facilities in the movement of information").

156. *See, e.g.*, *Computer I*, 28 F.C.C.2d 291, 299 (1970) (tentative decision of the commission) ("We recognize . . . that the provision of other services and, particularly data processing services by common carriers, may give rise to critical problems of unfair competition and cross-subsidy.").

157. *See id.* at 302-03.

158. *Computer II*, 77 F.C.C.2d at 428-30.

market power of the communications company and for the benefit of the data processing market.[159]

Unsurprisingly, in upholding the FCC's ancillary authority to adopt the *Computer I* and *II* regulations, courts relied on these same competition-promotion rationales. For instance, in upholding *Computer II*, the D.C. Circuit in *Computer and Communications Industry Ass'n v. FCC* explained as follows: "This [regulation] was based upon detailed findings on AT & T's market power and its ability to underwrite its competitive offerings with profits from its monopoly services. We believe this conclusion is well founded."[160] Years earlier, the Second Circuit in *GTE Service Corp. v. FCC* had offered similar market-based explanations in upholding *Computer I*'s original structural separation.[161]

More generally, courts have upheld numerous ancillary regulations aimed at preventing anticompetitive conduct by incumbent telephone carriers who own legacy infrastructure that was subsidized during monopoly eras. In this context, courts have upheld FCC ancillary regulations that (1) preempted state regulations of terminal equipment;[162] (2) established interim interconnection rates for MCI (a competitive carrier);[163] (3) restricted the ability of phone carriers to provide cable service in local areas;[164] (4) required incumbent carriers to refund excessive fees to customers;[165] and (5) preempted state regulation of inside wiring for telephone networks.[166] Further, in dicta, courts also have recognized the FCC's authority to impose requirements on private Title I "dark fiber" offerings.[167]

The common thread running through all of these cases is the fear that incumbent carriers could take advantage of either their facilities

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159. Cannon, *supra* note 56, at 180.

160. Computer & Commc'ns Indus. Ass'n v. FCC, 693 F.2d 198, 213 (D.C. Cir. 1982) (citation omitted).

161. GTE Serv. Corp. v. FCC, 474 F.2d 724, 732 (2d Cir. 1973) ("Specifically, the Commission was concerned that data processing costs would be passed on directly or indirectly to the public consumer of telephone services and that revenues derived from common carrier services would be used to subsidize data processing services."). The Second Circuit, however, also struck down part of *Computer I*. In the next Section, I attempt to reconcile the *GTE* court's actions under the competition framework.

162. N.C. Utils. Comm'n v. FCC, 552 F.2d 1036, 1051 (4th Cir. 1977) (upholding preemption of state regulation of terminal equipment despite "absence of explicit statutory authorization").

163. Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981).

164. Gen. Tel. Co. of the Sw. v. United States, 449 F.2d 846, 850 (5th Cir. 1971).

165. New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1107-08 (D.C. Cir. 1987).

166. *NARUC II*, 880 F.2d 422, 429-30 (D.C. Cir. 1989).

167. *E.g.*, Sw. Bell Tel. Co. v. FCC, 19 F.3d 1475, 1483-84 (D.C. Cir. 1994) ("[T]he Commission has ancillary jurisdiction over private offerings of common carriers under section 152 . . . ."). Dark fiber refers to high-speed transmission lines that have not yet been activated or "lit," but that could be. *See id.* at 1478.

or their ability to cross-subsidize services to inhibit market competition. Indeed, courts explicitly note these concerns in their opinions.

For instance, in *General Telephone Co. of the Southwest*, the court upheld the FCC's authority to prevent phone carriers from providing cable service in their local areas.[168] In doing so, the court noted the FCC's concern that carriers might leverage their control of underlying facilities to undermine cable competition.[169] Specifically, the court explained that the FCC was protecting cable competitors that "rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities."[170]

The D.C. Circuit offered similar arguments in *Lincoln Telephone & Telegraph Co.*, which upheld interconnection tariff rates, primarily for the new upstart MCI.[171] The court's language makes it clear that competition concerns motivated the extension of ancillary jurisdiction here, even though the ancillary regulation itself was likely inconsistent with a separate statutory provision:

> LT&T and MCI are . . . bitter rivals who are at loggerheads. It is in LT&T's interest to limit the competition posed by MCI, or any other specialized carrier. While we in no way mean to intimate that LT&T is attempting to set unreasonable terms and conditions, we do observe that LT&T's incentive to do so is great. The Commission properly perceived the need for close supervision and took the necessary course of action . . . .[172]

Moving beyond telephone carriers, anticompetitive concerns also explain the FCC's regulations of television networks. While other scholars have offered more comprehensive historical accounts of broadcasting, it is sufficient for purposes here to understand the difference between networks and stations. Generally speaking, individual local stations (the ones that actually broadcast) affiliate with a national network, which in turn provides the station with programming content. The networks themselves, though, generally do not broadcast signals over the air.[173]

From the very beginning, the FCC was concerned that networks had market power and would leverage that control to influence adjacent markets such as programming content. However, because the FCC could not regulate the networks directly under Title III, the

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168. *Gen. Tel. Co. of the Sw.*, 449 F.2d at 850.

169. *See id.* at 851.

170. *Id.*

171. Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981).

172. *Id.* at 1109. On the statutory inconsistency, see *supra* notes 143-46 and accompanying text.

173. For an overview of these traditional business relationships, see Krattenmaker & Metzger, *supra* note 38, at 408-11.

FCC instead tailored its regulations to apply only to the stations. In essence, these were backdoor regulations of networks that were structured to limit the types of agreements that *stations* could enter.[174]

After *Southwestern Cable Co.* changed the regulatory landscape by introducing ancillary jurisdiction, the FCC immediately applied it to the networks directly. The resulting regulations included the so-called "fin-syn" rules, which sharply limited the networks' ability to take *fin*ancial interests in programming companies and to enter the *syn*dication market.[175] In upholding the FCC's regulations, the Second Circuit echoed the concerns that networks might otherwise act anticompetitively in these markets.[176]

2. *Leveling the Competitive Playing Field*

In this smaller category of cases, the FCC's ancillary regulations were designed to promote competitive neutrality. Unlike in the previous category, the parties here (wireless companies and early cable providers) were not perceived to have market power.

Turning first to wireless services, the ancillary regulation upheld in *Mobile Communications Corp. of America v. FCC*[177] is best understood as an attempt to level the competitive playing field. There, the FCC had originally assigned a wireless (PCS) license to a carrier (Mtel) for free.[178] However, as wireless service grew in the 1990s, the FCC became concerned that the free PCS license would give Mtel an unfair competitive advantage.[179] It thus reversed its previous decision and required Mtel to pay for the license.[180] Interestingly, the reversal also seemed to violate a specific statutory provision governing wireless license fees.[181]

The D.C. Circuit ultimately upheld the regulation.[182] In doing so, the court echoed the same competitive concerns that had motivated the FCC to rescind the free license. Specifically, the court outlined in

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174. *See id.* at 429-33.

175. *See* Christian, *supra* note 65, at 107-09.

176. Mt. Mansfield Television, Inc. v. FCC442 F.2d 470, 486-87 (2d Cir. 1971) ("[T]he syndication rule is aimed at decreasing network dominance and curbing potential competitive restraints.").

177. 77 F.3d 1399 (D.C. Cir 1996).

178. *Id.* at 1402.

179. Application of Nationwide Wireless Network Corp., 9 F.C.C.R. 3635, 3639 (1994) (memorandum opinion and order) ("[W]e are concerned that the award of a free license to [the carrier] would create an unfair competitive advantage . . . .").

180. *Id.* at 3640.

181. The carrier had noted that the Communications Act had specific provisions governing administrative fees and thus raised an *expressio unius* argument. *Mobile Commc'ns Corp. of Am.*, 77 F.3d at 1404-05.

182. *Id.* at 1406.

detail the various reasons why rival providers would be unfairly harmed by Mtel's free PCS license.[183]

In sum, the competition-promotion framework reconciles far more of the cases above than the descriptive frameworks listed in Part III. For instance, courts upheld cases involving both new technologies (*Computer I*) and old ones (television network regulations). In addition, some of these regulations were flatly inconsistent with other statutory provisions. Competition promotion, by contrast, is the common thread running through all of these cases.

B. Cases Rejecting Ancillary Jurisdiction

The competition-promotion framework also provides the best explanation for the cases where courts rejected the FCC's exercises of ancillary jurisdiction. Often, the rejected regulations were designed to promote social goals (as opposed to market competition). Other "rejected" cases, however, are more difficult to classify under one conceptual umbrella, though they are generally consistent with a competition-promotion descriptive framework.

1. Noneconomic Goals

Courts have been most likely to reject ancillary regulations when the underlying regulatory goal is primarily social in nature. Of course, there is no bright conceptual line separating economic goals from social goals. Social goals often have economic dimensions, and vice versa. That said, the less that the FCC's regulatory objectives are aimed at promoting competition (and preventing vertical leveraging in particular), the more skeptical courts become.

Two recent D.C. Circuit decisions vacating the FCC's ancillary regulations—*MPAA* (2002) and *American Library Ass'n* (2005)—illustrate the courts' skepticism of noneconomic goals.[184] In *MPAA*, the FCC required television broadcasters to provide "video descriptions" for the hearing impaired.[185] As laudable as this goal might have been, it quite clearly had little to do with market competition. Similarly, the broadcast flag regulations at issue in *American Library Ass'n* were primarily about preventing copyright infringement.[186]

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183. *Id.* at 1405-06 (noting competitive disadvantage of "would-be license holders").

184. Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005) (vacating broadcast flag regulations); *MPAA*, 309 F.3d 796, 798-99 (D.C. Cir. 2002) (vacating "video description" requirements).

185. *MPAA*, 309 F.3d at 798.

186. *Am. Library Ass'n*, 406 F.3d at 693-94. While protecting copyright has both economic and social dimensions, its protection is arguably less motivated by systematic efforts to facilitate markets by, for instance, preventing vertical leveraging.

The courts in these cases, however, did not speak in terms of social versus economic goals, but instead offered other reasons for rejecting the FCC's regulations. For instance, in *MPAA*, the court stressed that the FCC was trying to illegally reach "content," which triggered First Amendment concerns.[187] In addition, the FCC's regulations appeared to contradict the statutory scheme regarding video descriptions.[188] In *American Library Ass'n*, the court emphasized that the FCC was extending regulations to device manufacturers for the first time.[189] It also held that the broadcast flag regulations did not cover "transmission[s]" and thus fell outside the FCC's general jurisdiction.[190]

There are reasons to be skeptical, however, that these factors were motivating the court's decisions. As explained earlier, the court's conclusions in the broadcast flag case are arguably inconsistent with both the Act and precedent.[191] And though the video description rules arguably contradicted other provisions of the Act, we have seen that courts often endorse ancillary regulations anyway. Further, some of the concerns the courts cited could apply just as easily to other cases where the courts upheld ancillary jurisdiction. For instance, the FCC's limitations on television networks' association with programming potentially implicated both content and First Amendment concerns. Despite these potential similarities, the more competition-oriented regulations were upheld, while the more socially oriented regulations in the two more recent cases were not.

2. *Miscellaneous Cases*

Courts have also rejected ancillary regulations in a handful of other cases, one of which (involving the construction of the Sears Tower) quite clearly had no procompetition objective.[192] In two others, though, the cases appear at first glance to be in tension with the descriptive framework I have outlined.

In the first, *California v. FCC*, the Ninth Circuit vacated several of the FCC's *Computer III* regulations,[193] which had relaxed *Comput-*

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187. *MPAA*, 309 F.3d at 805 ("One of the reasons why § 1 has not been construed to allow the FCC to regulate programming content is because such regulations invariably raise First Amendment issues.").

188. *See id.* at 802 (finding that 47 U.S.C. § 713 barred FCC's regulations).

189. *Am. Library Ass'n*, 406 F.3d at 695.

190. *Id.* at 704-05.

191. *See supra* note 134.

192. Ill. Citizens. Comm. for Broad. v. FCC, 467 F.2d 1397, 1398-99 (7th Cir. 1972) (holding that FCC lacked jurisdiction to regulate construction of the Sears Tower to prevent signal interference). The FCC had denied that it had the authority to act, and it was sued on that basis. *Id.*

193. *See* California v. FCC, 905 F.2d 1217, 1246 (9th Cir. 1990) (reversing *Computer III* in part).

er II's structural separation requirements. Upon close review, however, *California* arguably has little relevance to the ancillary jurisdiction doctrine. For one, the court rejected the regulations for other reasons—namely, because they were deemed arbitrary and capricious and an intrusion on state jurisdiction.

To the extent that the case is relevant to an ancillary jurisdiction analysis, it arguably supports the competition-promotion framework. The regulations in *California relaxed* the competitive safeguards that *Computer II* had erected. Indeed, the court here seemed concerned that the regulations would harm competition in these markets by prematurely removing the structural separations.[194]

The second case, *GTE Service Corp. v. FCC*,[195] is more problematic. As explained above, *GTE* upheld the original *Computer I* structural separation between carriers and their data-processing subsidiaries. On this level, *GTE* is clearly consistent with the competition framework. However, *GTE* went on to vacate other *Computer I* regulations that imposed requirements directly upon the data-processing subsidiaries themselves (including limitations on contracting with the affiliated carrier).[196] The court concluded that the FCC was improperly reaching into a competitive market that it had previously declined to regulate.[197]

This decision, however, is not necessarily inconsistent with the framework given that the data-processing market *alone* (isolated from the carrier facilities) was competitive and not threatened by anticompetitive conduct. That said, the court quite clearly was not deferring to the FCC's economic judgment (in this respect, this part of the case does not fit well within the framework).

C. Cable Regulation: A Case Study

One challenge in developing a descriptive framework is reconciling the line of cases reviewing the FCC's ancillary regulations of cable in the 1960s and 1970s (ancillary regulations became unnecessary after Congress added Title VI in 1984). These cases are, to put it mildly, not a model of coherence. The competition-promotion framework, however, provides the most coherence possible, both in terms of explaining the cases themselves and in illustrating their relationship to the other ancillary jurisdiction cases. In particular, the

194. *Id.* at 1228-29 ("[T]he FCC provided no record support that any of the so-called changes were relevant to its regulatory task of protecting captive ratepayers and competitors against the damaging effects of cross-subsidization.").
195. 474 F.2d 724 (2d Cir. 1973).
196. *Id.* at 733.
197. *See id.* at 733-34.

framework best accounts for the cases' *evolution*, which was toward competition promotion.

At first glance, the cable cases seem incoherent, particularly at the Supreme Court level. Consider, for instance, *Midwest Video I* (1972) versus *Midwest Video II* (1979)—two Supreme Court cases that arguably contradict each other. In *Midwest I*, the Court upheld extremely intrusive regulations requiring cable companies to create their own programming content. These regulations, however, were soon replaced with relatively less-intrusive "access" regulations, which required cable companies to set aside channels for third parties (e.g., public, government). In *Midwest II*, however, the Court vacated these less-intrusive regulations.[198]

While the cases seem to contradict each other, some coherence emerges when we look not merely at Supreme Court cases but at the larger context of cable cases as a whole during this period. Below is the timeline of the most important cable ancillary cases and how the courts ruled.

TABLE 1

YEAR	CASE	COURT	RESULT
1968	*Southwestern Cable*	Supreme Court	Upheld
1972	*Midwest Video I*	Supreme Court	Upheld (plurality)
1975	*NARUC*	DC Circuit	Rejected
1977	*HBO*	DC Circuit	Rejected
1979	*Midwest Video II*	Supreme Court	Rejected

From this perspective, a trend emerges—courts grew less deferential to the FCC's cable regulations through time. And though courts offered various reasons for their skepticism, I will argue that this trend can be best explained within the competition-promotion framework.

Of course, the more familiar story of early cable regulation is that the FCC used its initial ancillary authority to protect an incumbent industry from competition.[199] Under this view, the FCC's regulations represent agency capture at its worst. While subsequent cable regulations clearly support that view, the original motivations were arguably more ambiguous. More precisely, it is plausible to see how

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198. *Compare Midwest Video I*, 406 U.S. 649, 670 (1972), *with Midwest Video II*, 440 U.S. 689, 695-96 (1979). Dissenting in *Midwest Video II*, Justice Stevens noted the logical inconsistency of upholding less-intrusive regulations than the Court rejected in *Midwest Video I*. *See Midwest Video II*, 440 U.S. at 709-10 (Stevens, J., dissenting).

199. *See, e.g.*, Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1688 (2003) ("The desire to protect incumbents also determined the FCC's response to the emergence of cable television.").

courts might have perceived the FCC's initial regulations as more benign efforts to promote competitive neutrality.

In the initial case, *Southwestern Cable*, courts arguably saw the FCC as acting to limit what it perceived to be cable's unfair competitive advantages with respect to broadcasters. From a contemporary perspective, the original behavior at issue in *Southwestern Cable Co.* was problematic in a couple of ways. First, cable service relied upon appropriating broadcasters' transmission signals (for which they paid nothing).[200] Second, cable companies were also importing broadcast programming (often identical programming) from distant markets that otherwise could not be seen in the local community.[201] The FCC's ultimate regulations responded to these specific concerns.

Clearly, the FCC's actions both helped broadcasters and served social goals such as protecting free over-the-air television. However, the regulations also had a sincerely procompetition dimension. Specifically, the FCC aimed to eliminate cable's perceived unfair competitive advantage stemming from its reliance on broadcast retransmissions. The *HBO* court, in distinguishing *Southwestern Cable* to vacate cable regulations, explained this thinking:

> What was considered unfair by the Commission in the distant signal cases was that cable was competing with local broadcasters by bringing into the local area *identical* programming plucked out of the air from distant stations. Because local broadcasters had to pay copyright royalties for this material and cable did not, cable was thought to have an unfair advantage.[202]

Over time, though, the courts grew increasingly skeptical of, and eventually rejected, subsequent regulations that either had noneconomic objectives or represented more blatant anticompetitive efforts to protect incumbent broadcasters. Nominally, the objectives were more socially oriented (e.g., promoting programming diversity, protecting the quality of free programming). For instance, the channel "access" requirements struck down in *Midwest Video II* were nominally adopted to promote programming diversity and self-

200. United States v. Sw. Cable Co., 392 U.S. 157, 161-62 (1968) (noting that cable providers "do not recompense producers or broadcasters for use of the programming which they receive and redistribute").

201. *Id.* at 163 ("[Cable providers] may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of [cable] systems have increased, their principal function has more frequently become the importation of distant signals.").

202. *HBO*, 567 F.2d 9, 41-42 (D.C. Cir. 1977). The *HBO* court, however, disagreed with the FCC's argument that *Southwestern Cable* prevented unfair competition. *Id.* at 41. However, the court noted that, even if *Southwestern Cable* should read that way, the competitive concerns in that case were different than in the case before it. *Id* at 41-42.

expression.[203] Similarly, in *HBO*, the FCC limited the types of programs that cable companies could charge the public to see. The concern was that the most popular programs would be "siphon[ed]" away from free broadcast television, thus lowering its quality (particularly for lower-income viewers).[204] Finally, in *NARUC*, the court struck down regulations that had quite literally no relation to video or broadcasting competition—the regulations dealt with two-way non-video communications.[205]

While these regulations were nominally social, the more cynical interpretation is that they intentionally suppressed competition by burdening cable. Indeed, if you scratch beneath the surface of the courts' opinions, they seemed increasingly to view these "social" regulations as blatant efforts to stifle cable competition to protect incumbent broadcasters. For instance, the court in *HBO* noted cable's concerns that the FCC was trying to "snuff out pay cable" programming.[206] The court added the following:

> [I]t is clear that [the regulations'] thrust is to prevent *any* competition by pay cable entrepreneurs for film or sports material that either has been shown on conventional television or is likely to be shown there. How such an effect furthers any legitimate goal of the Communications Act is not clear.[207]

Other courts raised similar concerns. In *Midwest Video II*, the Eighth Circuit all but accused the FCC of being "captured" by incumbent broadcasters.[208]

The one cable case, however, that does not fit within this narrative is *Midwest Video I*, where the Court upheld regulations requir-

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203. Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251, 59 F.C.C.2d 294, 296 (1976) (report and order) (explaining that channel access regulations will "result in the opening of new outlets for local expression, aid in the promotion of diversity in television programming, . . . aid in the functioning of democratic institutions, and improve the informational and educational communications resources of cable television communities").

204. *HBO*, 567 F.2d at 21 (internal quotation marks omitted). Interestingly, one of the judges called for limiting the FCC's authority in this area strictly to promoting competitive neutrality. *See id.* at 28 n.* ("Judge MacKinnon is of the view that the FCC's jurisdiction to regulate cablecasting in the interests of the broadcasting industry is restricted to instances where the cable stations substantially rely on broadcast signals or their activities amount to unfair competition.").

205. *NARUC I*, 533 F.2d 601 (D.C. Cir. 1976).

206. *See HBO*, 567 F.2d at 25.

207. *Id.* at 28 (citation omitted).

208. *Midwest Video II*, 571 F.2d 1025, 1030 n.8 (8th Cir. 1978) ("Whether agencies become captives of their regulates, . . . the wisdom and implications to social progress of a regulatory system that enlists the power of government to preserve established industry against new technological competition, as distinguished from reliance on consumer preference at a perceived risk of market chaos, is a matter for the Congress, not the courts.").

ing cable companies to create their own programming content.[209] The regulatory objections here were not only social, but most likely anti-competitive as well.

There are several reasons, however, why *Midwest Video I* undermines the descriptive framework less than it might appear. First, *Midwest Video I* marked the beginning of federal courts' skepticism. The Court in *Midwest Video I* upheld the regulations in a plurality opinion that depended on a reluctant concurrence from Chief Justice Burger who warned that the FCC had "strain[ed] the outer limits" of its ancillary authority.[210] Second, the logic of *Midwest Video II* arguably overruled the earlier case. Third, *Midwest Video I* was a relatively early ancillary jurisdiction case in which the Court was still working out the doctrine's contours. As the table above shows, though, courts steadily grew skeptical of the types of regulations at issue in *Midwest Video I.* Thus, even if *Midwest Video I* itself provides little support, the broader evolution of the case law does.

In sum, the competition framework illustrates why the cable cases are not necessarily an incoherent mess after all. Of course, the narrative is not perfect, and courts did offer wide-ranging and often inconsistent rationales in upholding and rejecting cases. But when we look closely at both of the cases as a whole and the types of regulations at issue, a clearer picture emerges.

D. Objections

Having laid out the descriptive framework, I turn now to potential objections. The first is simply that the narrative does not reconcile every single ancillary jurisdiction case. In this respect, it suffers from the same weaknesses as the ones I critiqued in Part III.

Admittedly, the framework cannot adequately account for every case—it is probably unrealistic to think that any narrative could. However, the framework reconciles significantly more cases than any other account could or has. In doing so, it illustrates why the doctrine has far more coherence and limitations than previously believed. Further, the cases that appear to contradict the narrative, like *Midwest Video I* and *California v. FCC*, actually have limited relevance or even reinforce it.

That said, there are admittedly a small number of cases that simply do not fit. For instance, the FCC's creation of the Universal Service Fund (USF) is arguably unrelated to competition promotion. Similarly, the initial case upholding the FCC's ancillary authority to

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209. *See Midwest Video I*, 406 U.S. 649, 670 (1972).
210. *Id.* at 675-76 (Burger, C.J., concurring in the result).

establish rates of return, *Nader v. FCC*,[211] seemed to benefit AT&T rather than its competitors. In that case, the FCC lowered AT&T's proposed rate of return, but not low enough to suit the company's competitors, who then petitioned courts to vacate it (unsuccessfully).[212]

Even these cases, however, arguably reinforce the narrative—or, at the least, do not contradict it. The creation of the USF, for example, was one piece of a larger scheme to liberalize and restructure the long-distance market.[213] So while the USF regulations themselves do not necessarily promote competition, they were part of, and enabled, the larger regulatory reform. Similarly, in *Nader*, the authority at issue (the FCC's authority to set rates of return) was intimately tied to AT&T's monopoly status. Notably, the FCC did in fact lower AT&T's proposed rate of return.[214] While reasonable minds can disagree on the wisdom of rate-of-return regulations, these regulations were motivated in some sense to prevent incumbent carriers from charging excessive rates. But again, even assuming these cases ultimately contradict the descriptive narrative that I have proposed, that narrative nonetheless reconciles significantly more cases than the other narratives have or can.

A second concern is that focusing on cases, as opposed to FCC orders, is a misguided approach. After all, the cases represent only a fraction of the instances in which the FCC has exercised its ancillary jurisdiction. Essentially, I am only reviewing instances in which the ancillary jurisdiction was challenged through litigation. In addition, one may argue that the cases themselves are too small a subset from which to make meaningful inductions.

Focusing on cases does, however, have several important advantages. For one, cases more accurately reflect when the FCC is *actually* relying on its ancillary jurisdiction, as opposed to merely citing it within a laundry list of potential sources of authority. If anything, relying on challenged cases strengthens the analysis because it presumably involves the FCC's weakest claims of ancillary authority. Otherwise, parties might not have invested the resources to litigate these regulations. The fact that courts have overwhelmingly affirmed the FCC regulations within this particular subset of challenged cases when they promote competition is itself telling.

In addition, cases provide a more manageable and easily verifiable subset for analysis. While there are not an overwhelming number of

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211. 520 F.2d 182 (D.C. Cir. 1975).

212. *See id.* at 186-87.

213. Rural Tel. Coal. v. FCC, 838 F.2d 1307, 1310 (D.C. Cir. 1988) ("This case concerns part of the Commission's attempt to use its power to allocate costs between federal and state jurisdictions in order to cushion the transition to a competitive long-distance communications market.").

214. *Nader*, 520 F.2d at 186-87.

cases, there are enough from which to draw informed conclusions. Further, the ancillary jurisdiction authority is ultimately as broad as courts say it is. To know its scope, we must necessarily examine how courts have treated it. The competition-promotion framework represents a significant improvement on the existing descriptive understanding of a doctrine often criticized as vague or even unlimited. The next Part, by contrast, examines what courts *should* do going forward.[215]

V. ANCILLARY JURISDICTION AS COMPETITION PROMOTION: A NORMATIVE PROPOSAL

The fact that courts have traditionally upheld exercises of ancillary jurisdiction in the circumstances described above does not, in and of itself, normatively justify adopting the framework. Indeed, given that courts' conclusions are not dictated by the text of § 154(i), they are arguably best understood as policy preferences. These policy preferences, however, are sound and should be more formally incorporated into courts' doctrinal analysis (or, even better, in future legislation or regulation).

Accordingly, this Part argues that courts and other policymakers *should* adopt the competition-promotion framework in reviewing and crafting the FCC's ancillary jurisdiction authority. Consistent with past practice, courts should uphold exercises of ancillary authority that promote competition and prevent anticompetitive behavior, primarily where vertical leveraging concerns exist.[216] Similarly, courts should reject attempts to use ancillary jurisdiction for other noneconomic objectives.

This Part first offers several justifications for adopting this normative approach. Broadly speaking, the most important normative benefits of the competition-promotion framework are that it would impose a coherent limit on the FCC's authority, while simultaneously providing a powerful ex ante restraint on agency capture. Expanding

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215. One could disagree with the normative proposals that follow in Part V while agreeing with the positive analysis in Part IV.

216. There is a spirited debate about whether regulatory policy should, as a normative matter, be concerned with vertical leveraging at all. *Compare, e.g.*, Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171 (2002) (refuting economic concerns about vertical leveraging in media markets), *with* 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, 109-12 (2003) (outlining regulatory contexts where vertical leveraging concerns are valid). This Article is only marginally relevant to that more general debate. My more limited point is that when the FCC has affirmatively decided to act to address vertical leveraging notwithstanding these objections, it should have the authority to do so under the ancillary jurisdiction doctrine. If the FCC, by contrast, feels that vertical leveraging poses no concern, it can simply refrain from regulating.

on the latter point, the framework would provide the FCC with maximum authority in situations where it is institutionally most likely to be acting against the interests of entrenched providers. Finally, after outlining these various normative benefits, this Part illustrates how the approach would work in practice by applying it to various individual regulatory proceedings.

A. Normative Benefits of the Competition-Promotion Framework

1. Coherence

The first benefit of adopting the competition-promotion framework is that it would bring coherence and concrete limitations to the ancillary jurisdiction doctrine. These objectives, however, are not merely ends in themselves. Achieving them will also protect the viability of the ancillary jurisdiction authority in the future.

Both courts and scholars have grown increasingly critical of the doctrine in recent years.[217] These criticisms stem directly from the doctrine's perceived inadequacies—namely, its alleged incoherence and potentially limitless scope. This Article has attempted to correct these perceptions. However, if left uncorrected, the perceptions could threaten the viability of the doctrine itself. The D.C. Circuit, for instance, has grown particularly skeptical of the doctrine and arguably wants to abandon it. As illustrated in earlier sections, the court recently has engaged in doctrinal gymnastics to avoid recognizing the FCC's ancillary authority while nominally acknowledging *Southwestern Cable*.

While these criticisms raise important concerns, it is nonetheless important that the FCC retain some form of ancillary jurisdiction authority. As courts have noted for years, the communications field is an inherently dynamic one that is characterized by rapidly changing technologies. The FCC therefore needs the flexibility to accommodate these changes to ensure that they do not undermine the agency's regulatory goals.

Further, the structure of the communications industry makes it particularly fertile ground for potential anticompetitive conduct. Many vital services, particularly broadband and the vast array of services that rely on it, continue to depend upon access to underlying physical facilities owned by legacy monopoly providers. These providers are subject to little or no access competition.[218] It is therefore critical that the FCC retain the authority to address these concerns.

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217. *See supra* Part II.C.

218. For instance, the broadband access market is frequently alleged to be—at best—a duopoly of cable and DSL (wireline telephone) providers. *See, e.g.*, Susan P. Crawford, *Network Rules*, 70 LAW & CONTEMP. PROBS. 51, 61-65 (2007).

It does not follow, however, that the FCC should have unlimited authority. A better approach would be simply to define the doctrine's scope more narrowly, which adopting the proposed competition framework would do. In particular, adopting this framework would address critics' specific concerns without throwing the baby out with the bathwater.

2. *Institutional Expertise/Preventing Agency Capture*

Another significant benefit of adopting the competition-promotion framework is that facilitating this type of market competition within these industries falls more squarely within the FCC's expertise and core competence. The FCC, unique among policymakers, has a global understanding of not only the various telecommunications industries, but the new dynamic interrelationships that convergence has created (e.g., cable companies providing "phone" service and vice versa). The FCC is therefore institutionally well suited to understand how technological or regulatory changes in one industry will affect other interrelated industries. In particular, the agency can assess potential externalities imposed by the regulation or deregulation of a particular communications industry (e.g., does deregulation of broadband access limit video competition from new online providers?).

In addition, the FCC has extensive experience addressing concerns about access to network facilities. Indeed, the problem of incumbent providers leveraging their facilities has preoccupied the agency from its inception up through more modern problems, such as the implementation of the 1996 Act.

When the FCC, however, has strayed from these objectives, it has acted in areas where it has less institutional expertise. For instance, in the recent broadcast flag case, the FCC's primary objective was to prevent copyright infringement. However, a separate federal agency, the United State Copyright Office, has far more expertise in this area than the FCC.[219]

Another problem with promoting noneconomic regulatory objectives is that these goals are inherently more contentious. The regulatory goal of promoting competition, by contrast, is less controversial. While parties sharply disagree about how to best promote competition and whether it is a realistic option in certain contexts, there exists a fairly wide consensus that facilitating market competition is a normatively appealing regulatory objective, other things being

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219. *See* BENJAMIN, LICHTMAN, SHELANSKI & WEISER, *supra* note 132, at 653.

equal.[220] More socially oriented objectives such as programming diversity and localism, by contrast, are generally more controversial.

Note, however, that I am not casting doubt on the FCC's ability to pursue regulatory social goals as a general matter. My more limited argument is that it should not do so under its ancillary authority, which could lead to perception of illegitimacy of the FCC's ancillary regulations. Expanding the FCC's ancillary jurisdiction to enact controversial social goals has arguably triggered a strong backlash that could ultimately weaken the entire doctrine. Instead, it would be wiser for the FCC to wait for a more explicit statutory delegation from Congress, the more politically accountable branch of government.

An additional concern with promoting social objectives is that they have, historically, proven more susceptible to agency capture and special interest regulation. Indeed, this is arguably what happened to the FCC in the 1970s as it passed increasingly anticompetitive cable regulations. Under the guise of promoting vague concepts such as "programming diversity," the FCC effectively hindered the growth of cable services for years. In a similar vein, the broadcast flag regulation was seemingly intended to benefit politically well-connected incumbent industries.

Agency capture, of course, is not necessarily confined to social goals. Conceivably, the FCC could help incumbent providers just as easily under the guise of promoting "competitive neutrality." Historically, however, this fear has been largely unfounded. Most of the cases upholding ancillary jurisdiction have either helped new competitors or limited the ability of incumbent providers to leverage their legacy facilities. The most likely reason is that the regulatory context of addressing vertical leveraging is, institutionally speaking, more likely to involve regulations adverse to the larger, more established provider who would benefit from the ability to leverage.

Essentially, I am proposing an interpretive rule of construction that construes the FCC's powers under § 154(i) more broadly when the agency acts to promote competition in the face of vertical leveraging concerns. One benefit of this interpretative canon is that it would reduce the potential for agency capture by erring on the side of new competitors. Established providers are often much more politically well connected than new rivals. And as noted above, they (particularly legacy facilities owners) are much more likely to benefit from vertical leveraging. For that reason, they have the incentive and the ability to resist proentry policies. Constraining the FCC's ancillary

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220. *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1325-26 (1998) (illustrating a broad shift in regulatory law over the last quarter of the twentieth century toward promoting market competition).

authority in this manner would maximize the agency's authority within regulatory contexts where it is least likely to be helping established incumbents. This type of doctrine would help prevent a repeat of the more egregious cable regulations in the 1970s that were transparent attempts to stifle cable competition on behalf of broadcasters.

3. *Legitimacy*

Another benefit of the competition-promotion framework is its consistency with precedent. Assuming that courts' decisions are essentially policy preferences, the decades of precedent would help both legitimize the doctrine and avoid charges that courts are acting like self-appointed regulators. Instead, in the tradition of common law jurisprudence, they would be adopting a rule with a long and solid foundation in precedent. The consistency of the competition-promotion framework with the case law would therefore increase the concept's legitimacy and strengthen its doctrinal foundations.

4. *Political Compromise*

Finally, for those who think political preferences matter more than doctrinal logic, the competition-promotion framework represents an appealing political compromise.[221] On the one hand, the framework appeals to skeptics of agency regulation by narrowing the agency's regulatory powers and ensuring that it operates more clearly within its statutory delegation. On the other hand, it appeals to regulation advocates by ensuring that the agency can act to prevent anticompetitive conduct by entrenched incumbents (particularly facilities owners) in emerging markets.

B. *Regulatory Examples*

This Section illustrates how the competition framework would look in practice by applying it to several modern regulatory proceedings. In some of the proceedings, the framework suggests that courts should uphold ancillary regulations. In others, it suggests the opposite.

1. *Comcast Throttling Proceeding*

The FCC's recent reprimand of Comcast is a textbook example of a proceeding where courts should uphold the FCC's authority under the competition-promotion framework.[222] As noted earlier, Comcast was discovered to be interfering with applications such as BitTorrent

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221. Interestingly, the hostility to ancillary jurisdiction does not necessarily track clean ideological lines. For instance, both Comcast and Susan Crawford, who have rather divergent views on broadband access policy, are both skeptical of broad ancillary jurisdiction.

222. *See* FCC Press Release, *supra* note 81.

that use peer-to-peer protocols.[223] Critically, the FCC found that Comcast had an "anticompetitive motive" to interfere with these applications, which represent an emerging competitive threat to traditional cable video services: "Such applications, including those relying on BitTorrent, provide Internet users with the opportunity to view high-quality video that they might otherwise watch (and pay for) on cable television. Such video distribution poses a potential competitive threat to Comcast's video-on-demand . . . service."[224]

Looking ahead, the D.C. Circuit should uphold the FCC's order as a valid exercise of its ancillary authority to promote competition and prevent vertical leveraging. Notably, Comcast owns the underlying facilities over which higher-layer applications such as BitTorrent run. Thus, the FCC's order directly addresses the concern that Comcast will leverage control of its facilities to affect vertical markets (which is precisely what it did). More broadly, affirming the FCC's broad authority to promote these types of objectives will create incentives for broadband access providers to refrain from future technologically novel techniques that achieve the same anticompetitive purposes. In this respect, adopting the competition-promotion framework will provide economically beneficial signals to broadband access providers.

It is not strictly necessary that the FCC establish or even suspect an anticompetitive intent in the traditional antitrust sense. Instead, courts should uphold the regulations even assuming that Comcast acted solely for the more innocent purpose of managing congestion. Regardless of Comcast's subjective motivation, its actions would nonetheless potentially impede video competition and other higher-layer markets.[225]

2. *Open Network Regulations*

The open network regulations recently proposed by the FCC would also be easily justified under the competition-promotion framework. While the proposed regulations encompass multiple policy debates,[226] the animating fear among regulatory advocates throughout all of these contexts is that facilities-based broadband

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223. *See supra* note 79.

224. FCC Press Release, *supra* note 81.

225. My point is not to prevent broadband access providers from taking steps to avoid congestion (assuming they are consistent with open access and nondiscriminatory principles). The larger point is that courts should not block, on jurisdictional grounds, the FCC's attempts to act in this context, assuming the underlying regulations are designed to promote competition. The FCC should of course balance these various considerations in crafting an ultimate policy.

226. The regulations, for instance, would impose network neutrality, open device attachment, and other nondiscrimination and disclosure requirements. I refer to these policy debates collectively as "open network" policies.

providers will stifle competition in vertical markets that depend on incumbent facilities.[227] For instance, the primary fear of network neutrality advocates is that infrastructure owners will leverage their control of these underlying facilities in economically harmful ways. These potential harms include establishing a prioritized "fast lane" for those services that can afford to pay a premium to the broadband access providers—premiums that would stifle new competitors by raising entry costs. A related fear is these providers could give their own affiliated services priority over competitive online services.

These same considerations would apply to the imposition of open network requirements as merger conditions. For instance, in the recent AT&T and BellSouth mega-merger, the FCC negotiated "voluntary" conditions that included temporary network neutrality requirements.[228] Critics of these conditions argued that the FCC lacked the authority to impose such requirements (thus the need for "voluntary" conditions).

Even assuming, however, the FCC had explicitly imposed network neutrality requirements (either here or in similar proceedings), those requirements should have been upheld under the competition-promotion framework. Here again, the FCC would have been addressing potential anticompetitive behavior made possible by the carriers' control of legacy infrastructure.

Indeed, the specific language of the requirement illustrates these concerns. Under the merger condition, the new AT&T/BellSouth cannot "privilege[], degrade[] or prioritize[] any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination."[229] The most notable aspect of this language is not what it prevents, but what it continues to allow. It would have been easier if the FCC simply prevented treating any packet differently for any reason. Instead, the FCC prohibited specific types of differential treatment associated with limiting competition in vertical markets. So long as they are crafted in this spirit, ancillary regulations imposing neutrality requirements should be upheld.

In short, open network requirements—whether one agrees or disagrees with them—are primarily intended to promote and protect competition in adjacent markets. Accordingly, they are the types of ancillary regulations that fall squarely within the FCC's institutional expertise and that warrant broader deference by courts under the competition-promotion framework.

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227. *See generally* Tim Wu, *The Broadband Debate, A User's Guide*, 3 J. ON TELECOMM. & HIGH TECH. L. 69 (2004).

228. AT&T Inc. and BellSouth Corp., Application for Transfer of Control, 22 FCC Rcd 5662 (2007) (memorandum opinion and order).

229. *Id.* at 5814.

3. Public Safety

Courts, however, should reject the FCC's ancillary regulations when the objective is to promote public safety. Few can deny that promoting public safety is a vitally important role of government. The problem, however, is less the merits of the objective itself and more that the FCC's methods of promoting it have proven historically problematic.

Public safety as a regulatory objective has proven to be susceptible to agency capture and interest group regulation. Professor Susan Crawford has written at length of the FCC's problematic drafting of recent public safety rules applied to VoIP voice service—specifically, E911 and Communications Assistance Law Enforcement Act (CALEA) requirements.[230] While the new rules nominally involved promoting public safety, Crawford illustrates how in reality they were influenced—if not written entirely—by third-party private companies that would benefit financially from them.

The goal in limiting ancillary jurisdiction in this context, then, is not to impede public safety regulations, but to force an institutional shift in the way the rules are drafted. Specifically, many of these concerns would be reduced if these responsibilities were shifted to Congress in the first instance. Airing these various issues out in Congress would ensure more public scrutiny and would at least reduce the chances that private parties could exploit public safety concerns for financial gain. Professor Susan Crawford writes as follows:

> Out of the glare of public scrutiny that would likely accompany any attempt to legislate in the CALEA and E911 context, incumbents, law enforcement, and vendors of compliance services are finding it relatively easy to exact Commission rules that favor these parties and keep the world of telephony policy in place. These parties would find it relatively difficult to obtain these same rules from Congress, because more interest groups would be involved and more eyes would be watching.[231]

Interestingly, adopting the competition-promotion framework would address these precise concerns. While the agency proceedings would still be relatively obscure to the public, the framework I pro-

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230. *See* Crawford, *supra* note 89, at 893-925. The FCC enacted these rules on both statutory grounds and on its Title I ancillary authority. Courts upheld both sets of regulations by relying on direct statutory authority and not ancillary authority. Vonage Holdings Corp. v. FCC, 489 F.3d 1232, 1241 (D.C. Cir. 2007) ("Finding that the Commission has section 254(d) authority to require interconnected VoIP providers to make USF contributions, we have no need to decide whether the Commission could have also done so under its Title I ancillary jurisdiction."); Am. Council on Educ. v. FCC, 451 F.3d 226, 232-35 (D.C. Cir. 2006) (relying on CALEA statute to affirm FCC authority).

231. Crawford, *supra* note 89, at 925.

pose would operate as an ex ante constraint that prevents the FCC from doing the bidding of the politically well-connected.

VI. CONCLUSION

In this Article, I have attempted to correct popular misunderstandings of ancillary jurisdiction as a vague and potentially unlimited doctrine. It is particularly important to address these criticisms given that they threaten to weaken the doctrine entirely. The competition-promotion framework accomplishes these goals and thus helps protect a doctrine that has proven vital in some of the country's most important communications regulatory proceedings. The framework illustrates the coherence and limitations of the doctrine as courts have interpreted it. Further, it also provides a sound, workable, and politically acceptable roadmap for policymakers in the future as they grapple with the problems and potential of the intersection between new unforeseen technologies and traditional legacy infrastructure.