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# Like a Good Neighbor

## A *STATE FARM* SOLUTION TO THE FCC'S NET NEUTRALITY LIMBO

### INTRODUCTION

[It is] competition from the new commodity, the new technology, the new source of supply, the new type of organization—competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives.

Joseph Schumpeter<sup>1</sup>

In 1942, economist Joseph Schumpeter described innovation as a process of “creative destruction” in which entrepreneurial competition spurred the “destruction” of old ideas, products, businesses, or industries and replaced them with new ones.<sup>2</sup> At its core, Schumpeter’s theory aptly describes the state of the communications industry, spread across various forms of media and industries, where large incumbent firms compete against many smaller firms or individual entrepreneurs. For every Comcast-NBC conglomerate, for example, there exists an upstart company like Netflix standing ready to challenge the industry’s status quo. From Schumpeter’s standpoint, entrepreneurial competition drives the incumbents to innovate and create new products out of fear of displacement by the entrepreneurs.<sup>3</sup> Product innovation in turn drives economic growth.

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<sup>1</sup> JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 83 (1950). Innovation is “industrial mutation” that “incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one.” *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> The entrepreneurs, on the other hand, attempt to create new products or new ideas as a way to usurp the market position held by the incumbents. While Schumpeter’s growth theory accommodates the existence of firms that exhibit monopolistic behavior—such as manipulating price, quality, or quantity of a commodity—it does not necessarily account for a market structure in which incumbents control more than just a commodity or factor of production, that is, by controlling the platform of competition itself.

As a result of consolidation in the communications industry, the large incumbent companies have grown even larger, and as a consequence, a smaller number of firms offer an increasing variety of services. Phone and cable companies no longer offer simple television programming and phone services over copper, coaxial, or fiber optic cable; those wires also serve as the gateway to the Internet. With industry consolidation, phone and cable companies now serve as the primary Internet service providers (ISPs) in the United States, placing them in control of the physical wires attached to users' homes as well as the broader networks that connect their subscribers to the rest of the world. Broadband Internet has produced a plethora of new ways for users to access dynamic video, sound, and other communication technologies, many of which threaten to displace the traditional telephony and television products offered by phone and cable companies. Rather than respond to these threats by innovating or creating new competitive products, however, the incumbents could eliminate or weaken the impact of competition generated by new technologies because they control the platform of competition itself, that is, the broadband connection.

Broadband providers face increasing incentives to interfere with broadband users' access to certain kinds of online content, and not just with respect to products that compete with their own products.<sup>4</sup> Reported or threatened methods of interference include outright blocking of certain kinds of online content,<sup>5</sup> limiting the speed at which users can download certain kinds of content, giving preference to affiliated content or degrading upload or download speeds for unaffiliated content, or charging content creators for access to

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<sup>4</sup> ISPs have faced challenges to existing business models due to increased consumption of network resources by users accessing high bandwidth content as well as declining revenues in traditional telecommunications offerings like phone and cable services. See Rob Frieden, *Network Neutrality or Bias?—Handicapping the Odds for A Tiered and Branded Internet*, 29 HASTINGS COMM. & ENT L.J. 171, 173 (2007) (“Core telecommunications service revenue streams, such as that provided by basic wireline telephone services, have declined as increasing numbers of subscribers migrate to new options provided by wireless carriers, cable television companies and Voice over the Internet Protocol (VoIP) ventures.” (footnotes omitted)). For example, revenues earned from traditional phone services declined from \$97.6 billion in 2000 to \$76.6 billion in 2009. See INDUSTRY ANALYSIS & TECHNOLOGY DIV., WIRELINE COMPETITION BUREAU, FCC, TRENDS IN TELEPHONE SERVICE 3-5 tbl.3.3 (Sept. 2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>5</sup> Declan McCullagh, *Telco agrees to stop blocking VoIP calls*, CNET NEWS (Mar. 3, 2005, 4:08 PM), [http://news.cnet.com/Telco-agrees-to-stop-blocking-VoIP-calls/2100-7352\\_3-5598633.html](http://news.cnet.com/Telco-agrees-to-stop-blocking-VoIP-calls/2100-7352_3-5598633.html).

the ISP's subscribers.<sup>6</sup> Opponents of these practices argue in favor of the principle of "network neutrality," which represents the idea that regulators should prohibit broadband providers from discriminating between different types of online content. The most egregious occurrence of interference arose in North Carolina in 2005 when a broadband provider blocked an Internet-based phone service used by its subscribers because the service had cut into its revenue earned from long distance telephony. The FCC has thus identified a need to regulate these types of practices as a way to foster innovation among the incumbent firms as well as the insurgent entrepreneurs,<sup>7</sup> many of whom depend on unrestricted access to broadband users in order to remain competitive. The FCC has experienced great difficulty, however, in justifying its jurisdiction to regulate these practices following legal challenges to the agency's authority to regulate broadband at all.<sup>8</sup>

In light of these legal challenges, the FCC must find a way to clearly delineate the boundaries of its jurisdiction before it may properly regulate broadband. This note offers a new jurisdictional path by which the FCC may properly do so. In the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, Congress bestowed upon the FCC broad authority "to regulate common carrier services, including landline telephony (Title II of the Act); radio transmissions, including broadcast television, radio, and cellular telephony (Title III); and 'cable services,' including cable television (Title VI)."<sup>9</sup> The Communications Act, as amended by the Telecommunications Act of 1996, offers definitional distinctions between "telecommunications services" and "information services," and the FCC adopted these statutory definitions as a means of distinguishing between technologies it would regulate under Title II (telecommunications services) and those it would not (information services).<sup>10</sup> In 2002, the FCC

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<sup>6</sup> *In re Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C. Rcd. 17905, 17915-16 (2010) [hereinafter *Open Internet Order*].

<sup>7</sup> *Id.* at 17909-15.

<sup>8</sup> Edward Wyatt, *U.S. Court Curbs F.C.C. Authority on Web Traffic*, N.Y. TIMES, Apr. 7, 2010, at A1, available at <http://www.nytimes.com/2010/04/07/technology/07net.html>.

<sup>9</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010) (citations omitted). Title II of the Act was codified at 47 U.S.C. §§ 201-276 (2006). Title III of the Act was codified at 47 U.S.C. §§ 301-399b. And Title VI of the Act was codified at 47 U.S.C. §§ 521-573.

<sup>10</sup> Information services include, *inter alia*, "protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security, and caching. . . . traditional ISP services such as e-mail, access to online newsgroups, and creating or obtaining and aggregating content." Inquiry Concerning

issued an opinion in *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities* (“*Declaratory Ruling*”), in which it concluded that broadband Internet qualified as an “information service”<sup>11</sup> and, as a result, was exempted from all Title II regulation.<sup>12</sup> Today, the FCC faces difficulty in justifying its authority to regulate broadband due to its adoption of “information” or “telecommunications” service categories as a proxy for determining regulability under Title II.<sup>13</sup> This categorical exemption continues today, notwithstanding technological advances and industry practices that have rendered the categories functionally indistinct and outdated, and prevents the FCC from adequately serving the Communication Act’s goals of fostering an innovative and dynamic environment for the Internet.

The FCC should abandon its decisions that produced the categorical exemption approach, including the 2002 *Declaratory Ruling* and a 1980 opinion, *In re Second Computer Inquiry (Computer II)*.<sup>14</sup> Instead, the FCC should adopt a more flexible approach that asks whether any particular technology or entity serves the same or equivalent function as those technologies traditionally regulated under Title II. Doing so would permit the FCC to reassert its proper Title II jurisdiction over broadband Internet while retaining the flexibility to adopt only those regulations that would serve the public interest. Such a reversal, however, must be adequately supported by “reasoned analysis” by the agency in order to withstand judicial review for arbitrary and capricious action under the Administrative Procedure Act, as set forth by the Supreme Court in *Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*<sup>15</sup>

To keep pace with continuously changing conditions in an industry marked by rapid technological innovation, the FCC must at times amend or abrogate its rules on policy matters to

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High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C. Rcd. 4798, 4809-11, ¶¶ 17-18 (2002) [hereinafter *Declaratory Ruling*] (footnotes omitted).

<sup>11</sup> *Id.* at 4802 ¶ 7.

<sup>12</sup> *Id.*

<sup>13</sup> These categories have become a “proxy for regulability” because the Communications Act does not necessarily mandate their use as the exclusive means of distinguishing between regulated or exempted technologies. The “proxy,” then, draws its authority from FCC rulemaking, subject only to the traditional strictures of administrative law for their proper implementation. *See infra* Part II.

<sup>14</sup> Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980), *aff’d sub nom.* Computer & Comm’n Indus. Ass’n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) [hereinafter *Computer II*].

<sup>15</sup> *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983) (citing 5 U.S.C. § 706(2)(A) (2006)); *see infra* Part II.B.

uphold the goals of the Communications Act. This note argues that the FCC should amend its policy of categorically exempting broadband Internet and information services from all regulation. Part I describes the current state of the broadband industry and the arguments underlying the network neutrality debate. Part II discusses the *State Farm* standard of judicial review applicable to a reversal of policy by a federal agency. Part III lays out the grounds on which the FCC could articulate the kind of “reasoned analysis” necessary to justify the reversal, including recognition of the technical and functional anomalies produced under the existing categorical exemption approach. Part IV concludes that Title II treatment would not necessarily subject broadband providers to the full scope of common carrier regulation because the forbearance provisions of section 160 would permit implementation of network neutrality regulations as a light-touch common carrier approach.

## I. THE NETWORK NEUTRALITY DEBATE

### A. *Broadband*

#### 1. The Most Loved Innovation of the Decade

In September 2011, consumer electronics website T3 announced the results of a survey of 2000 people who were asked about their “most loved innovation” of the decade. Their number one response was broadband Internet.<sup>16</sup> As of October 2010, over 68.2 percent of U.S. households enjoy access to high-speed broadband, up from just 4.4 percent in 2000.<sup>17</sup> Broadband connectivity today serves as a key indicator of national economic growth and productivity.<sup>18</sup> Broadband Internet fosters “new business models, new processes, new inventions, new and improved goods and services,” increases economic competitiveness, lowers information costs, improves market access to global

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<sup>16</sup> Devina Divecha, *Broadband Is the Most Loved Innovation of the Decade*, T3.COM (Sept. 8, 2011, 4:33 PM), <http://www.t3.com/news/broadband-is-the-most-loved-innovation-of-the-decade>.

<sup>17</sup> NAT'L TELECOMM. & INFO. ADMIN., U.S. DEP'T OF COMMERCE, DIGITAL NATION: EXPANDING INTERNET USAGE 3, 7 (Feb. 2011), *available at* [http://www.ntia.doc.gov/files/ntia/publications/ntia\\_internet\\_use\\_report\\_february\\_2011.pdf](http://www.ntia.doc.gov/files/ntia/publications/ntia_internet_use_report_february_2011.pdf). The National Telecommunications & Information Administration (under the Commerce Department) calculated these numbers from the Census Bureau's Current Population Surveys conducted as part of the 2010 Census. *Id.* at 6.

<sup>18</sup> ORG. FOR ECON. CO-OPERATION & DEV., OECD COMMUNICATIONS OUTLOOK 40 (2011).

markets, and permits workplace flexibility.<sup>19</sup> The FCC defines “broadband” as “advanced telecommunications capability,” which means “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”<sup>20</sup> Telecommunications capability includes Digital Subscriber Line (DSL), cable modem, fiber optic, wireless broadband, satellite, and broadband over power line (BPL) services.<sup>21</sup> Cable modem and DSL service serve as the primary means of broadband access, although consumers increasingly have access to wireless, mobile, and fiber optic broadband.<sup>22</sup> Cable companies provide broadband access to their subscribers through the same coaxial cables used to provide television programming.<sup>23</sup> Similarly, telephone companies provide broadband access through the phone wires that also provide phone service.<sup>24</sup>

## 2. End-to-End and Best-Efforts Delivery

The architects of the Internet constructed its networks based on a principle of design that envisioned the ISP in the role of a passive intermediary.<sup>25</sup> The ISP had little reason to interact with the data traveling through its networks any more

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<sup>19</sup> ORG. FOR ECON. CO-OPERATION & DEV., BROADBAND AND THE ECONOMY: MINISTERIAL BACKGROUND REPORT 8 (2008).

<sup>20</sup> 47 U.S.C. § 1302(d)(1) (2006).

<sup>21</sup> Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, FCC 11-78, at 3 n.9 (May 20, 2011) [hereinafter Seventh Broadband Deployment Report], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-11-78A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-78A1.pdf); *Types of Broadband Connections*, BROADBAND.GOV, [http://www.broadband.gov/broadband\\_types.html](http://www.broadband.gov/broadband_types.html) (last visited Mar. 25, 2013). To qualify as broadband, the internet service must enable a user to download content at four megabytes per second (mbps) and to upload content at one mbps to qualify as a broadband connection. See Seventh Broadband Deployment Report, *supra*, at 2 n.2.

<sup>22</sup> See Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status As Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1323 n.36 (2010) (citing Indus. Analysis & Tech. Div., Wireline Competition Bureau, Fed. Comm’n Comm’n, High-Speed Services for Internet Access: Status as of December 31, 2008 7-8 (2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296239A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf)).

<sup>23</sup> *Cable Modem, Types of Broadband Connections*, BROADBAND.GOV, [http://www.broadband.gov/broadband\\_types.html#cable](http://www.broadband.gov/broadband_types.html#cable) (last visited May 16, 2013).

<sup>24</sup> *Digital Subscriber Line (DSL), Types of Broadband Connections*, BROADBAND.GOV, [http://www.broadband.gov/broadband\\_types.html#dsl](http://www.broadband.gov/broadband_types.html#dsl) (last visited May 16, 2013).

<sup>25</sup> See J.H. SALTZER ET AL., M.I.T. LAB. FOR COMPUTER SCI., END-TO-END ARGUMENTS IN SYSTEM DESIGN 2-3 (1984), available at <http://web.mit.edu/Saltzer/www/publications/endtoend/endtoend.pdf>.

than was necessary to transmit it from point A to point B.<sup>26</sup> By contrast, highly-sophisticated computers sitting at the ends of the networks would receive that data, inspect and process it, and put it to use before sending new data back out to the network destined for other computers on the “other side” of the Internet.<sup>27</sup> Thousands of networks exist between those end points, including those owned or operated by ISPs, whose only function is to determine the next point in the network that would bring the data closer to its final destination. From this design principle emerged the idea of a “dumb” network with “smart” edges, such that the middle part of the network performed only the simplest functions like routing, while the computer systems at the edges performed the more complicated tasks necessary for a complete exchange of information over the Internet.

This “end-to-end principle” allocates the most important tasks to the endpoints of the network in order to obtain maximum network efficiency.<sup>28</sup> These efficiency considerations obtain greater significance upon the threat of ISPs to begin interfering with data they receive in the “middle” of the network, that is, anywhere between the origin and the destination computers. Any practices implemented by ISPs to block, limit, or reduce the quality of transmission for certain kinds of online content could potentially disrupt the traditional end-to-end principle underlying the architecture of the Internet, especially where ISPs implement those practices discriminatorily based on the substantive content of the data rather than transmission efficiency.

### B. *Network Neutrality*

Many ISPs have engaged in or expressed an intent to charge for, block, limit, or otherwise restrict their subscribers’ access to certain kinds of online content, with each proposal constituting a form of interference that would violate the end-to-end principle and network neutrality. Because these proposals exist in various forms and would vary in their

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<sup>26</sup> See *id.*

<sup>27</sup> See Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 829 (2004) (“The network simply forwards or routes the data packets and does not—and cannot by architecture—discriminate or differentiate traffic generated by different applications.”).

<sup>28</sup> See *id.* at 839-40; David P. Reed et al., *Active Networking and End-to-End Arguments*, STANFORD, [http://cyberlaw.stanford.edu/e2e/papers/Saltzer\\_Clark\\_Reed\\_ActiveNetworkinge2e.html](http://cyberlaw.stanford.edu/e2e/papers/Saltzer_Clark_Reed_ActiveNetworkinge2e.html) (last modified May 15, 1998, 3:17 PM).



application, each individual proposal involves unique arguments both for and against their implementation.

As a general matter, however, proponents of network neutrality argue that network management practices treating content unequally might trigger concerns about free expression on the Internet,<sup>29</sup> while others see such discriminatory practices as harmful to economic growth and innovation.<sup>30</sup> There are natural incentives for providers to engage in discriminatory behavior for anticompetitive reasons, given that the online activities that most heavily burden their networks are also those that directly compete with broadband providers' separate cable television and telephone service products.<sup>31</sup> This presents an unacceptable risk of anticompetitive behavior that becomes more pronounced in a large number of geographic regions where consumers have access to only two or fewer broadband providers.<sup>32</sup>

Conversely, opponents of net neutrality fear that the FCC's regulatory interference in the industry would reduce broadband providers' incentives to innovate or invest in expanding capacity and thereby cause great harm to consumers and the economy as a whole.<sup>33</sup> The private sector has invested hundreds of billions of dollars in broadband infrastructure over the past decade.<sup>34</sup> Verizon, for example, invested \$80 billion in capital expenditures between 2004 and 2008—more than any other company in the United States in any industry.<sup>35</sup> Thus, any regulation implemented by the FCC must be carefully tailored to avoid undermining such a high level of beneficial,

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<sup>29</sup> JAY STANLEY, NETWORK NEUTRALITY 101: WHY THE GOVERNMENT MUST ACT TO PRESERVE THE FREE AND OPEN INTERNET 21 (2010), available at [http://www.aclu.org/files/assets/netneutrality\\_report\\_20101021.pdf](http://www.aclu.org/files/assets/netneutrality_report_20101021.pdf).

<sup>30</sup> Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575, 581-83 (2007).

<sup>31</sup> *Open Internet Order*, supra note 6, at 17915-18.

<sup>32</sup> According to the FCC, four percent of people in the United States have access to three or more broadband providers; seventy-eight percent have access to two broadband providers; thirteen percent have access to only one provider; and five percent have access to none. *Broadband Competition and Innovation Policy*, BROADBAND.GOV, <http://www.broadband.gov/plan/4-broadband-competition-and-innovation-policy/> (last visited Mar. 25, 2013).

<sup>33</sup> Daniel F. Spulber & Christopher S. Yoo, *Rethinking Broadband Internet Access*, 22 HARV. J.L. & TECH. 1, 41-50 (2008).

<sup>34</sup> Reply Comments of Verizon and Verizon Wireless on the Seventh Broadband Deployment Notice of Inquiry, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 10-159, at 1-2 (2011), available at <https://prodnet.www.neca.org/publicationsdocs/wwpdf/10610verizon.pdf>.

<sup>35</sup> *Id.* at 2.

necessary investment. Some opponents of network neutrality, however, believe that the issue amounts to little more than a contract issue between broadband providers and their subscribers.<sup>36</sup> From a business perspective, providers argue that they must be afforded discretion to efficiently manage their networks—even when a degradation of service for some online activities may result—particularly when those practices reflect legitimate business decisions or necessary network management practices.<sup>37</sup>

## II. REVERSAL OF AGENCY ACTION

### A. *Specific Policies Subject to Reversal*

The FCC has identified a need to regulate broadband because of the threat of ISP interference with users' broadband connections. The agency, however, has experienced enormous difficulty in demonstrating its jurisdictional authority to implement such regulation due to its rigid definitional classification system, which labels technologies as categorically subject to, or exempt from, its regulatory reach. To successfully establish a long-term, sustainable jurisdictional framework for regulating broadband, the FCC must first reverse certain agency decisions that produced the current categorical exemption approach. In its 1980 opinion, *Computer II*, the FCC adopted an approach to regulating Title II technologies by applying common carrier obligations to providers of "basic services," while exempting those offering "enhanced services."<sup>38</sup> "Basic service" meant "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information,"<sup>39</sup> which excluded any data-processing functions. "Enhanced service," by contrast, included the application of some additional process by either the subscriber or the supplier of the service before the user would be able to view the information.<sup>40</sup> The "basic" and

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<sup>36</sup> Julian Sanchez, *More Net Neutrality Violations That Aren't*, CATO @ LIBERTY (Nov. 11, 2010, 1:40 PM), <http://www.cato.org/blog/more-net-neutrality-violations-arent>.

<sup>37</sup> Joint Brief for Verizon and MetroPCS at 49, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. July 2, 2012), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-317120A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-317120A1.pdf).

<sup>38</sup> Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976 (2005) (citing *Computer II*, 77 F.C.C.2d 384, 417-23, ¶¶ 86-101 (D.C. Cir. 1982)).

<sup>39</sup> *Id.* at 976 (internal quotation marks omitted).

<sup>40</sup> See *Computer II*, 77 F.C.C.2d at 387.

“enhanced” categories served as predecessors to the “telecommunications” and “information” service categories currently used to determine whether the FCC could regulate communications technologies under Title II. In adopting these definitions and setting forth distinct regulatory obligations for each, the FCC relied on its rulemaking authority to establish the bifurcated regulatory regime that remains in place today.

To recap, the FCC’s difficulties in regulating broadband result from policies set forth over the course of several agency decisions. First, the FCC established definitions for the “basic” and “enhanced” categories in *Computer II*. Second, the agency used these definitional categories to also define which technologies it would regulate under Title II. The agency, however, was not statutorily required to treat “enhanced services” as categorically exempt from Title II regulation. Third, when Congress later adapted the “basic service” and “enhanced service” definitions into the “telecommunications service” and “information service” definitions in the Communications Act, the FCC continued to use these statutory definitions as a means of determining which technologies it would regulate under Title II. As with “enhanced services,” the FCC also did not have to treat “information services” as categorically exempt from Title II regulation. Finally, in its 2002 *Declaratory Ruling*, the FCC concluded that broadband Internet qualified *only* as an “information service,” and thus was not subject to Title II regulation. With this final measure, the FCC used its rulemaking authority to push broadband beyond its Title II authority by placing it within a categorical exemption.

To regulate broadband, then, the FCC must either abrogate the 2002 *Declaratory Ruling* by declaring that broadband instead qualifies as a “telecommunications service,” its *Computer II* decision by abandoning *Computer II*’s categorical exemption approach, or, by reversing both. Reversing only *Computer II* would maintain broadband as exclusively an “information service” while allowing the FCC to regulate broadband under Title II by abandoning the categorical exemption approach.

*B. Standard of Review*

A reversal of agency policy must be analyzed under *State Farm*,<sup>41</sup> which sets out the standard for judicial review of agency action under the Administrative Procedure Act (APA).<sup>42</sup> The APA permits courts to set aside “arbitrary” or “capricious” agency action.<sup>43</sup> In determining whether an agency has engaged in arbitrary or capricious action, a court must determine whether the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.”<sup>44</sup> Courts must uphold agency action even if the decision provides “less than ideal clarity” so long as “the agency’s path may reasonably be discerned.”<sup>45</sup> The courts generally apply the same level of review to a reversal of agency policy as they apply to an agency decision to adopt a rule in the first place.<sup>46</sup>

Thus, under *State Farm*, an agency reversing policy through rescission of a rule must provide a “reasoned analysis” to demonstrate the absence of arbitrary or capricious action.<sup>47</sup> In 2009 and 2012, the Supreme Court issued two opinions under *F.C.C. v. Fox Television Stations, Inc. (Fox I and Fox II* respectively), in which the Court sought to clarify the *State Farm* standard for agency policy reversals.<sup>48</sup> In *Fox I*, Justice Scalia authored a 5-4 majority opinion in which he attempted to clarify the standard by requiring, first, that the agency display awareness that the action in fact constituted a change of position.<sup>49</sup> In other words, the agency may not depart from prior rules without actually acknowledging the fact of the reversal, nor can it simply ignore existing rules.<sup>50</sup> Second, the agency must demonstrate the existence of good reasons for the new policy,<sup>51</sup> although the agency need not prove the relative

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<sup>41</sup> *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 27, 43 (1983).

<sup>42</sup> 5 U.S.C. § 551 (2006).

<sup>43</sup> *Id.* § 706(2)(A).

<sup>44</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) [hereinafter *Fox I*] (quoting *State Farm*, 463 U.S. at 43).

<sup>45</sup> *Id.* at 513-14 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

<sup>46</sup> *State Farm*, 463 U.S. at 41.

<sup>47</sup> *Fox I*, 556 U.S. at 513-16 (citing *State Farm*, 463 U.S. at 42).

<sup>48</sup> *Id.* at 514-16; *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2315-16 (2012) [hereinafter *Fox II*].

<sup>49</sup> *Fox I*, 556 U.S. at 514-16.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

superiority of the new reasons over the old.<sup>52</sup> A court, however, may require a more detailed explanation where the agency relies on factual findings that contradict the reasons supporting the original policy.<sup>53</sup>

Following *Fox I*, some ambiguity remained because Justice Kennedy, although having joined the majority, penned a separate concurrence in which he offered a number of additional factors—in addition to those listed by Scalia—that he believed should also be considered. These factors, when compared to the considerations identified *State Farm*, would arguably create a heightened scrutiny for agency reversals of policy. Kennedy's factors take on exceptional importance because the four-justice dissent also supported the adoption of this proposed level of heightened scrutiny. The dissent disagreed, however, with Kennedy's conclusion that the agency satisfied the burden in this case.

In particular, Kennedy believed that an agency must also provide an explanation for the reversal from prior policy.<sup>54</sup> Under that analysis, “the agency must explain why it now rejects the considerations that led it to adopt that initial policy.”<sup>55</sup> Justifications for reversal are adequate if based on discoveries in science, advances in technology, or circumstances changed by “any of the other forces at work in a dynamic society.”<sup>56</sup> Additionally, new circumstances might justify a reversal even where the agency must make difficult predictive judgments like those required in adopting a policy in the first place.<sup>57</sup> Therefore, an agency would be required to first provide a reasoned analysis for the new policy while acknowledging the

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 515.

<sup>54</sup> Justice Scalia authored the 5-4 majority opinion, in which Justice Roberts, Kennedy, Thomas, and Alito joined, holding that the FCC had articulated a sufficiently reasoned analysis for its change in policy that the agency action did not constitute arbitrary and capricious action. *Id.* at 516. Justice Kennedy, however, did not join the portion of the majority's opinion expressing disapproval of the dissent's analytical framework. Instead, Kennedy wrote a separate concurrence in which he joined the four-justice dissent to the extent that they would require an agency to explain *why* they changed the policy. *Id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment). Presumably, Scalia's opinion would require a less-searching review of the agency's justification and would grant the agency action deference merely upon demonstration of some reasoned analysis combined with acknowledgement of the change itself.

<sup>55</sup> *Id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment) (alteration, citation, and internal quotation marks omitted).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 535-36.

departure itself, but it would then have to explain how changed circumstances justify the reversal.

The question of what standard to apply is complicated somewhat by *Fox II*, in which Justice Kennedy wrote for the majority and merely applied the factors articulated by Justice Scalia's majority in *Fox I*, completely ignoring the additional factors that he and the four-justice dissent had previously supported.<sup>58</sup> Whether Justice Kennedy experienced a change of heart, or merely believed that the *Fox I* majority's factors appropriately covered the agency action under the circumstances existing in *Fox II*, a careful review under a heightened analysis will nonetheless prove useful as a guide for agencies contemplating reversals of policy.

The *Fox* cases not only clarify the *State Farm* standard of arbitrary and capricious review, but they also offer compelling factual similarities to those found in the network neutrality debate. The underlying facts involved the FCC's reversal of its method of enforcing the prohibition of indecent language used on broadcast television.<sup>59</sup> Under the initial policy, the FCC could penalize broadcasters for broadcasting indecent language as a general matter, but it provided a safe-harbor for non-repetitive or isolated uses of an indecent word.<sup>60</sup> The original policy also distinguished between literal and nonliteral uses of offensive words, holding nonliteral uses actionable only if repeated.<sup>61</sup> The FCC later reversed that policy by abolishing the safe harbor,<sup>62</sup> disavowing the literal/nonliteral distinction,<sup>63</sup> and adopting a context-based approach for

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<sup>58</sup> *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2315-16 (2012).

<sup>59</sup> Section 1464 of Title 18 prohibits any utterance of "any obscene, indecent, or profane language by means of radio communication." *Id.* at 2312.

<sup>60</sup> *Fox I*, 556 U.S. at 511-13.

<sup>61</sup> *Id.* For example, use of the "F-word" without reference to the sexual act to which it commonly relates constitutes a nonliteral—or "expletive"—use of the word. *See In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 & March 8, 2005*, 21 F.C.C. Rcd. 13299, 13308 (2006) [hereinafter *Broadcast Television Complaints Order*], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-17A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-17A1.pdf).

<sup>62</sup> In abolishing the safe harbor, the FCC believed that even a single use of an offensive word could "constitute [a] harmful 'first blow[]' to children" and could encourage the widespread use of offensive words on broadcast television used only one at a time. *Fox I*, 556 U.S. at 518-19 (internal citations and quotation marks omitted).

<sup>63</sup> The FCC argued that it could no longer justify the distinction between literal and nonliteral uses of offensive words because, with regard to the "F-word," the nonliteral, expletive use of the word still derived its impact from its underlying sexual connotation. *See Broadcast Television Complaints Order*, 21 F.C.C. Rcd. at 13308. Thus, a "strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions' [was] artificial" and no longer made sense. *Id.* Additionally, the FCC stated that, in some cases, "it [would be] difficult (if not impossible) to distinguish

determining the actionability of an indecent broadcast.<sup>64</sup> Writing for a five-justice majority that included Justice Kennedy, Justice Scalia rejected the argument that the reversal constituted arbitrary or capricious action by noting that the FCC had explicitly acknowledged the reversal and arguing that the agency had articulated an “entirely rational” and “reasonable” explanation for abandoning the policy.<sup>65</sup> In his separate concurrence, Justice Kennedy agreed that the reversal did not constitute arbitrary and capricious action, even under the dissent’s heightened scrutiny, because the agency had considered permissible factors and provided careful and complete analysis, including a procedural history of its newly-adopted policy and the reasons for the new rule.<sup>66</sup>

The literal/nonliteral categories at issue in the *Fox* cases greatly resemble the “telecommunications” and “information” service categories relevant to FCC regulation of broadband Internet. Justice Kennedy upheld the FCC’s disavowal of the literal/nonliteral categories of offensive language upon claims that the agency experienced great difficulty in distinguishing between the two.<sup>67</sup> Similarly, the FCC sufficiently justified its reversal upon its recognition that the categorical “safe harbor” exemption for nonliteral, non-repetitive offensive words did not appreciate the actual harm caused by offensive words even when used in isolation. The FCC reasoned that harm nonetheless resulted because the offensive impact of nonliteral uses actually derived from its underlying literal connotation. In sum, the FCC adopted a context-based approach that appropriately permitted consideration of the actual harmful elements underlying each use of offensive language. Similar considerations arise with respect to FCC policies on broadband. Part III of this note demonstrates that many of the same factors would support an FCC decision to abandon use of the “telecommunications” and “information” service dichotomy as the

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whether a word is being used as an expletive or as a literal description of sexual or excretory functions.” *Id.*

<sup>64</sup> *Fox I*, 556 U.S. at 511-13.

<sup>65</sup> *Id.* at 516-18; *cf.* *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46, 54-55 (1983) (holding that National Highway Traffic Safety Administration reversal of seatbelt policy due to the policy’s potential ineffectiveness constituted arbitrary and capricious action because the agency failed to consider certain safety benefits resulting from that policy or whether the policy could be modified).

<sup>66</sup> *Fox I*, 556 U.S. at 538 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>67</sup> *Broadcast Television Complaints Order*, *supra* note 61, at 13308.

exclusive means of determining the regulability of any particular communications technology. The *Fox* cases and *State Farm*, when read together and in review of the relevant FCC considerations, would obligate judicial deference for the FCC's decision to apply limited Title II regulations to broadband Internet.

### III. A REASONED ANALYSIS

#### A. *Anticipating Reversal*

A year after deciding *Computer II*, the FCC issued a notice inquiry, *In the Matter of Policy & Rules Concerning Rates for Competitive Common Carrier Services & Facilities Authorizations Therefore (Competitive Carrier Notice)*, in which it acknowledged the impact of its *Computer II* approach by expressly stating:

We wish to make clear at the outset . . . that a decision to remove entities from Title II regulation—under either a forbearance or definitional approach—does not remove our Title I and Title III jurisdiction over such entities, nor does it foreclose our ability to reimpose Title II regulation upon a principled finding that such action would be warranted under the Act.<sup>68</sup>

In making these statements, the FCC reserved for itself the flexibility to abandon the categorical exemption approach that ultimately resulted in precluding “information services” from all FCC regulation. By its own admission, the FCC also understood that a definitional approach serves the same function as a forbearance approach<sup>69</sup> while also acknowledging the unique potential of a definitional approach to create far-reaching impact.<sup>70</sup> Despite demonstrating candid awareness of the impact of its decision, the FCC nevertheless adopted inflexible rules whose legacies live on in the categorical exemptions applicable under Title II today.

#### B. *Legal Framework Underlying FCC Authority*

The Communications Act, 47 U.S.C. §§ 151 *et seq.*, as amended by the Telecommunications Act of 1996, grants the

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<sup>68</sup> *In re Policy & Rules Concerning Rates for Competitive Common Carrier Services & Facilities Authorizations Therefor*, 84 F.C.C.2d 445, 448 (1981) [hereinafter *Competitive Carrier Notice*].

<sup>69</sup> *Id.* at 464.

<sup>70</sup> *Id.* at 448 (“We appreciate that this fundamental review of our Title II regulatory responsibilities may well engender far reaching consequences.”).



FCC broad authority “to regulate common carrier services, including landline telephony; radio transmissions, including broadcast television, radio, and cellular telephony; and ‘cable services,’ including cable television.”<sup>71</sup> The Act contains mandatory regulation of common carriers under Title II, which subjects qualifying entities to, among other things, various antidiscrimination and disclosure regulations. The FCC also maintains authority to regulate under its “ancillary jurisdiction,” which permits the agency to undertake regulatory action when “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.”<sup>72</sup> The FCC’s ancillary jurisdiction applies where the agency cannot claim express statutory authority but believes that regulation is necessary to honor statements of policy expressed under the Act—but only when in support of a statutorily mandated responsibility.<sup>73</sup> The D.C. Circuit in 2005 explicitly denied the FCC’s asserted basis to regulate broadband Internet under its ancillary jurisdiction in *Comcast Corp. v. FCC*.<sup>74</sup> In 2010, the FCC again asserted authority to regulate broadband under its Title I ancillary jurisdiction based on other grounds when the agency issued its 2010 *Open Internet Order*.<sup>75</sup> Many expect that the D.C. Circuit will strike down those rules on jurisdictional grounds.<sup>76</sup>

Because Title I likely cannot support regulation of broadband, the FCC must find a way to regulate under Title II if it intends to do so at all. The question of whether Title II applies to any particular technology depends on whether the technology qualifies as a “telecommunications service” or an “information service.”<sup>77</sup> The FCC draws a line between “telecommunications services” and “information services” for

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<sup>71</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010) (citations omitted); see also Edward J. Sholinsky, *Blocking Access to the Information Superhighway: Regulating the Internet Out of the Reach of Low-Income Americans*, 38 RUTGERS L.J. 321, 357-58 (2006).

<sup>72</sup> *Comcast Corp.*, 600 F.3d at 644 (citing *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

<sup>73</sup> *Id.* The *Comcast* court made clear that statements of policy do not alone create a “statutorily mandated responsibility[.]” *Id.*

<sup>74</sup> *Id.* at 645.

<sup>75</sup> *Open Internet Order*, *supra* note 6, at 18057-58 (2010) (statements of FCC Commissioner Robert McDowell in dissent describing the majority’s asserted basis of jurisdiction), *appeal dismissed sub nom.* *Verizon v. FCC*, Nos. 11-1014, 11-1016, 2011 WL 1235523 (D.C. Cir. Apr. 4, 2011).

<sup>76</sup> See, e.g., Jasmin Melvin, *U.S. FCC Draws Tough Court for Web Rule Lawsuits*, REUTERS (Oct. 6, 2011), <http://www.reuters.com/article/2011/10/06/usa-internet-rules-idUSN1E7951UO20111006>.

<sup>77</sup> See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 977-78 (2005).

purposes of determining which entities to regulate as common carriers.<sup>78</sup> Entities that offer telecommunications service must comply with the Title II common carrier requirements, whereas providers of information services enjoy an exemption from all such regulations. These distinctions result in regulation applied to phone service while leaving broadband Internet untouched.<sup>79</sup>

The strict telecommunications and information service dichotomy attempts to draw a clear line where none actually exists. Because modern communications technologies increasingly reach across the FCC line of demarcation, the dual categories drawn by the statute provide little value as definitive boundaries for determining which technologies to regulate or exempt. The FCC could avoid these anomalies by abandoning its use of categorical exemptions, provided that the reversal of policy could withstand *State Farm* review. To satisfy the *State Farm* standard, as clarified by the *Fox* cases, the FCC could demonstrate a reasoned analysis for the change in policy by reviewing its prior factual findings that telecommunications service in fact comprises a critical component of information service. To comply with Justice Kennedy's heightened scrutiny in *Fox I*, the FCC could justify its rejection of the considerations underlying its prior approach by demonstrating how technological convergence has rendered these categories functionally indistinct. Specifically, advances in technology have permitted broadband users to receive telecommunications and cable service by means of information service platforms. Lastly, the FCC's inflexible rules conflict with common law definitions of "common carrier," the application of which would otherwise permit regulation of broadband providers under Title II.

### C. *Technical Distinctions*

The FCC's difficulty in drawing coherent boundaries between basic and enhanced service—and later, between telecommunications and information service—reflects an outdated formalist approach to applying different regulatory obligations to different technologies that fit neatly into one category or another.<sup>80</sup> The FCC's 2002 *Declaratory Ruling*

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<sup>78</sup> *Declaratory Ruling*, *supra* note 10, at 5, ¶ 7; see also *Computer II*, 77 F.C.C.2d 384 (1980), *aff'd sub nom.* *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

<sup>79</sup> See *Brand X*, 545 U.S. at 974-77.

<sup>80</sup> See Christopher S. Yoo, *New Models of Regulation and Interagency Governance*, 2003 MICH. ST. DCL L. REV. 701, 714 (2003).

continued that approach by categorically exempting broadband from all regulation.<sup>81</sup>

A question arises as to whether the FCC might permissibly reverse its earlier interpretation of the Communications Act in classifying broadband as an information service under the *Declaratory Ruling* in light of the fact that the Supreme Court later affirmed that particular interpretation in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.<sup>82</sup> In *Brand X*, the Court deferred to the FCC's interpretation of the Communications Act under the *Chevron* standard of judicial review.<sup>83</sup> *Chevron* holds that "where Congress [leaves] . . . a gap [in the enabling statute] for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."<sup>84</sup> To review an agency action, a court must then ask whether the agency's interpretation amounts to a permissible reading of the statute.<sup>85</sup> Importantly, however, the Court noted that approval of an agency interpretation under *Chevron* does not amount to a determination that the particular construction was the *only* construction possible.<sup>86</sup> Nor does judicial approval require a construction that the court would have reached if the matter had originally arisen in a judicial proceeding.<sup>87</sup> Thus, multiple constructions may satisfy the statutory purpose, and a court's determination that one of them is permissible does not foreclose other interpretations. Although the Supreme Court approved the FCC's *Declaratory Ruling* classifying broadband providers as exclusively an information service, this does not preclude a different interpretation that the broadband providers do in fact offer telecommunications services.<sup>88</sup> This suggests that

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<sup>81</sup> *Declaratory Ruling*, *supra* note 10, at 4819.

<sup>82</sup> 545 U.S. 967.

<sup>83</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

<sup>84</sup> *Id.* at 843-44.

<sup>85</sup> *Id.* at 843.

<sup>86</sup> *Id.* at 843 n.11.

<sup>87</sup> *Id.*

<sup>88</sup> In fact, the Supreme Court in *Brand X* stated explicitly that a prior *Chevron* interpretation by the FCC does not foreclose reversal of that interpretation in the future. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (relying on *Chevron*, 467 U.S. 837). *Brand X* argued that *Chevron* deference did not apply to the FCC's *Declaratory Ruling* because of the action's inconsistency with the FCC's past treatment of broadband providers as common carriers. See, e.g., *Computer II*, 77 F.C.C.2d 384 (1980), *aff'd sub nom.* *Computer & Comm'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982). "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying

the FCC's classification of broadband remains open to the agency's own reversal if justified under *State Farm* analysis.

The Supreme Court's analysis in *Brand X* helps to identify the technical anomalies produced by the FCC's categorical exemption approach. Specifically, the Court's analysis—and Justice Scalia's dissent in particular—demonstrates that information services do in fact contain a telecommunications component, relevant to a *State Farm* review requiring factual support for reversing a prior policy. Recognition of this fact would adequately demonstrate a reasoned analysis by the agency in adopting a new policy. *Brand X* would certainly prove informative if the FCC were to reverse its *Declaratory Ruling*.

The FCC's classification of broadband as an information service in the *Declaratory Ruling* depended on the technical manner in which users receive information through the service.<sup>89</sup> Specifically, the FCC treated as conclusive the fact that broadband providers do not “offer” a telecommunications component of information service as a stand-alone product that customers could separately purchase.<sup>90</sup> Companies that offer phone services, on the other hand, “offer” telecommunications directly to consumers as a separate, independent product—namely, the transmission of voice communication itself.<sup>91</sup> The existence of a processing capability as the primary sellable product therefore permitted the FCC to distinguish information services from telecommunications services even though the telecommunications service comprises a critical part of information services.

Writing in dissent, Justice Scalia concluded that the FCC's determination that broadband providers do not offer telecommunications to the public relied on an implausible reading of the Communications Act.<sup>92</sup> He argued that the telecommunications component of information services does not lose its independent quality merely because the broadband provider does not sell it as a finished product to the end user.<sup>93</sup>

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interpretations and the wisdom of its policy on a continuing basis.” *Brand X*, 545 U.S. at 981 (citing *Chevron*, 467 U.S. at 863-64).

<sup>89</sup> See *Brand X*, 545 U.S. at 976.

<sup>90</sup> *Id.* at 989.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1005 (Scalia, J., dissenting).

<sup>93</sup> *Id.* at 1008. “[F]or the inputs of a finished service to qualify as the objects of an ‘offer’ (as that term is reasonably understood), it is perhaps a sufficient, *but surely not a necessary*, condition that the seller offer separately ‘each discrete input that is necessary to providing . . . a finished service.’” *Id.* at 1007-08.

Scalia noted that any reasonable consumer would understand that broadband includes “high speed access to the internet” (the telecommunications component) in addition to “other applications and functions” (the data processing functions).<sup>94</sup>

In applying the *State Farm/Fox* analysis, the FCC must first recognize the fact of reversal in order to survive judicial review.<sup>95</sup> Second, the FCC should engage in a reasoned analysis to demonstrate good reasons for a reversal of the policy. Because the agency has already undertaken an investigation to establish the factual existence of a telecommunications component in broadband,<sup>96</sup> the FCC must merely demonstrate a reasoned analysis for adopting an alternative interpretation of “offer” under the Communications Act. To ensure that the FCC would also satisfy the additional requirements articulated by Justice Kennedy in his *Fox I* concurrence, the FCC would find adequate support by discussing the technical means by which broadband service operates, as discussed below.<sup>97</sup>

When broadband providers offer Internet access to the public, they serve their users in primarily two functions. The first is when the broadband users initiate communication with other computers. The ISP sends out information to computers in the broader Internet and requests information in return. In this capacity, they perform, among other things, data-processing functions such as DNS resolution or retrieval from caches storing popular content, consistent with the definition of “information services.”<sup>98</sup> ISPs perform their second function when transmitting information received from other computers to their subscribers. In this regard, broadband providers

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<sup>94</sup> *Id.* at 1008. Justice Scalia provided a memorable analogy about pizza delivery service to illustrate the implausibility of the FCC and the majority’s interpretation of “offer.” *Id.* at 1007. A pizza restaurant does not sell delivery service separate from the pizza product itself, but any reasonable consumer would understand that the restaurant “offers” delivery service with its sales of pizza. *Id.* The FCC’s reading would require a statement from a pizza restaurant akin to: “No, we do not offer delivery—but if you order a pizza from us, we’ll bake it for you and then bring it to your house.” *Id.*

<sup>95</sup> See *Fox I*, 556 U.S. 502, 515-16 (2009).

<sup>96</sup> The FCC’s factual investigation undertaken prior to the 2002 *Declaratory Ruling* resulted in a conclusion that telecommunications did in fact comprise a portion of information services. As such, because the FCC has itself treated telecommunications service as a critical component of information services, no fact-based conflict would subject the decision to heightened scrutiny. See *Brand X*, 545 U.S. at 992-93.

<sup>97</sup> *Fox I*, 556 U.S. at 533-35.

<sup>98</sup> These functions “include protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security, and caching.” *Declaratory Ruling*, *supra* note 10, at 12-13, ¶¶ 17-18.

primarily serve as conduits of information without altering the form of the communication before receipt by the users.<sup>99</sup> Once the data leaves the user, ISPs and network service providers function much like postal workers, who only need to read the destination address on the exterior of a letter to figure out where it should go.<sup>100</sup> For postal workers—and for ISPs performing their routing functions—opening the package to look at the contents would be completely unnecessary when the destination address appears on its exterior. Additionally, the fact that fewer ISPs now engage in the full scope of data-processing functions demonstrates both the existence of a separable telecommunications component in the ISP's operations as well as the relative importance of its role as a mere conduit.<sup>101</sup>

Simply recognizing the telecommunications component of information services as a factual matter does not alone answer the question whether the FCC may actually regulate it. In fact, a review of the language of the Telecommunications Act appears to reveal a legislative intent to the contrary. In adopting the definitions for information and telecommunications service in

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<sup>99</sup> The Fourth Circuit recognized that this results in a pure transmission of data over the last mile (that is, the phone or cable connection between a household and the ISP). When the ISP transmits data over the last mile, “it is a pipeline for telecommunications and properly classified as a telecommunications facility because it transmits ‘information of the user’s choosing, without change in the form or content.’” Christian R. Eriksen, *Cable Broadband: Did the Ninth Circuit Beat the FCC to the Punch in Last Mile Regulation?*, 6 TUL. J. TECH. & INTELL. PROP. 283, 287 (2004) (citing *MediaOne Grp., Inc. v. Cnty. of Henrico*, 257 F.3d 356, 364-65 (4th Cir. 2001)) (internal quotation marks omitted). Similarly, the Ninth Circuit came to the same conclusion in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).

<sup>100</sup> See Duncan Geere, *How Deep Packet Inspection Works*, WIRED.CO.UK (Apr. 27, 2012), <http://www.wired.co.uk/news/archive/2012-04/27/how-deep-packet-inspection-works>.

<sup>101</sup> See Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet*, 63 FED. COMM. L.J. 91, 108 (2010) (“ISPs today . . . act primarily, if not exclusively, as conduits, forwarding and transmitting their subscribers’ data to or from one or more Internet gateways or ‘peering points’ from which the data is routed to or from a website or other Internet location designated by the end user. Even if the ISP also offers its own proprietary ‘information services,’ it typically uses the public Internet for providing access to such proprietary content or applications.”). For example, many more people use web-based email services rather than email services offered by ISPs. Additionally, ISPs have outsourced storage and caching functions to third parties called content delivery networks. See Athena Vakali & George Pallis, *Content Delivery Networks: Status and Trends*, IEEE INTERNET COMPUTING, Nov.–Dec. 2003, at 68 (“ISPs use proxies to store the most frequently or most recently requested content.”). Similarly, many ISPs use third-party DNS servers. See “Alex”, *Predictions for DNS in 2010*, CENTERNETWORKS (Dec. 3, 2009), <http://www.centernetworks.com/predictions-for-google-dns-2010>.

1996,<sup>102</sup> Congress appears to have indicated its preference for treating information and telecommunications service as mutually exclusive categories. Information service means “the offering of [data processing capability] *via telecommunications*.”<sup>103</sup> If information services could exist in both categories, the statutory definition of information services “would become tautological” because “such a service must simultaneously *be* a ‘telecommunications service’ and perform its function ‘*via telecommunications*.”<sup>104</sup> Supreme Court precedent in *Brand X*, however, forecloses this argument completely. By applying *Chevron* deference to the FCC’s interpretation of “offering”—necessary to the agency’s determination that broadband qualified only as an information service—the Supreme Court conclusively determined that ambiguity existed in the statute, and that ambiguity amounted to a Congressional delegation of authority to interpret the particular provision.<sup>105</sup> Thus, by applying *Chevron* deference in *Brand X*, the Supreme Court implicitly left the definitions open to re-interpretation under *State Farm*.<sup>106</sup>

#### D. Technological Convergence

Even if the FCC were to decide against reversing its 2002 *Declaratory Ruling*, the agency could achieve the same effect by abandoning its categorical exemption approach adopted in *Computer II*. Broadband would thus remain an information service, but the FCC would abandon the use of the telecommunications and information service definitions as the exclusive means of determining which technologies it would regulate or exempt. The FCC would find further *State Farm* support by identifying the anomalies created by technological convergence. Technological convergence, or the “moving

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<sup>102</sup> See Nat’l Cable & Telecomms. Ass’n v. *Brand X Internet Servs.*, 545 U.S. 967, 967 (2005) (recognizing the Telecommunications Act as updating definitional provisions of the Communications Act).

<sup>103</sup> 47 U.S.C. § 153(20) (2006) (emphasis added).

<sup>104</sup> Peter W. Huber et al., *Information Services*, § 12.2.3, Federal Telecommunications Law (2011 Supp.).

<sup>105</sup> “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

<sup>106</sup> See *Brand X*, 545 U.S. at 981 (discussing the interplay between *Chevron* and *State Farm*).

towards the use of one medium as opposed to many,”<sup>107</sup> renders the FCC’s categorical exemptions functionally indistinct as advances in technology permit enjoyment of traditionally-regulated communications technologies, such as cable television and phone services, on information service platforms.<sup>108</sup> Demonstrating this would satisfy Justice Kennedy’s heightened scrutiny in *Fox I* requiring an agency to explain the reasons *why* it has reversed that prior policy. Submitting proof of technological convergence would also be consistent with Kennedy’s suggestion that an agency could satisfy its burden by pointing to advances in technology. In abandoning the categorical exemption approach, the FCC should instead adopt a context-based approach akin to its policy adopted in *Fox*, when it decided to regulate the actual harm caused by use of indecent language. In particular, the FCC should adopt a standard for determining the regulability of communications technologies under Title II that considers whether any particular technology or entity serves the same or equivalent function as those technologies traditionally regulated under Title II.

Convergence in communications technology becomes increasingly important because users today receive—on the same device and over broadband connections—various types of video content, music, radio, and telephony services.<sup>109</sup> The Communications Act<sup>110</sup> applies separate sets of regulations and obligations to different types of communications technologies, including Title II regulations applied to phone service, Title III to broadcasting, and Title VI for cable television.<sup>111</sup> Technological convergence presents a unique problem, however, because digital services received over broadband contain elements of all three.<sup>112</sup>

Voice-over-Internet Protocol (VoIP), or Internet-based phone service, illustrates why the FCC must recognize these technological advances when adopting a new approach. The

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<sup>107</sup> Thomas B. Fowler, *Convergence in the Information Technology and Telecommunications World: Separating Reality From Hype*, TELECOMMS. REV. 11, 11 (2002).

<sup>108</sup> *Id.* at 17-18.

<sup>109</sup> *Id.* at 12.

<sup>110</sup> As amended by the Telecommunications Act.

<sup>111</sup> “Much of the Communications Act is sector-specific, including Title II for telephone service, Title III for broadcasting, and Title VI for cable television. Depending on the classification of a company or service, different obligations may apply.” Kevin Werbach, *The Network Utility*, 60 DUKE L.J. 1761, 1771-72 (2011). Although the Telecommunications Act of 1996 adopted the “information services” category and meant to encompass Internet service, Congress’s silence as to how the FCC should regulate “information services” resulted in the uncertainty about the regulability of broadband today. *Id.* at 1774.

<sup>112</sup> *Id.* at 1773-74.



FCC has not conclusively stated which title of the Communications Act governs VoIP, but the agency has nonetheless applied certain Title II regulations to it based on what the technology actually does.<sup>113</sup> “Because VoIP constitutes the functional equivalent of Title II telephone service . . . the Commission can impose regulatory safeguards that . . . protect consumers but also have a direct and negative monetary impact on VoIP providers.”<sup>114</sup> The FCC also articulated a similar functionalist rationale for abandoning the literal/nonliteral dichotomy in *Fox I*, a justification that satisfied Justice Kennedy’s heightened standard of review. By focusing on the real harm resulting from any use of offensive language, the FCC adopted a more flexible approach capable of regulating all occurrences of the prohibited activity. The FCC should similarly adopt a functional approach with respect to every technology potentially regulable under the Communications Act.

Moreover, as technologies have converged, the FCC has faced increasing difficulties in determining under what category of regulation any new technology should fall.<sup>115</sup> This difficulty mirrors the problems that the FCC encountered in *Fox* in identifying whether offensive language qualified as literal or nonliteral.<sup>116</sup> Other technologies additionally demonstrate the FCC’s continuing conundrum. Skype, one of the most popular VoIP services, offers phones that look like any other landline phone for use in households.<sup>117</sup> Similarly, Internet Protocol Television (IPTV) offerings, like AT&T’s U-verse and other video on demand (VOD) services, deliver “both data service and video programming in the electronic language known as Internet Protocol” rather than the traditional cable television offering over coaxial cable.<sup>118</sup> Users receive IPTV directly through a set-top box on a normal television, viewable without any difference

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<sup>113</sup> Rob Frieden, *Legislative and Regulatory Strategies for Providing Consumer Safeguards in A Convergent Information and Communications Marketplace*, 33 HASTINGS COMM. & ENT. L.J. 207, 224 n.60 (2011) (discussing six separate FCC decisions applying Title II regulations to VoIP).

<sup>114</sup> *Id.* at 225.

<sup>115</sup> *See id.* at 214-15.

<sup>116</sup> *See Broadcast Television Complaints Order*, *supra* note 61, at 13308.

<sup>117</sup> *Skype: Phones*, SKYPE.COM, <http://shop.skype.com/phones/> (last visited Jan. 16, 2012). Skype is just one of many VoIP services available to consumers today. *See* Steven J. Vaughan-Nichols, *Skype Jumps The Shark: Seven Alternative VoIP Services*, ZDNET.COM (June 13, 2012), <http://www.zdnet.com/blog/networking/skype-jumps-the-shark-seven-alternative-voip-services/2488>.

<sup>118</sup> In-Sung Yoo, *The Regulatory Classification of Internet Protocol Television: How the Federal Communications Commission Should Abstain from Cable Service Regulation and Promote Broadband Deployment*, 18 COMMLAW CONSPECTUS 199, 201 (2009).

in format or presentation,<sup>119</sup> although its classification as an information service places it outside of the FCC's ability to regulate.<sup>120</sup> Likewise, video-streaming services Hulu and Netflix deliver new and old movies and television shows to users through traditional living room televisions.<sup>121</sup>

In addition, the historical policy reasons underpinning the FCC's decision to adopt a categorical exemption approach have also changed. *Computer II* (and its predecessor *Computer I*)<sup>122</sup> justified adoption of the categorical approach out of concern that AT&T, which had operated as a monopolist phone company prior to that time, would enter the enhanced data-processing services industry and trample the competition.<sup>123</sup> The FCC also wanted to protect the emerging computing industry from burdensome common carriage regulations.<sup>124</sup> The categorical exemption approach adopted in light of these policy reasons continues today despite the fact that these concerns no longer exist. First of all, AT&T now exists as one of the largest broadband providers.<sup>125</sup> Additionally, industry consolidation—in which a smaller number of companies offer a greater number of services—reduces the need to protect companies that offer only Internet service from common carrier regulations when most ISPs today already comply with Communications Act regulation in their capacity as phone and cable companies.<sup>126</sup>

For all of these reasons, the FCC would encounter little difficulty in justifying its decision to abandon the categorical exemption approach adopted in *Computer II* in light of technological advances and the fact that the policy considerations underpinning the original rules no longer exist.

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<sup>119</sup> *Id.* at 204.

<sup>120</sup> *See supra* Part II.A.

<sup>121</sup> *See* NETFLIX.COM, <https://signup.netflix.com/MediaCenter/HowNetflixWorks> (last visited Jan. 16, 2012); *Hulu Plus: Devices*, HULU.COM, <http://www.hulu.com/plus/devices?src=topnav> (last visited Jan. 16, 2012); *How Netflix Works*.

<sup>122</sup> *In re* Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm'n Servs. & Facilities, 28 F.C.C.2d 267 (1971) [hereinafter *Computer I*].

<sup>123</sup> 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, 598 (2004).

<sup>124</sup> *Id.*

<sup>125</sup> *AT&T Drives Most Internet Traffic for U.S. Businesses in September 2011*, COMSCORE (Nov. 14, 2011), [http://www.comscore.com/Insights/Press\\_Releases/2011/11/AT\\_T\\_Drives\\_Most\\_Internet\\_Traffic\\_for\\_U.S.\\_Businesses\\_in\\_September\\_2011](http://www.comscore.com/Insights/Press_Releases/2011/11/AT_T_Drives_Most_Internet_Traffic_for_U.S._Businesses_in_September_2011).

<sup>126</sup> Frieden, *supra* note 113, at 214.

## IV. COMMON CARRIERS UNDER THE COMMON LAW

Broadband providers qualify as common carriers under the common law, consistent with the definitions adopted by the Communications Act, because of how they hold themselves out to potential customers and how they treat content sent to and from their subscribers. The FCC risks undermining the policies of the Communications Act by failing to treat broadband providers as common carriers even when they qualify as such under traditional and modern tests. Applying these principles to find that broadband providers qualify as common carriers under Title II provides greater support for satisfying the *State Farm* and *Fox* standard of review.

## A. Principles

Over half a century before the Communications Act was enacted, the Supreme Court eloquently declared that a common carrier “stand[s] . . . in the very ‘gateway of commerce.’”<sup>127</sup> In 1934, Congress passed the Communications Act and imposed mandatory Title II regulations upon “common carriers,” defined by the statute as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . .”<sup>128</sup> In adopting these definitions, the FCC defined a common carrier as “[a]ny person engaged in rendering communication service for hire to the public.”<sup>129</sup> Because neither definition provides much guidance, resort to the common law and the understanding of common carriers at the time of enactment will assist in determining whether broadband providers would qualify under the statutory definition.<sup>130</sup>

Common carrier duties derive from common law requirements imposed upon transportation businesses, such as ports or railroads, “to serve all comers and serve them equally.”<sup>131</sup> Eventually common carrier status extended to communications networks.<sup>132</sup> In 1887, one month before Congress approved the

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<sup>127</sup> *Munn v. Illinois*, 94 U.S. 113, 132 (1876).

<sup>128</sup> 47 U.S.C. § 153(11) (2006) (defining “common carrier”); 47 U.S.C. § 201 (announcing general Title II obligations applied to common carriers).

<sup>129</sup> 47 C.F.R. § 101.3 (2012).

<sup>130</sup> *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 640 (D.C. Cir. 1976).

<sup>131</sup> Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 878 (2009).

<sup>132</sup> *Id.*

Interstate Commerce Act,<sup>133</sup> the court in *Chesapeake & Pacific Telephone Co. v. Baltimore & Ohio Telephone Co.* expressed the view of common carriers existing at the time: “The telegraph and telephone are important instruments of commerce, and their service, as such, has become indispensable to the commercial and business public.”<sup>134</sup> These technologies, serving as “public vehicles of intelligence . . . have no power to discriminate, and, while offering ready to serve some, refuse to serve others.”<sup>135</sup>

Although common carrier status regularly applied to natural monopolies,<sup>136</sup> early common law cases reflected the view that even a private carrier that holds itself out to the public at large creates a common carrier duty by taking on a “quasi-public character.”<sup>137</sup> An undertaking “to carry for all people indifferently” serves as the essential element of “quasi-public character.”<sup>138</sup> Yet the common law did not impose a requirement on carriers to literally make the service available to the entire public as a practical matter; common carrier status applied even to businesses that were sufficiently specialized that only a fraction of the population could make use of them.<sup>139</sup>

### B. *A Case for Common Carriage*

Broadband providers arguably qualify as common carriers under modern and traditional common carrier tests. The current test used by courts to determine whether a carrier qualifies as a common carrier under the Communications Act asks: “(1) whether the carrier holds himself out to serve indifferently all potential users; and (2) whether the carrier allows customers to transmit intelligence of their own design and choosing.”<sup>140</sup> The thrust of the second prong addresses whether the carrier actively regulates transmission of information based on

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<sup>133</sup> *Transcript of Interstate Commerce Act*, OURDOCUMENTS.GOV, <http://www.ourdocuments.gov/doc.php?flash=true&doc=49&page=transcript> (last visited Mar. 25, 2013).

<sup>134</sup> *Chesapeake & P. Tel. Co. v. Baltimore & Ohio Tel. Co.*, 7 A. 809, 811 (Md. 1887).

<sup>135</sup> *Id.*

<sup>136</sup> A natural monopoly exists “[i]f the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more . . . .” Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969).

<sup>137</sup> *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 640 (D.C. Cir. 1976).

<sup>138</sup> *Id.* at 641.

<sup>139</sup> *Id.*

<sup>140</sup> *See, e.g., Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 746 (8th Cir. 2009).

the substantive content of the customer's communications.<sup>141</sup> This test does not depart substantially from the tests applied by courts and government agencies when Congress enacted the Communications Act.<sup>142</sup> A determination that broadband service providers qualify as common carriers would subject them to mandatory regulation under Title II unless the FCC were to forbear from doing so in the public interest.<sup>143</sup>

For purposes of determining whether broadband providers satisfy the common carrier test, the first prong asks whether broadband providers hold themselves out to serve all potential users indifferently. Broadband providers do not supply Internet service only to certain types of users for the broadband services.<sup>144</sup> With respect to potential customers, all individuals freely transact with broadband providers for Internet access, and no broadband providers apply individual selection criteria in deciding whether or not to sell its services to a particular customer.<sup>145</sup> As such, broadband providers satisfy the first prong of the common carrier test.

As to the second prong, when a broadband user requests information from the Internet, that user initiates a process by which a host computer transmits information to the ISP,<sup>146</sup> and the ISP then sends the data out to other networks before connecting to larger backbone networks until the packet arrives at the intended downstream destination.<sup>147</sup> Each network in the middle of the system does little more than look at the destination address for the purpose of determining

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<sup>141</sup> U.S. Telecom Ass'n v. FCC, 295 F.3d 1326, 1335 (D.C. Cir. 2002).

<sup>142</sup> Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 640-43 (D.C. Cir. 1976).

<sup>143</sup> 47 U.S.C. § 160 (2006) ("[T]he Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service . . . if the Commission determines that . . . forbearance from applying such provision or regulation is consistent with the public interest.").

<sup>144</sup> See, e.g., *Verizon's Commitment to Our Broadband Internet Access Customers*, VERIZON, <http://www22.verizon.com/about/legacypages/broadbandcommitment.htm> (last visited Mar. 26, 2013). Verizon explicitly states: "If you buy broadband Internet access from Verizon Online. We will not prevent you or other users of our service from sending and receiving the lawful content of your choice; running lawful applications and using lawful services of your choice; or connecting your choice of legal devices that do not harm the network or the provision of Internet access service, facilitate theft of service, or harm other users of the service. We will not unduly discriminate against any lawful Internet content, application, or service in a manner that causes meaningful harm to competition or to you or other users of our service." *Id.*

<sup>145</sup> See, e.g., *id.*

<sup>146</sup> See Solum & Chung, *supra* note 27, at 842; see also Jeff Tyson, *How Internet Infrastructure Works*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/internet/basics/internet-infrastructure2.htm> (last visited Jan. 18, 2012).

<sup>147</sup> See Solum & Chung, *supra* note 27, at 842; see also Tyson, *supra* note 146.

which network to forward the packet along to next.<sup>148</sup> ISPs do not typically alter the contents of the data sent by users or block the transmission based on the contents of the data packet, provided that the transmission or the content is not unlawful.<sup>149</sup> In sum, because broadband providers hold themselves out to serve potential users indiscriminately and allow customers to transmit data of their own choosing, they therefore qualify for mandatory Title II regulation as common carriers.

*C. Net Neutrality Is a Light-Touch Approach Consistent with § 230*

Once the FCC has articulated a reasoned analysis for reversing its *Declaratory Ruling* and *Computer II* rulings, sufficient to survive *State Farm* review, the agency would enjoy the flexibility to erect a long-term, sustainable regulatory regime over broadband Internet. Simply because Title II applies to broadband or to information services as a general matter does not necessarily require application of the full scope of common carrier regulation. Under § 160, Congress gave the FCC authority to forbear regulating any entity under Title II if justified in the public interest.<sup>150</sup> In fact, permitting the FCC to regulate under the § 160 forbearance provision would permit the FCC to apply the exact same level of regulation on the industry as it currently applies under the categorical exemption approach. The FCC explicitly recognized this in its *Common Carrier Notice Inquiry*.<sup>151</sup> A substantial benefit would accrue, however, in that the forbearance provisions would permit the FCC to remain flexible and attentive to new harms and changing market conditions. Regardless of the potential benefits of flexibility, the FCC must nonetheless demonstrate that regulation of some or any of the broadband industry does not conflict with the policy statements of the statute.

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<sup>148</sup> See SALTZER ET AL., *supra* note 25, at 2-3. Under some circumstances, ISPs may inspect data packets and block illegal content (e.g., illegal downloading, malware, etc.), but otherwise broadband providers do not individually select the content they transmit to and from their subscribers based on the data packet's substantive content. See, e.g., Verizon's *Commitment to Our Broadband Internet Access Customers*, *supra* note 144; Dennis O'Reilly, *How To Use VPN To Defeat Deep Packet Inspection*, CNET (Feb. 12, 2012), [http://howto.cnet.com/8301-11310\\_39-57381346-285/how-to-use-vpn-to-defeat-deep-packet-inspection/](http://howto.cnet.com/8301-11310_39-57381346-285/how-to-use-vpn-to-defeat-deep-packet-inspection/). These activities should not defeat common carrier status, just as any other common carrier might actively regulate activities that are harmful to other customers or that otherwise result in a violation of law.

<sup>149</sup> O'Reilly, *supra* note 148.

<sup>150</sup> 47 U.S.C. § 160 (2006).

<sup>151</sup> *Competitive Carrier Notice*, *supra* note 68, at 464.

Although the policy statements provided in § 230 clearly express Congressional intent for the Internet to exist in an environment of deregulation, those statements do not compel the conclusion that Congress desired a complete absence of regulation.<sup>152</sup> Section 230(b)(2) calls upon the FCC “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>153</sup> In the *Declaratory Ruling*, the FCC concluded that the policy statements under § 230 applied to technologies captured by its “information services” definition in § 153(24).<sup>154</sup> As a result, the FCC determined that “information services” should exist in an environment of “regulatory forbearance” marked by the removal of regulatory barriers.<sup>155</sup> The FCC, however, may have read those policy statements too broadly when it concluded that no regulation of information services should ever be warranted.<sup>156</sup> In fact, the policy statements in § 230 stand for nothing more than the proposition that Congress intended for “information services” to exist in an environment of *reduced* regulation. “Reduced regulation” does not necessitate an environment of *zero* regulation.

That conclusion becomes apparent in light of the heightened regulatory environment for common carriers. Section 201 of Title II announces the general mandatory common carrier obligation that “[i]t shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor.”<sup>157</sup> In regulating carriers, the FCC may require a common carrier to allow competitors to access its lines and charge consumers reasonable rates.<sup>158</sup> The Act prohibits common carriers from making “unjust or unreasonable

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<sup>152</sup> 47 U.S.C. § 230.

<sup>153</sup> *In re Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, 17 F.C.C. Rcd. 4798, 4801-02 (2002) [hereinafter *Cable Modem Ruling*] (citing § 230(b)(2)).

<sup>154</sup> In the *Cable Modem Ruling*, the FCC concluded that “consistent with section 230(b)(2) of the Act, we seek ‘to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.’” *Id.* Further they “conclude[d] that cable modem service, as it is currently offered, is properly classified as an interstate information service.” *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> 47 U.S.C. § 201 (2006).

<sup>158</sup> *Id.*

charges.”<sup>159</sup> For purposes of disclosure and review, common carriers must file with the FCC a schedule of charges and provide notice of any changes to them,<sup>160</sup> subject to discretionary hearings conducted by the FCC for determining the lawfulness of the rate revisions.<sup>161</sup> The Act additionally requires telecommunications carriers, among other things, to “interconnect” with other carriers,<sup>162</sup> to offer “unbundled” services,<sup>163</sup> and to contribute to a universal service fund.<sup>164</sup>

The FCC could nonetheless remain faithful to § 230 policy statements by adopting a “light-touch” common carrier approach in implementing network neutrality regulations.<sup>165</sup> In doing so, the FCC could avoid applying all existing common carrier rules to broadband providers based on its authority to forbear regulation in the public interest under § 160. Many months before the FCC released the Open Internet Order in 2010, the agency had explored the possibility of applying network neutrality rules by regulating only the telecommunications component of information services under Title II. In doing so, the FCC would apply, among others, §§ 201, 202, and 208 to prevent “unreasonable denials of service” and other “unjust or unreasonable practices.”<sup>166</sup> While an approach to separate out the components of information services might bear some promise, a *State Farm* approach stands on firmer ground. Nevertheless, the proposal to adopt only §§ 201, 202, and 208 would operate effectively as a light-touch common carrier approach to implementing network neutrality regulation on broadband providers.

## CONCLUSION

The FCC’s continuing jurisdictional difficulties demonstrate the need for a different approach. By abandoning FCC policies established in *Computer II* and the *Declaratory*

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* § 203.

<sup>161</sup> *Id.* § 204(a)(1).

<sup>162</sup> *Id.* § 251.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* § 254. The universal service provision requires that common carriers contribute to a fund that subsidizes basic telephony services for underserved and under-funded populations. Crawford, *supra* note 131, at 899.

<sup>165</sup> Austin Schlick, *A Third-Way Legal Framework For Addressing The Comcast Dilemma*, BROADBAND.GOV (May 6, 2010), <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html>.

<sup>166</sup> *Id.*



*Ruling*, the agency can establish a long-term, sustainable regime to regulate broadband providers. To justify the reversal of its policies, the FCC should point to the technical and functional anomalies created through the use of inflexible categorical exemptions as a way to regulate a dynamic and constantly evolving industry. Moreover, evidence that broadband providers qualify as common carriers under common law tests add further weight to the importance of bringing FCC authority in line with the exercise of power granted to it by Congress in 1934 and 1996.

Once the FCC has adequately satisfied the *State Farm* and *Fox* standards for reversal of its policies, the agency would enjoy full discretion to regulate broadband providers under Title II. The deregulatory pronouncements, however, contained in § 230 of the Act caution against application of regulations that impose regulatory barriers or impact the vibrant and competitive broadband market. Nevertheless, application of network neutrality principles would remain fully consistent with those policies articulated in the statute. They would provide a workable framework for protecting against the economic harms caused to both consumers and makers of online content by ISP practices of discriminating against and interfering with certain types of online content. These harms necessitate some FCC involvement to foster the innovative dynamic aptly described in the Schumpeterian growth theory, which accommodates the existence of large incumbent firms but requires an interdependent relationship with the insurgent entrepreneurs to spur economic growth through product innovation. Indeed, it is competition that strikes at the very foundation and lives of the world's innovators, but without a neutral platform of competition—the broadband connection itself—that dynamic cannot survive.

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