OFF THE HOOK

Kevin Werbach†

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

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

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

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† Assistant Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania. Contact: werbach@wharton.upenn.edu. Thanks to Dan Hunter, Lawrence Lessig, Richard Shell, Phil Weiser, David Zaring, and Marvin Ammori for helpful comments. The author served as co-lead of the Federal Communications Commission Agency Review for the Obama–Biden Transition Project. The views expressed herein are entirely the author’s own and do not represent those of the Obama Administration, the FCC, or any of its Commissioners.
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INTRODUCTION

Consider the iPhone. An ingenious and wildly successful device, Apple’s iPhone 3G is simultaneously a handheld computer, a Global Positioning System location sensor, a digital music and video player, and a platform for tens of thousands of third-party software applications.1 It is also, as the name suggests, a phone. And that, from a public-policy standpoint, ought to make all the difference. The iPhone and devices like it are endpoints of communications networks. Such networks have been regulated for nearly a century to safeguard the public interest. Yet today, as telecommunications and media converge into the Internet, networks are becoming a vast legal gray area. It is unclear, for example, whether the Federal Communications Commission (FCC) can apply its rules mandating open interconnection and nondiscrimination to the platforms supporting the iPhone ecosystem. And the same analysis applies to any device or service connected

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to the Internet—which is, increasingly, all of them. Without a theory for Internet regulation, both competition and user interests are imperiled.

A recent example shows the danger of the present course. In a landmark August 2008 decision, the FCC sanctioned Comcast for discriminating against peer-to-peer file-sharing applications on its broadband-access network. To justify its legal authority, the FCC relied on the bold but unfounded discovery of a congressional “national Internet policy” in section 230 of the Communications Act of 1934. The agency misread its own governing statute, placing the entire effort in jeopardy. Even if it survives judicial review, the FCC’s decision provides little guidance for future action. This should be a grave concern for anyone who cares about the vast and growing range of activity that depends on the Internet—from data-enabled mobile phones to digital-video distribution to smart-grid systems for energy monitoring.

Fortunately, the answer lies within the Communications Act, but not where everyone has been looking. As this Article will demonstrate, the FCC has expansive authority over the Internet, pursuant to the interconnection provisions of Title II of the Act. This is an unfashionable position. The dominant perspectives in contemporary communications and cyberlaw scholarship support a limited role for the FCC, either because the FCC cannot be trusted to regulate wisely, or because the Commission’s legal authority over the Internet is narrow. Commentators have been content with the notion that Internet-based services are somehow subject to “ancillary jurisdiction” under

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


5 This authority does not mean that the FCC should regulate more aggressively in every area. On the contrary, giving the FCC a sound basis to address the contemporary challenges of Internet policy is a way to allow deregulation of many areas in which the Commission was historically active. See Lawrence Lessig, Reboot the FCC: We’ll Stifle the Skypes and YouTubes of the Future if We Don’t Demolish the Regulators that Oversee Our Digital Pipelines, NEWSWEEK.COM, Dec. 23, 2008, http://www.newsweek.com/id/176809. In spectrum policy, for example, the FCC should abandon its paternalistic command-and-control licensing regime for an approach that relies on courts, market transactions, and self-regulatory organizations. See Kevin Werbach, Supercommons: Toward a Unified Theory of Wireless Communication, 82 TEX. L. REV. 863, 864–87 (2004).

the vague and procedural Title I of the Communications Act. However, this approach represents a legal dead end. It cannot support the needs of a national and global economy increasingly built around the Internet.

The basic problem with prior theories of Internet regulation is that they dismiss or ignore the existing statutory framework that delegates authority to the FCC. The Internet was once on the periphery of the communications industry; it is now at the core. It should not be subject to outdated regulatory restraints, but neither should it forfeit the protections that an administrative agency affords. Without a legal basis for the FCC to regulate Internet services, network operators will have the power to limit innovation that might challenge their traditional business models. Those who control choke points will be able to pervert market forces that would otherwise promote competition. And the opportunity for new communications and media channels to reinvigorate democratic discourse will be missed. The network of networks that we call the Internet is more fragile than it seems.

Such problems will only worsen. As new platforms such as social networks and smart mobile devices become ubiquitous, no forum will be empowered to address the competitive dynamics of standards or the proper limits on exploitation of user information. We cannot know what Facebook and YouTube and Skype and Twitter will become, but clearly they and their ilk are what AT&T and radio broad-

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casters were at the beginning of the twentieth century: the emerging infrastructure of communication and community for a changing society. Neither Congress nor the courts are likely to address all of the critical issues that these children of broadband networks pose.

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

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

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12 See id. ("Barack Obama supports the basic principle that network providers should not be allowed to charge fees to privilege the content or applications of some web sites and Internet applications over others."); see also Posting of Ryan Singel to Wired Epicenter Blog, Obama Nominates Net Neutrality Backer for FCC Chief, http://blog.wired.com/business/2009/03/obama-nominates.html (Mar. 3, 2009, 4:58 PM) (describing FCC Chairman-designate Julius Genachowski, who was subsequently confirmed).

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


15 See In re Preserving the Open Internet and Broadband Industry Practices, 24 F.C.C.R. 13,064 (Oct. 22, 2009) (notice of proposed rulemaking). The Open Internet proceeding is still in the notice and comment phase. In other words, the FCC has taken no binding action on this topic since President Obama took office. The FCC's jurisdictional theory in the Open Internet Notice of Proposed Rulemaking did not significantly deviate
issue a National Broadband Plan. Classic communications-policy issues of interconnection, universal access, competition, pricing, and discrimination are bound to generate new debates in light of technological change. Yet, at least at present, there are no clear answers about the scope of FCC authority to address them.

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

I

THE PHANTOM NATIONAL INTERNET POLICY

The FCC is an independent regulatory agency established during the New Deal to oversee telephone and radio services. Today, its jurisdiction covers a broad collection of major industries, including broadcasting, telephone service, mobile phones, satellite communications, and cable television. The FCC oversees universal-service funding mechanisms, content regulation, and other mechanisms with significant impacts in shaping mass culture. The agency's authorizing statute, the Communications Act of 1934, was substantially overhauled by the Telecommunications Act of 1996.

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


See Peter W. Huber et al., Federal Telecommunications Law 209-11, 220-21 (2d ed. 1999); Nuechterlein & Weiser, supra note 6, at 146.


Like any administrative agency, the FCC is technically a creature of Congress.\textsuperscript{22} It can interpret congressional mandates but may not go beyond them. The scope of agency authority thus becomes a question when new technologies develop that Congress did not contemplate. The Internet is a perfect example.

A. The Rise of Information Services

From the communications-policy perspective, the Internet is a rather odd duck. It demonstrably involves "interstate and foreign communication by wire or radio,"\textsuperscript{23} the touchstone for FCC jurisdiction. It uses facilities of all major types of regulated communications providers, including telecommunications carriers, cable television operators, broadcasters, wireless operators, and satellite providers.\textsuperscript{24} It also delivers services that mimic and compete with those of the regulated providers, including voice-over Internet protocol (VoIP) phone service\textsuperscript{25} and video programming.\textsuperscript{26} And yet the Internet is somehow part of the entire regulated communications world while standing outside of it.

The Telecommunications Act of 1996 distinguishes between "telecommunications" and "information services."\textsuperscript{27} "Telecommunications" means "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."\textsuperscript{28} In other words, telecommunications involve an unaltered communications pipe, analogous to traditional voice telephone service.\textsuperscript{29} "Information service" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."\textsuperscript{30} In other words, information service involves some computer processing that acts upon

\begin{itemize}
  \item \textsuperscript{22} See Crawford, \textit{supra} note 6, at 728-36.
  \item \textsuperscript{23} 47 U.S.C. § 152(a).
  \item \textsuperscript{25} See id. at 11,541-45; \textit{In re IP-Enabled Servs. and E911 Requirements for IP-Enabled Serv. Providers}, 20 F.C.C.R. 10,245, 10,290 (May 19, 2005) (first report & order & notice of proposed rulemaking).
  \item \textsuperscript{26} See Kevin Werbach, \textit{The Implications of Video Peer-to-Peer on Network Usage}, in \textit{Peer to Peer Video: The Economics, Policy, and Culture of Today's New Mass Medium} 95, 98 (Eli M. Noam & Lorenzo Maria Pupillo eds., 2008).
  \item \textsuperscript{27} See Weinberg, \textit{supra} note 8, at 222.
  \item \textsuperscript{28} 47 U.S.C. § 153(43).
  \item \textsuperscript{29} See Weinberg, \textit{supra} note 8, at 222. In reality, voice calls may involve protocol conversions and other technical manipulations, but these are not visible to the user. Moreover, there is no net change in the kind of information put into and taken out of the network. Voice goes in, voice comes out.
  \item \textsuperscript{30} 47 U.S.C. § 153(20).
\end{itemize}
the content transmitted across the network. Internet-based services are generally understood to be information services.\textsuperscript{31}

The telecommunications/information services distinction, added in the Telecommunications Act of 1996, codified an earlier FCC-developed division between basic and enhanced services.\textsuperscript{32} In its \textit{Computer Inquiry} decisions between the late 1960s and the early 1990s, the FCC wrestled with the treatment of data-processing services that interacted with the telephone network.\textsuperscript{33} For most of that time, telephone service was provided primarily by AT&T and other heavily regulated monopolies.\textsuperscript{34} In the \textit{Computer Inquiries}, the FCC had to consider both how to treat new data-processing services, such as voicemail and electronic data links between companies, as well as whether AT&T and other local monopolies could compete in those markets.\textsuperscript{35}

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


\textsuperscript{34} See NUECHTERLEIN & WEISER, \textit{supra} note 6, at 55.

\textsuperscript{35} See Cannon, \textit{supra} note 32, at 168–69.


\textsuperscript{37} See Cannon, \textit{supra} note 32, at 188.

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

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

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

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39 See Cannon, supra note 32, at 184.
40 See Cannon, supra note 38, at 50.
41 See NUECHTERLEIN & WEISER, supra note 6, at 217.
42 See sources cited supra note 32.
44 See Stevens Report, supra note 24, at 11,541–45.
46 See id. at 3312–14. However, the Commission did impose some “social polic[y]” obligations, such as 911 emergency service and law-enforcement access on VoIP providers. Crawford, Ambulance, supra note 7, at 874.
47 See Cannon, supra note 38, at 53–56.
48 See In re Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Servs. Are Exempt from Access Charges, 19 F.C.C.R. 7457, 7465–68 (2004) (order) [hereinafter Petition for Declaratory Ruling]. This was AT&T the postdivestiture, long-distance
And then, something funny happened: the biggest providers of regulated telecommunications services became the biggest providers of unregulated broadband access. The major network operators largely missed the initial wave of the Internet, ceding to stand-alone Internet-service providers (ISPs) such as AOL and Earthlink the leading position in the dial-up Internet-access market. Dial-up Internet traffic passes through the telephone network like voice or fax calls. High-speed broadband connections, on the other hand, involve end-to-end data transmission. The cable industry was the first to deploy broadband aggressively. Cable was not subject to the common-carriage requirements of Title II. The cable industry developed its cable-modem networks as closed systems, rejecting calls to offer access to independent ISPs. Telephone companies initially had to offer unbundled access to their competing digital-subscriber-line (DSL) networks under the infrastructure-sharing rules of the 1996 Act.

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

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

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

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

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

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

54 See Wireline Broadband Order, supra note 32, at 14,909–11; In re Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities, 17 F.C.C.R. 4798, 4859 (Mar. 14, 2002) (declaratory ruling & notice of proposed rulemaking) (determining that cable-modem service is properly classified as an information service); Kevin Werbach, Only Connect, 22 BERKELEY TECH. L.J. 1293, 1268 (2008).

55 See Wireline Broadband Order, supra note 32, at 14,858.
The Supreme Court ratified the FCC's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*. Subsequently, in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, the Court rejected the use of antitrust claims to gain unbundled access to the telecommunications component of those broadband-information services and acknowledged the Commission's finding of robust competition between cable-modem and DSL services.

The FCC's caveat for its broadband-reclassification decisions was that information services are not entirely without regulatory obligations. In addition to the specific mandates of Title II, the Commission has general housekeeping authority under Title I of the Act. In theory, that authority could be used to fashion a new set of rules for information services. Obligations that would apply to Internet-based services are therefore generally labeled "Title I" mandates. The concept of Title I regulation, however, is quite vague today. The FCC and the courts have asserted that the FCC could establish some rules for information services. The boundaries for such action must be determined.

B. The Open-Access Movement and Network Neutrality

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

54 U.S. 967, 1002-03 (2005).

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

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

59 NUECHTERLEIN & WEISER, supra note 6, at 218 ("To say that a given communications technology . . . should be regulated under Title I is to embrace two conclusions. The first is that the service in question slips through the cracks of the substantive titles of the Communications Act (II, III, and VI), and is thus immune from the industry-specific regulations contained in those titles. The second is that the FCC has broad discretion to regulate or deregulate the service as it sees fit . . ."). See id. at 218-21.

60 See id. at 218-21.

certain industries were "'affected with the public interest'" or subject to regulation solely based on their size and influence, these scholars define a class of infrastructure that forms the platform for an array of other activities. Drawing on newer literatures in common-pool resources and complexity theory, the approach seeks to legitimize infrastructure within the framework of neoclassical economics while also drawing on communitarian and related theories of political economy.

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

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

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62 Frischmann, supra note 61, at 963 (quoting Richard A. Epstein, Principles for a Free Society: Reconciling Individual Liberty with the Common Good 279–318 (1998)).
63 See id. at 1004–22.
64 See Crawford, supra note 49, at 390–94.
66 See Crawford, Ambulance, supra note 7, at 925 ("The delegation by Congress of broad power over communications to an independent, unaccountable 'expert' agency is, in this age of convergence, leading to a situation in which the capture of 'new technology' rulemakings by 'old technology' companies and interests is very likely.").
67 See Frischmann, supra note 61, at 1022.
68 See id. at 929–31 (arguing that focusing exclusively on supply-side issues yields an incomplete analysis because it fails to account for the social benefits of open access).
70 See Werbach, Layered Model, supra note 69, at 60.
71 See id. at 61–64.
This design allows one physical network to carry many different applications. It also means that third parties, including service providers, content providers, and even users, can interact at the higher levels of the network without involving the lower layers.

Infrastructure scholars generally favor separation of the Internet’s application and content layers from the regulated physical layer of communications networks. The only way to keep incumbent operators and incumbent regulators from corrupting the Internet, on this theory, is to quarantine it. These scholars tend to be skeptical of the ability of regulators such as the FCC to manage the issues that arise at the interfaces between networks and applications. These scholars prefer the more drastic solution of barring network operators from competing at the higher levels of the system.

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

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73 See Werbach, supra note 36, at 66–67.
74 See Crawford, supra note 8, at 927.
75 See id. at 928.
76 See id. at 927.
77 See Crawford, Ambulance, supra note 7, at 923–38.
78 See In re Amendment of Section 64.702 of the Comm’n’s Rules & Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 474–75 (1980) (final decision) [hereinafter Computer II]; In re Amendment of Sections 64.702 of the Comm’n’s Rules & Regulations (Third Computer Inquiry), 104 F.C.C.2d 958 (1986) (report & order) [hereinafter Computer III].
79 See Computer II, supra note 78, at 388–89.
80 See Computer III, supra note 78, at 1002–03.
81 See Wireline Broadband Order, supra note 32, at 14,865.
82 See id. at 14,856, para. 2.
83 See Lemley & Lessig, supra note 9, at 951–52; Werbach, supra note 54, at 1255.
As an alternative to mandatory separation, open-Internet proponents coalesced around the concept of network neutrality.\textsuperscript{84} The basic concept of network neutrality is that network operators should not disadvantage unaffiliated providers of applications or content.\textsuperscript{85} Van Schewick has explained in detail how this approach reflects the “end-to-end” architecture of the original Internet.\textsuperscript{86} Other network-neutrality champions such as Tim Wu and Lessig situated the approach within the history of communications policy.\textsuperscript{87} They argue that network neutrality represents an extension of common carriage, the long-established doctrine that telephone companies and certain other businesses must be a neutral-service platform for all customers.\textsuperscript{88}

On this view, government rules expressly prevented network operators from discriminating against users of their networks from the nineteenth-century precursors of the Communications Act until Brand X. Wu has made the case that \textit{Carterfone}, the 1968 FCC decision barring AT&T from controlling what devices connected to the telephone network, reflects the same policy of regulating network operators to promote competition and innovation at higher layers.\textsuperscript{89} To network-neutrality advocates, therefore, the Internet represents the fullest expression of policy goals articulated in the Communications Act and celebrated FCC decisions.\textsuperscript{90}

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


\textsuperscript{85} See van Schewick, supra note 84, at 333; Wu, \textit{Network Neutrality}, supra note 84, at 142–43.

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


\textsuperscript{88} \textit{See id.} at 12.


\textsuperscript{91} \textit{See infra} Part II. There are other objections to network-neutrality rules, including concerns that they stifle investment in networks and prevent efficient congestion management. \textit{See C. Scott Hemphill, \textit{Network Neutrality and the False Promise of Zero-Price Regulation}}, 25 YALE J. ON REG. 135, 148–51 (2008); Christopher S. Yoo, \textit{Beyond Network Neutrality}, 19
Verizon Wireless provide nondiscriminatory interfaces for mobile phones parallels a requirement that AT&T provide nondiscriminatory interfaces for landline phones. However, the Internet is not just a device that hangs off the end of the network. It is the network. Internet-based services directly overlap with and sometimes compete with regulated communications offerings. Most seriously from a legal standpoint, this arrangement means that the network-platform owners can themselves become Internet-based providers.

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

C. The Internet Policy Statement and Beyond

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

As part of its Wireline Broadband Order classifying DSL as an integrated information service, the FCC also issued a nonbinding policy statement. Although this document explicitly disclaimed having any legal force, it represented a strong public statement by the Commis-
sion. At its core, the Policy Statement describes three user entitlements:

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

These three policies are subject to a blanket caveat, included in a footnote, that “[t]he principles we adopt are subject to reasonable network management.” This footnote becomes the critical test. Because all broadband-access providers impose a number of limitations on applications and devices, the question is whether these limitations are consistent with “reasonable network management.”

The Commission asserted, without substantial analysis, that it had the authority to take action to support the goals articulated in the Policy Statement. Such initiatives would be part of the FCC’s “ongoing policymaking activities,” whatever that meant. Because the Policy Statement was not an order, the FCC could not enforce it directly. Instead, the FCC described it as a list of principles that the Commission believed were consistent with its statutory mission, and the Commission suggested that it would take further action when needed.

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

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96 I prefer the term “user” to consumer. See Benkler, Consumers to Users, supra note 61, at 562.
97 Internet Policy Statement, supra note 95, at 14,988.
98 Id. at 14,988 n.15. There is a fourth statement, “consumers are entitled to competition among network providers, application and service providers, and content providers,” which is entirely hortatory. Id. at 14,988. Promoting competition is part of the FCC’s mission, as understood today, but there is no conceivable recourse for “violation” of this statement, as it refers to the general state of certain markets. If a company eliminated or precluded competition through anticompetitive practices, it could be subject to recourse under either FCC rules or antitrust law. Such a case would never be brought under the aspirational declaration of the Policy Statement.
99 In re Broadband Indus. Practices, 22 F.C.C.R. 7894, 7896 (2007) (notice of inquiry) (“The Commission, under Title I of the Communications Act, has the ability to adopt and enforce the net neutrality principles it announced in the Internet Policy Statement.”).
100 Internet Policy Statement, supra note 95, at 14,988.
102 See id.
Madison River agreed to a consent decree after the FCC launched an investigation of its practice. Although the case showed that the FCC was willing to act in situations of discrimination, it had a limited impact. Madison River is a traditional, regulated telephone company that was completely blocking a service for no apparent reason other than anticompetitive motives. It was relatively easy for the FCC to justify its intervention. The first real test of the FCC's will to promote Internet openness came later and involved Comcast's network-management techniques.

D. The Comcast P2P Order

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

In the fall of 2007, testing revealed that Comcast, the nation's second largest broadband-access provider, had implemented network-management technology that deliberately slowed peer-to-peer file-transfer traffic. Here, it seemed, was a paradigmatic case of a network operator foreclosing innovation and competition by discriminating against certain users of its infrastructure. P2P services could deliver video programming, which competed with Comcast's cable-television programming. In the post-Brand X world, it seemed, Comcast had the incentive and the opportunity to violate network neutrality, as scholars had previously warned.

104 See Comcast Order, supra note 2, at 13,031-32.
106 See generally Wu, Network Neutrality, supra note 84 (describing the potential for network-neutrality violations).
Several public-interest groups filed complaints against Comcast with the FCC. After initially denying that it was throttling P2P traffic, Comcast eventually acknowledged that its network-management approach was arbitrary and overinclusive. It promised to implement a new, nondiscriminatory system. It also reached an agreement with BitTorrent, the company that started to commercialize the primary video-P2P technology, on standards to address bandwidth concerns.

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

The matter did not end there. Comcast complied with the FCC’s mandates but also sued to have the Order invalidated on jurisdictional and procedural grounds. The United States Court of Appeals for the District of Columbia Circuit heard oral arguments on the case in January 2010.

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109 See Vishesh Kumar, Comcast, BitTorrent to Work Together on Network Traffic, WALL ST. J., Mar. 27, 2008, at B7. BitTorrent itself (the company) was not a party to the FCC proceeding, perhaps because of its agreement with Comcast. Comcast was therefore not formally prohibited from continuing its controversial broadband network management practices prior to the FCC action. However, Comcast’s public commitment to change its practices, coupled with an agreement with the most visible provider of the BitTorrent technology, made it clear that Comcast did not intend to do so.
110 See Comcast Order, supra note 2, at 13,059-61.
111 See id. Effectively, therefore, the FCC required Comcast to meet the deadline that the company had already set for itself.
Unfortunately, the FCC’s reach exceeded its grasp. To sanction Comcast for unreasonable and discriminatory network-management techniques, the FCC engaged in an ad-hoc process and built an unsustainable legal foundation. The Comcast order was just the tip of the iceberg.

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

It is the policy of the United States—
(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.\(^\text{115}\)

In the Comcast P2P Order, the FCC based its actions on the statutory language of section 230.\(^\text{116}\) Although the decision cited six other provisions of the Communications Act in support of ancillary authority over broadband-network management,\(^\text{117}\) all of these provisions were subsidiary to section 230.\(^\text{118}\) The Commission obviously understood that its jurisdictional claim was suspect, so it took the “kitchen sink” approach of listing every possible statutory hook. These other provisions reinforce the view that an active FCC Internet policy is consistent with established themes in the Communications Act. None of the pro-

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

\(^{116}\) See Comcast Order, supra note 2, at 13,035, para. 15.

\(^{117}\) The other provisions were section 151 (directing the Commission “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”), 47 U.S.C. § 151; section 201 of the Act (requiring that “[a]ll charges, practices, classifications, and regulations for and in connection with [common-carrier] service, shall be just and reasonable”), id. § 201(b); section 706 of the Telecommunications Act of 1996 (ordering the FCC to “encourage the provision of new technologies and services to the public”), id. § 157(a); section 256 (directing the FCC “to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications service”), id. § 256(a)(1); section 257 (directing the FCC to eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services”), id. § 257(a); and section 521(4) (directing the FCC to “assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public”), id. § 521(4).

\(^{118}\) The section 230 discussion came first and was the longest section of the FCC’s jurisdictional analysis. The Commission stated that “Congress inscribed these policies [addressing the Internet in the 1996 Act] into section 230.” Comcast Order, supra note 2, at 13,035, para. 15.
visions, however, provide the unifying directive of congressional intent without section 230.

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

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

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

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

Comcast argued that, instead, Congress intended section 230(b) to limit regulation. It pointed to the language of section 230(b) (2)
that the Internet should remain "unfettered by Federal or State regulation." The FCC responded that section 230(b)(2) could not reasonably be read as a prohibition on any FCC regulation of broadband-access providers and noted that it had previously rejected such an interpretation. To the FCC, the “last few words” Comcast cited were a distinct policy goal, which should not trump the main directive to promote Internet development.

In short, the FCC painted a picture of a well-defined congressional policy mandate, which the agency was faithfully effectuating. The argument would be convincing based on the evidence cited in the Comcast P2P Order. Unfortunately for the FCC, this position is inconsistent with both prior FCC practice and the legislative history of the statutory provision. Based on the oral argument, the Court of Appeals appears likely to overturn the Order, upsetting the FCC’s entire framework of Internet regulation.

II
FAILINGS OF THE FCC’S CURRENT APPROACH

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

A. The Real Section 230

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

Section 230 was adopted as part of the Telecommunications Act of 1996. It is the only provision in that massive overhaul of the Communications Act that directly references the Internet, a fact such as restrictions on children’s access to material on the Web, 47 U.S.C. § 231, and a moratorium on Internet taxes, Internet Tax Freedom Act, id. § 151.
that supports the FCC's claim that it represents a "national Internet policy." However, the vague and inconsistent language of section 230(b) belies the FCC's claim that the provision was intended to carry such weight. Congress expressed its desire for affirmative steps to "promote," "preserve," and "encourage" Internet development and, at the same time, an Internet "unfettered" by regulation. The first three subsections, which are the ones the FCC cites in the Comcast Order, offer no specific directives, in contrast to the detailed provisions in the rest of the Telecommunications Act.

The legislative history of section 230 clears up the confusion. Section 230 began as a freestanding bill, the Internet Freedom and Family Empowerment Act (IFFEA), introduced in 1995 by Representatives Christopher Cox and Ron Wyden. The IFFEA was subsequently accepted as an amendment to the House version of the 1996 Telecommunications Act. The House–Senate conference committee adopted the House language virtually intact in the final version of the legislation.

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

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132 See Wireline Broadband Order, supra note 32, at 14,987.
139 See Cannon, supra note 137, at 57.
140 See id. at 65–67.
141 See id. at 70.
142 See id. at 64.
143 See id. at 68–69.
Civil libertarians were not the only ones concerned about the CDA. Many Internet businesses saw it as a major economic threat.\textsuperscript{144} An early court decision, \textit{Stratton Oakmont, Inc. v. Prodigy Services Co.}, found online-service providers such as Prodigy responsible for libelous postings by their subscribers.\textsuperscript{145} With the boundaries of intermediary liability online unclear—and such liability potentially quite extensive—Internet access and service providers worried they would be forced into the role of private online censors or held responsible for content beyond their control.\textsuperscript{146} Even worse, the language of \textit{Stratton} suggested that online-service providers who took steps to exclude any inappropriate or illegal content would be more likely to face liability for questionable material they did not block.\textsuperscript{147}

The IFFEA was introduced in response to these fears about the CDA.\textsuperscript{148} It represented an alternative approach to dealing with the widespread concern about pornography and other online material that was inappropriate for children. Where the CDA proposed government regulation of Internet speech, the IFFEA endorsed nongovernmental mechanisms and prohibited government regulation.\textsuperscript{149} The IFFEA offered a specific alternative to the CDA's private censorship: a safe harbor for online-service providers for content over which they had no control and limited liability for ISPs, even when they take affirmative steps to remove unauthorized or illegal material.\textsuperscript{150} That safe harbor now appears in later provisions of section 230 of the Communications Act.\textsuperscript{151}

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

\begin{footnotesize}
\begin{enumerate}
\item See id. at 90.
\item See Cannon, supra note 137, at 59, 62–63.
\item See id. at 61–62.
\item See id. at 67–69.
\item See Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995); Steven Levy, \textit{No Place for Kids? A Parents' Guide to Sex on the Net}, NEWSWEEK, July 3, 1995 ("Conservative Republican Chris Cox of California has teamed with liberal Democrat Ron Wyden of Oregon to develop the grandiosely entitled Internet Freedom and Family Empowerment Act. Basically, the bill would forbid the federal government from creating any regulatory agency to govern the Internet, relying instead on a variety of means (not yet determined) to protect children.").
\item See Cannon, supra note 137, at 68.
\item See Comcast Order, supra note 2, at 13,038 n.69. Comcast argued that Congress had chosen a specific remedy, a safe harbor for good actors in sections 230(c)–(d), as a means of implementing the goals in section 230(b). This argument, implying that the safe harbor was the sole means of implementing the aspirational portions of section 230, goes further than necessary. There is a significant difference between claiming that Congress
\end{enumerate}
\end{footnotesize}
Commission asserted that the framing of section 230(b) as the "policy of the United States" implies that it has broader application than the specific provisions Congress adopted, to be filled in by the Commission under its general grant of authority.153 This reading conflicts with the legislative history.

Congress added the Cox-Wyden amendment to the Telecommunications Act to address inappropriate online content and to prevent ISP liability. The amendment was titled "Online Family Empowerment."154 As codified, section 230 is titled "Protection for private blocking and screening of offensive material."155 These titles belie the FCC's claim that section 230 was intended as a broader "national Internet policy."

The House–Senate conference committee report similarly describes the purpose of the provision: "Section 104 of the House amendment protects from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material."156 Representative Cox, one of the provision's authors, has emphasized this aspect when describing the purpose of the bill.157 The purpose of the Cox–Wyden legislation was to protect the Internet by protecting service providers potentially subject to liability, not by advancing the broader vision of the open-access advocates.

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

decided only to adopt a safe harbor and claiming that Congress directed the FCC to create a "national Internet policy" in any way it saw fit under the policy goals of section 230(b).

153 Id.
157 See 146 CONG. REC. H6067 (daily ed. July 17, 2000) (statement of Rep. Cox) ("Third, the [Internet Gambling Prohibition Act of 2000] would unfairly make . . . interactive service providers . . . responsible for policing the behavior of their subscribers. This is the principle that we rejected when then Representative Wyden and I brought the Internet Freedom and Family Empowerment Act to the floor so that we could stop the approach that the Senate had adopted with the Communications Decency Act, later rejected by the Supreme Court."); see also Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n, Electronic Shareholder Forum Rules; Codification of Interpretation of Rule 14(a) (8)(i)(8) (Nov. 28, 2007), available at http://www.sec.gov/news/speech/2007/spch112807cc.htm (explaining that the bill "enhanced free speech on the Internet by making it unnecessary for internet service providers to unduly restrict customers' actions for fear of being found legally liable for their conduct").
Cox–Wyden amendment included the following provision: "FCC Regulation of the Internet and Other Interactive Computer Services Prohibited—Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to economic or content regulation of the Internet or other interactive computer services." This was not an insignificant element of the bill. Representative Cox later described the goal of the legislation that became section 230 as keeping the FCC from "regulating prices of computer services offered over the Internet." Representatives Cox and Wyden later teamed up to introduce the Internet Tax Freedom Act, which established a moratorium on new Internet-specific taxes. Representative Cox, who subsequently became Chairman of the Securities and Exchange Commission, has elsewhere expressed fears about the FCC turning into a "Federal Computer Commission" by engaging in direct regulation of Internet-based services.

The Senate passed a telecommunications bill including the CDA, and the House passed a bill including the Cox–Wyden language, meaning that it fell to a House–Senate conference committee to reconcile the conflict. Although the two amendments represented opposing policy positions, they were not facially inconsistent with one another. The conference committee compromised and left both in the final bill.

The most significant change to the Cox–Wyden language was the removal of the provision expressly precluding economic and content regulation of the Internet by the FCC. The conference committee report is silent on the rationale for this deletion, stating only that

159 Press Release, Rep. Cox, Sen. Wyden to Unveil Highly-Touted Bill to Keep the Internet Free from Taxes (Mar. 12, 1997) (on file with author) ("Rep. Cox has been a long time supporter of the Internet. His Internet Freedom and Family Empowerment Act approved by the U.S. House of Representatives in the summer of 1995, called on the Federal Communications Commission to stay [away] from regulating prices of computer services offered over the Internet." (emphasis omitted)).
163 See Barbara Esbin & Adam Marcus, "The Law Is Whatever the Nobles Do": Undue Process at the FCC, 17 COMMLAW CONSPECTUS 535, 592 (2009). In fact, some commentators concluded that the Cox–Wyden bill was a mere symbolic challenge to the CDA, allowing House members to claim opposition without actually sinking the indecency restrictions. See Cannon, supra note 157, at 67–69. This interpretation is even further from the FCC's view in the Comcast Order that section 230 was designed as an affirmative national Internet policy with substantive teeth. See supra text accompanying note 119.
"[t]he conference agreement adopts the House provision with minor modifications."  

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

There appear to be no contemporaneous statements suggesting that section 230(b), when introduced and adopted by Congress, was intended to "charge[ ] the Commission with . . . ongoing responsibility" to ensure Internet openness. To the contrary, the legislative history and text of the 1996 Act strongly suggest that Congress was seeking to moderate the restrictive consequences of existing court decisions and its own actions.  

Viewed in context, the section 230 "fix" was a way to avoid imposition of common-carrier rules on Internet-based service providers. The reason online-service providers faced the risk of liability for content they transmitted was that they were not common carriers. A common carrier such as a telephone company is immune from liability for the content it transmits because it is precluded from exerting any control over that content. Common carriers, however, are subject to many other intrusive regulations. Internet-based service providers did not wish to avail themselves of the common-carrier safe harbor because of the burden that came with it. Congress adopted section 230 to ensure that the reverse was not true: the benefit of unregulated status as an information-service provider did not imply greater liability for content on their networks. That is different from saying that online-service providers were exempt from all potential FCC regulation.

165 See id. at 81–84, 86–88.
166 See Comcast Order, supra note 2, at 13,056 n.69 (quoting Vonage Order, supra note 122, at 22,426).
168 Congress also may have intended to stop the FCC from imposing broadcast-like content controls on the Internet, other than the ones mandated under the CDA.
169 See HUBER ET AL., supra note 18, at 13–14.
170 Indeed, common carriers are the most extensively regulated class under the Communications Act. There are several other categories subject to less onerous restrictions. See, e.g., 47 U.S.C. § 153(26) (2006) ("Local exchange carrier"); id. § 153(44) ("Telecommunications carrier"); id. § 153(46) ("Telecommunications service"); id. § 153(47) ("Telephone exchange service").
The CDA provisions of the 1996 Act were challenged on First Amendment grounds immediately upon adoption. The Supreme Court found the legislation facially unconstitutional.\footnote{See Reno v. ACLU, 521 U.S. 844, 861-63, 882-83 (1997) (severing the unconstitutional CDA language from 47 U.S.C. § 223(a)(1), (d)).\footnote{See Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1403-06 (2000); Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452, 478-88 (1989) (tracing the evolution of the nondelegation doctrine).}} Accordingly, the Court struck from the statute the CDA language (section 223). The Cox–Wyden language of section 230, however, remained in effect. A naïve reader of the Communications Act today would therefore see, as the FCC described, language supporting Internet promotion with no counter balancing restrictions. The legislative history, however, shows the true picture. Section 230 tells the FCC not to put the new wine of the Internet into the old bottles of common-carrier or broadcast regulation.

B. Delegation Issues

Removing the section 230 foundation from the FCC’s Internet jurisdictional theory creates more serious problems. An administrative agency such as the FCC cannot act without a legislative delegation from Congress.\footnote{See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421-30 (1935).} In two 1935 cases, the Supreme Court invalidated federal statutes for not providing intelligible principles to agencies, thus violating the constitutional mandate that all legislative power remain vested in Congress.\footnote{See Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1403-06 (2000); Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452, 478-88 (1989) (tracing the evolution of the nondelegation doctrine).\footnote{See also Indus. Union Dep’t v. Am. Petroleum Inst., 448 U.S. 607, 607-08 (1980) (plurality opinion) (invalidating a standard set by the Occupational Safety and Health Administration).}} This nondelegation doctrine was not invoked to overturn a statute for more than sixty years and was considered a relic;\footnote{Since then, courts and commentators have viewed the doctrine as dead or at least dormant.”; see also Indus. Union Dep’t v. Am. Petroleum Inst., 448 U.S. 607, 607-08 (1980) (plurality opinion) (invalidating a standard set by the Occupational Safety and Health Administration).} however, the Supreme Court has recently exercised greater scrutiny over agency delegations. A prime example,\footnote{525 U.S. 366 (1999).} in\footnote{Id. at 388.} AT&T Corp. v. Iowa Utilities Board, involved the FCC. There, as here, the Commission claimed that Congress had invited it to regulate in a broad, new area with little discretion over its policy choices.

In Iowa Utilities Board, the Court invalidated portions of the Telecommunications Act of 1996 for not providing any “limiting standard, rationally related to the goals” of the Act.\footnote{Id. at 388.} The Act required incumbent local-exchange carriers to unbundle network elements that were “necessary” for competitors but left it to the Commission to interpret
that term.\textsuperscript{177} The Commission simply defined as “necessary” all those elements that new entrants had sought in its rulemaking process.\textsuperscript{178} The Supreme Court held that Congress had failed to make the hard policy choices involved in choosing the appropriate network elements to unbundle.\textsuperscript{179} Congress could not simply pass that decision on to the Commission, nor could the Commission then effectively pass it on to a set of private actors with a strong self-interest in the result.\textsuperscript{180}

Two years later, in\textit{Whitman v. American Trucking Ass'ns, Inc.}, the Supreme Court limited the scope of the doctrine.\textsuperscript{181} It reversed the District of Columbia Circuit for concluding that the Clean Air Act involved an impermissible delegation to the Environmental Protection Agency (EPA).\textsuperscript{182} The Court found that statutory language directing the EPA to set certain standards at a level of safety that was “requisite to protect the public health”\textsuperscript{183} offered “substantial guidance” to the administrative agency.\textsuperscript{184} The Court concluded that even such a broad command represented sufficient exercise by Congress of its legislative responsibilities.\textsuperscript{185}

The FCC’s approach in the \textit{Comcast Order} fails the \textit{Iowa Utilities Board} test, even under the more expansive standard of \textit{American Trucking}. The 1996 Act defines “information services,” but it does not provide any guidance at all for regulating them. Until now, this has not been a problem. The Title I information-services classification was important solely because it meant that certain rules \textit{did not} apply.\textsuperscript{186} There was no need to consider what rules for information services were important because there were no rules. All that changed when the FCC decided to require that information-service providers such as Comcast’s broadband-access operation adhere to the mandates of the Policy Statement.

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\item \textsuperscript{177} \textit{Id.} at 388–89; \textit{see} 47 U.S.C. \textsection 251(d)(2) (2006) (“[T]he Commission shall consider, at a minimum, whether \ldots access to such network elements as are proprietary in nature is necessary \ldots.”).
\item \textsuperscript{178} Bressman, \textit{supra} note 172, at 1432–33.
\item \textsuperscript{179} \textit{See Iowa Utils. Bd.}, 525 U.S. at 397.
\item \textsuperscript{179} \textit{See id.} at 388–89; Bressman, \textit{supra} note 172, at 1436–37.
\item \textsuperscript{180} \textit{See Whitman v. Am. Trucking Ass’ns, Inc.}, 531 U.S. 457, 486 (2001).
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} 42 U.S.C. \textsection 7409(b)(1) (2006).
\item \textsuperscript{183} \textit{Am. Trucking}, 531 U.S. at 475.
\item \textsuperscript{184} \textit{See id.} at 472–76. The decision also rejected the notion, advanced by some scholars and the D.C. Circuit, that an administrative agency could cure a faulty delegation through its own development of limiting standards. \textit{See id.} at 472.
\item \textsuperscript{185} The information-services category continued the FCC’s enhanced-services classification, which served both to establish an unregulated zone and to ensure that regulated network operators could not interfere with it. \textit{See} Steve Bickerstaff, \textit{Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet}, 78 \textit{Tex. L. Rev.} 1, 46–47 (1999).
\end{itemize}
\end{footnotesize}
To the FCC, the "national Internet policy" of section 230 provided the limiting principle. According to the story told by the FCC in the Comcast decision, Congress made the decision to favor an open, unfettered Internet, properly limiting the FCC's discretion. As described above, however, this interpretation rests on a faulty reading of the statute and its legislative history. Congress expressed a policy preference for further development of the Internet and for an Internet unfettered by regulation. Congress thus did not delegate general rulemaking authority over the Internet in section 230.

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

If section 230 is not the congressional limiting principle on FCC regulation of information services, under the current FCC theory, that leaves only the general public-interest standard of the Communications Act. That language could not be sufficient to save the Comcast Order from a nondelegation challenge. Iowa Utilities Board involved rules adopted under the same statute. If requiring unbundling when "necessary" provides no "limiting standard, rationally related to the goals" of the statute, the Internet case is even more extreme, because Congress offered no constraints at all, other than the definition of information services. A different source for FCC authority must be identified.

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187 See Comcast Order, supra note 2, at 13,042.
188 See supra Part II.A.
189 See supra Part II.A.
190 See Comcast Order, supra note 2, at 13,045 (stating that the Commission was acting in an adjudication, not a rulemaking); Internet Policy Statement, supra note 95, at 14,988 & n.15 (stating that the Policy Statement is not a set of enforceable rules).
191 By definition, an adjudication is binding only on the parties before the agency; it is not a prospective rule applicable to an entire industry. See Bressman, supra note 172, at 1420 (arguing that agencies must promulgate limiting standards through notice-and-comment rulemaking procedures for those standards to be "generally applicable, visible, and binding").
C. Other Problems with the Commission’s Approach

1. Whatever Happened to Unregulation?

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

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

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

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195 See In re The Provision of Interstate & Int'l Interexchange Telecomms. Serv. via the “Internet” by Non-Tariffed, Uncertified Entities, Rulemaking No. 8775 (Mar. 4, 1995) (petition for declaratory ruling, special relief, & institution of rulemaking), available at http://www.fcc.gov/Bureaus/Common_Carrier/Other/actapet.html; Werbach, supra note 17, at 44 n.217 (“The Commission has broad latitude in how to respond to petitions for rulemaking, and in [this] case it simply did not proceed with any further action.”).
197 See Michael Kende, The Digital Handshake: Connecting Internet Backbones, 11 COMM-LAW CONSPECTUS 45, 52–70 (2003); Werbach, supra note 54, at 1255.
198 See Lemley & Lessig, supra note 9, at 946–57; Werbach, supra note 54, at 1288.
200 Oxman, supra note 31, passim.
201 See François Bar et al., Access and Innovation Policy for the Third-Generation Internet, 24 TELECOMM. POL’Y 489, 490 (2000); Lemley & Lessig, supra note 9, at 928.
that would impose such a mandate. The Commission stated that its goal was to adopt a framework that “encourages the ubiquitous availability of broadband to all Americans,” consistent with section 706(a) of the 1996 Act, which promotes universal accessibility of advanced communications services. The Commission used section 230(f)(2) as further support for not classifying a portion of wireline-broadband access as a telecommunications service subject to Title II obligations.

In the order, the FCC made no reference at all to the supposedly central policy mandate of section 230(b).

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

These inconsistencies do not completely discredit the Comcast decision, but they suggest that the Commission needs to further articulate its position. The FCC is entitled to revise its interpretation of the statute to give greater emphasis to the procompetitive language in section 230(b). Nothing in the Comcast Order is inconsistent with the FCC’s prior classification decisions or with a general skepticism toward excessive regulation of the Internet. Furthermore, nothing in the earlier “unregulation” decisions suggests that the FCC would never impose regulations on broadband providers. In fact, once the Commission classified both cable-modem and telephone-based DSL offerings as information services, the agency and the courts repeatedly stated that new rules under Title I might be needed to achieve policy objectives that could no longer be realized through other Titles.

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202 See Wireline Broadband Order, supra note 32, at 14,856, para. 2; id. at 14,856-59 nn.6-10.
203 See id. at 14,857-58, para. 4.
204 Id. at 14,855, para. 1.
205 See id. at 14,856-57 n.8.
206 See id. at 14,864 n.41.
207 See Vonage Order, supra note 122, at 22,425.
210 See Nat’l Cable & Telecommms. Ass’n v. Brand X Internet Servs., 545 U.S 967, 976 (2005) ("Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose addi-
The problem is that the Comcast Order rests on ambiguous statutory authority. The Commission's refusal to acknowledge that ambiguity calls into question the validity of the underlying statutory delegation. Section 230(b) is internally inconsistent: it sings the praises of an open, competitive Internet—which might not emerge through market forces alone—as well as those of minimal regulation. The relationship of section 230(b) to section 706(a) and other provisions of the statute is also unclear. Justice Antonin Scalia concluded that the 1996 Act is "in many important respects a model of ambiguity or indeed even self-contradiction." As the Supreme Court noted, the Act's statutory ambiguity makes it incumbent on the FCC to make the hard choices necessary to constrain its own discretion.

2. The Substance of the National Internet Policy

Congress intended section 230 to limit, rather than expand, FCC regulatory authority. The Commission was undoubtedly correct that Congress did not intend to preclude all FCC oversight of broadband access. Nevertheless, it does not follow that Congress endorsed any regulation the FCC saw fit to impose. Section 230 was designed to foreclose FCC regulation of the Internet under the traditional price regulation of telecommunications. To be faithful to the statute, the FCC would have to define the scope of regulation consistently with those restrictions.

The Commission's definition of its statutory mandate, however, also begs for justification. In its Policy Statement, the Commission claimed that the "essence" of the national Internet policy is to "encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet." This gloss involves two subtle shifts from the express language of section 230(b). First, the Commission interpreted the section 230(b) (1) mandate "to promote the continued development of the Internet" as one "to encourage broadband deployment." The emphasis on broadband deployment derives from section 706(a) of the Act, which charges the FCC with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."

212 See id. at 387–92, 397.
213 See Comcast Order, supra note 2, at 13,042–43, para. 25.
214 See supra text accompanying notes 158–61.
215 Internet Policy Statement, supra note 95, at 14,988 (emphasis omitted).
216 Id. at 14,987, para. 2 (quoting 47 U.S.C. § 230(b)(1) (2006)).
217 Id. at 14,988 (emphasis omitted).
The Commission cited this provision in both the Policy Statement and the Comcast Order.\footnote{See Comcast Order, supra note 2, at 13,036, para. 16; Internet Policy Statement, supra note 95, at 14,987, para. 9.}

Although broadband deployment is certainly a means to "promote the continued development of the Internet,"\footnote{Comcast Order, supra note 2, at 13,082-83.} the connection is not so clear in the Comcast case. Comcast argued that P2P file sharing was overwhelming the capacity of its broadband network.\footnote{See id. at 13,034-38.} To Comcast, therefore, the FCC's restrictions on its network-management practices impeded deployment of its broadband service. Even if one believes that Comcast degraded P2P file transfers to prevent competition with its own video offerings, the threat of revenue cannibalization might cause the company to scale back its broadband investment.

Determining the nexus between an open or neutral Internet and the deployment mandate of section 706(a) is one of the "hard choices" that either Congress or the agency must make if the FCC's actions are to represent a valid delegation.\footnote{See Bressman, supra note 174, at 461.} The FCC could convincingly argue that measures to preserve an open and interconnected Internet would best promote broadband deployment and the statutory scheme more generally. The problem is that neither the Policy Statement nor the Comcast Order contains such analysis.\footnote{The FCC stated in the Comcast Order that "prohibiting network operators from blocking or degrading consumer access to desirable content and applications on-line will result in increased consumer demand for high-speed Internet access and, therefore, increased deployment to meet that demand." See Comcast Order, supra note 2, at 13,039, para. 18. This claim, with no supporting analysis or data, appears in the laundry list of statutory bases for jurisdiction other than section 230. A more searching inquiry is needed to form a foundation for FCC jurisdiction and proper administrative delegation. See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 387-92 (1999); Bressman, supra note 174, at 452-53.} Because the FCC has not connected the dots, it has not properly limited its own freedom of action.\footnote{See 5 U.S.C. § 553 (2006).}


Any application of the Policy Statement to decide actual cases raises serious administrative-law questions. The Administrative Procedure Act (APA) provides for procedural protections whenever an agency engages in either rulemaking or adjudication, but principles are not binding unless they are embodied in legislative rules.\footnote{Internet Policy Statement, supra note 95, at 14,988, para. 5.} The Commission's assertion that it "will incorporate the above principles into its ongoing policymaking activities," qualified by a footnote
stating that it was “not adopting rules in this policy statement”\textsuperscript{227}—is confusing. If the Policy Statement’s principles are not rules, how can the FCC circulate, according to an FCC source, “an item that finds Comcast’s broadband network management practices to be in violation of the FCC’s policy principles”?\textsuperscript{228}

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

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

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

\begin{footnotesize}
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\item \textsuperscript{227} Id. at 14,988 n.15.
\item \textsuperscript{228} Chloe Albanesius, FCC: Comcast Broke Rules, But Will Not Face Fines, PCMAG.COM, July 11, 2008, http://www.pcmag.com/article2/0,2817,2325455,00.asp (quoting “an FCC source”). FCC Chairman Kevin J. Martin made the even stronger statement that companies such as Comcast bear the burden of proof when they violate FCC policies: “When they show they are blocking access to some sort of content, they have the burden to show that what they are doing is reasonable.” Saul Hansell, \textit{F.C.C. Chief Would Bar Comcast from Imposing Web Restrictions}, N.Y. TIMES, July 12, 2008, at Cl.
\item \textsuperscript{229} Internet Policy Statement, \textit{supra} note 95, at 14,988.
\item \textsuperscript{230} See Philip J. Weiser, \textit{The Future of Internet Regulation} 32 (Univ. of Colo. Law Sch., Working Paper No. 09-02, 2009) (“The FCC’s determination that Comcast violated its Internet Policy Statement is also vulnerable on the legal ground that an agency cannot enforce a policy statement that did not emerge from notice-and-comment rulemaking or explicitly warn parties that it would be enforced.”).
\item \textsuperscript{231} SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, \textit{ad hoc} litigation is one that lies primarily in the informed discretion of the administrative agency.”).
\item \textsuperscript{232} See Comcast Order, \textit{supra} note 2, at 13,044.
\item \textsuperscript{233} See NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 819 (1990) (Scalia, J., dissenting). Moreover, there may be an argument that case-by-case adjudication is a better mechanism for novel situations where an agency has no track record of understanding the relevant issues. See M. Elizabeth Magill, \textit{Agency Choice of Policymaking Form}, 71 U. Chi. L. Rev. 1383, 1406 (2004); Weiser, \textit{supra} note 230, at 51.
\item \textsuperscript{234} See Pac. Gas & Elec. Co. v. Fed. Power Comm’r, 506 F.2d 33, 38 (D.C. Cir. 1974) (“The agency cannot apply or rely upon [a policy statement] as law because a general
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force statutory obligations requires some indication that the statute
does, in fact, describe legal obligations. But the Policy Statement was
adopted with no prior notice or opportunity to challenge it, as a
stand-alone document that expressly disclaimed any legal force.235

In the Comcast case, the FCC considered the complaint simultane-
ously with a petition for declaratory ruling and a notice of inquiry on
the same set of topics, only choosing to announce at the end of the
order that it was treating the matter as an adjudication.236 That pur-
ported adjudication involved no on-the-record hearings or testi-
mony.237 The FCC held two public forums on broadband-network
management, one of which included a presentation by a Comcast rep-
resentative.238 The Commission itself acknowledged that it could not
fine Comcast for its actions because the company had insufficient no-
tice that the obligations of the Policy Statement were to be en-
forced.239 Given these procedural shortcomings, the Comcast decision
faces a stiff challenge in court.

Even if the Comcast Order survives a judicial challenge, the FCC’s
approach is problematic. Case-by-case resolution requires a time-con-
suming, after-the-fact assessment of the challenged practice. The only
guidance the FCC provides in the Policy Statement is the language
that “reasonable network management” is acceptable.240 The Com-
mission will have to develop a jurisprudence to give meaning to that
term through its resolution of complaints.241 In the Comcast case, the
FCC stated that networking engineers did not consider the techniques

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235 See Internet Policy Statement, supra note 95, at 14,988 n.15; Weiser, supra note 230, at 32-33 & n.110.
236 The caption of the Free Press petition, which references seven separate rulemaking
dockets, belies the claim that the Comcast proceeding was best seen as an adjudication of a
private dispute between two parties. See Wireline Broadband Order, supra note 32.
237 See Weiser, supra note 230, at 32 (explaining that the “proceeding lacked most—if not all—of the characteristics associated with traditional fact-finding” and that the agency
“did not receive any evidence under oath, held no cross-examination, and merely evalu-
ated filings where parties advanced self-serving claims”).
En Banc Hearing in Cambridge, Massachusetts on Broadband Network Management
239 See Comcast Order, supra note 2, at 13,047.
240 Internet Policy Statement, supra note 95, at 14,988 n.15.
241 See Weiser, supra note 230, at 31 (“The FCC’s decision in the Comcast matter rep-
resents the beginning of what is likely to be a challenging effort to define ‘reasonable net-
work management.’ ”).
Comcast employed reasonable. The primary basis for the Commission's conclusion was the testimony of a few experts. Contrary to the FCC's assertion, the challenged practices do not violate the standards of the Internet Engineering Task Force, although engineers generally disfavor such practices. A more serious effort to engage these issues would require a process involving a representative technical and industry group.

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

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

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242 See Comcast Order, supra note 2, at 13,054, para. 45.
243 See id. at 13,054 n.212.
244 See id.; see also Paul Ohm, The Rise and Fall of Invasive ISP Surveillance, 2009 U. ILL. L. Rev. 1417, 1439 n.115 (discussing the IETF's comments on the RST packet mechanism that Comcast used). Comcast used a variety of different technical mechanisms, some of which were more problematic than others.
245 See Weiser, supra note 250, at 34.
246 See id. at 31; Werbach, supra note 36, at 92–94.
247 See Werbach, supra note 26, at 119.
248 See Ohm, supra note 244, at 1433–34.
250 See Comcast Order, supra note 2, at 13,055.
insufficient. Only through a rulemaking procedure that allows it to
gather all the necessary information can the Commission be certain of
discharging its duties properly. And such a proceeding (or proceed-
ings) must start with a solid jurisdictional foundation.

III
FINDING A HOME FOR THE INTERNET

Unless it intends to reverse its post–Brand X course of dumping
all broadband services into the Title I bucket, the FCC must take seri-
ously the implications of its choice. As explained below, the FCC
should declare regulation of broadband Internet access necessary as
ancillary to its obligations under sections 251 and 256 of the Commu-
nications Act. The Commission could use this authority for ongo-
ing efforts to promote open access and standards-based
interconnection. A careful reading of the Communications Act dem-
onstrates that these two core obligations of telecommunications-ser-
dvice providers will not be met if broadband-access providers can avoid
regulation. Title I cannot mean Title I. If the agency is to implement
the information-services classification consistently, it must give some
concrete meaning to the regulatory obligations of such services.

The FCC's mistake was to anchor Internet law in the part of the
Communications Act that mentions the Internet. Section 230 may be
a congressional delegation to develop policy, but it was a delegation
for the limited purpose of preventing intermediary liability. Regu-
lators must honestly confront the reality that Congress did not create
a national Internet policy in 1996. A new policy regime to promote
open access and interconnection for Internet infrastructure requires a
different foundation. Fortunately, such a foundation exists. If the In-
ternet is consuming legacy communications and media industries,
then Internet policy is the new telecommunications policy. The cen-

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

252 See supra text accompanying notes 148–58.

253 See supra Part II.A. The fact that the term "Internet" appears only twice out of
almost 750,000 words in the Telecommunications Act suggests that Internet-based services
were at best an afterthought in the exceptionally detailed regime that Congress spelled
out. See H. Russell Frisby, Jr. & David A. Irwin, The First Great Telecom Debate of the 21st
Century, 15 COMM.LAW CONSPectUS 373, 377 (2007). The term appears only once in the
text of the massive FCC interconnection order implementing the local-competition por-
tions of the Act. See Local Competition Ruling, supra note 199; In re Implementation of the
Local Competition Provisions in the Telecommunications Act of 1996 & Interconnection
Between Local Exch. Carriers & Commercial Mobile Radio Serv. Providers, 11 F.C.C.R.
Central provisions of the Communications Act must morph to apply to Internet-based systems.

A. Ancillary Jurisdiction

The concept of ancillary jurisdiction under the Communications Act was established by the Supreme Court in the 1968 case *United States v. Southwestern Cable Co.* 254 In *Southwestern Cable*, the FCC sought to regulate cable-television service, which was in its earliest stages of commercial development. 255 Cable posed a conundrum under the Communications Act. It was delivered over wires, like telephone service, but provided one-way delivery of video content to many subscribers, like broadcasting. It fit neither the common-carrier definitions of Title II of the Act nor the broadcast definitions of Title III, despite obviously having attributes of both. 256 And even though it was then a small industry, cable had the potential to significantly alter the market for video programming, which the FCC had regulated under its public-interest standard since the dawn of television. 257

The FCC needed a hook to assert jurisdiction over cable. To reach that goal, it used a two-step process. First, the Commission found that cable was within its primary statutory grant of authority under section 152(a) of the Act, which allows the FCC to regulate "all interstate and foreign communication by wire or radio." 258 Second, the FCC invoked section 303(r) of the Act, which allows the Commission to issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," 259 as "public convenience, interest, or necessity requires." 260 The FCC also referenced section 154(i), which provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions." 261

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255 See *Sw. Cable*, 392 U.S. at 167.

256 See id. at 164.


259 Id. § 303(r).

260 Id. § 303.

261 Id. § 154(i).
As the Supreme Court affirmed in *Southwestern Cable*, these provisions give the FCC authority to take steps “reasonably ancillary to the effective performance of the Commission’s various responsibilities.” Regulation of cable was deemed reasonably ancillary to the statutorily defined regulation of broadcasting because an unregulated cable industry could prevent effective achievement of those statutory mandates.

Ancillary authority has limits. In two successor cases in the 1970s, *Midwest Video I* and *Midwest Video II*, the Supreme Court clarified the boundaries of the authority carved out in *Southwestern Cable*. *Midwest Video I* upheld FCC rules requiring cable operators to originate their own programming. *Midwest Video II*, however, rejected FCC requirements that cable providers offer access to unaffiliated content providers and noncommercial users. The Court in *Midwest Video II* found these requirements tantamount to common-carriage obligations. Section 153(10) of the Act expressly stated that “a person engaged in . . . broadcasting shall not . . . be deemed a common carrier.” Although the FCC rules in question might have furthered statutory goals of the Communications Act, they required cable operators to do something that the FCC could not legally require of broadcasters. Therefore, the Court held, those rules could not possibly be “reasonably ancillary” to FCC regulation of broadcasting.

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

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262 *Sw. Cable*, 392 U.S. at 178. Weiser describes ancillary jurisdiction as “a cousin to the interstitial authority of the federal courts to develop the basic principles embodied in common law-like statutes such as the Sherman Antitrust Act or the Copyright Act.” Weiser, *supra* note 7, at 51.


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

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

268 *See id.*


270 *See Midwest Video II*, 440 U.S. at 708–99.

271 The distinction between *Southwestern Cable* and *Midwest Video I* was that the former allowed the FCC to protect the existence of the regulated industry (broadcasting), and the latter allowed the FCC to promulgate rules to effectuate the established statutory objectives of broadcast regulation. *See Crawford, supra* note 6, at 731–33.
systems were wholly unregulated.\textsuperscript{272} In other words, what mattered was what the statute said about the traditional regulated service, not what, if anything, it said about the new service.\textsuperscript{273} Cable could be regulated because it was a service within the FCC's general grant of jurisdiction that was likely to have a significant impact on services subject to specific FCC regulatory obligations. But when the FCC attempted to decouple the regulation of cable from the regulation of broadcasting, the Court overturned it.\textsuperscript{274}

In its 1971 Computer I decision, the FCC declined to regulate data-processing services but left open the possibility of doing so under ancillary jurisdiction.\textsuperscript{275} The Commission ultimately chose to maintain the unregulated status of what became enhanced or information services, but it noted that it could have taken a different tack if competitive dynamics in those markets were different.\textsuperscript{276} However, Computer I did promulgate rules restricting regulated common carriers from entering the unregulated data-processing market.\textsuperscript{277} The Second Circuit upheld these provisions in \textit{GTE Service Corp. v. FCC} even though the Communications Act gave the FCC no authority over such services.\textsuperscript{278}

In recent years, the FCC has asserted ancillary authority in several cases, including issues such as closed-captioning requirements for broadcasters, regulation of instant messaging, and a universal service fund.\textsuperscript{279} As Phil Weiser notes, “the FCC's conception of this authority

\textsuperscript{272} See \textit{United States v. Sw. Cable Co.}, 392 U.S. 157, 173–78 (1968). Whether the Commission was right is another story. For example, the FCC regulates indecent content on broadcast television but not on cable, even though the two platforms compete. See \textit{United States v. Playboy Entm't Group, Inc.}, 529 U.S. 803 (2000); Robert Corn-Revere, \textit{Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?}, PROGRESS ON POINT (Progress & Freedom Found., Wash., D.C.), May 2005. Though this may not be a level playing field, it has not made the FCC's content rules untenable.\textsuperscript{273} In Midwest Video II, the fatal flaw in the challenged FCC order was that it expressly contradicted the mandates of the statute for the legacy service by imposing common-carrier-like restrictions on broadcasters. See \textit{Midwest Video II}, 440 U.S. at 708–09.\textsuperscript{274} See \textit{id.}\textsuperscript{275} \textit{See In re Regulatory & Pol'y Problems Presented by the Interdependence of Computer & Commc'n Servs. & Facilities, 28 F.C.C.2d 267, 268 (1971) (final decision & order) [hereinafter Regulatory & Pol'y Problems Final Order] ("Since we are not proposing, at this time, to regulate data processing, as such, a discussion of the extent of our jurisdiction with respect thereto is neither relevant nor necessary . . . .").\textsuperscript{276} See \textit{id.}\textsuperscript{277} AT&T was prohibited from doing so under a 1956 consent decree, but other, smaller, incumbent carriers such as GTE could offer data processing through separate affiliates. See \textit{Regulatory & Pol'y Problems Presented by the Interdependence of Computer & Commc'n Servs. & Facilities, 28 F.C.C.2d 291, 298–99 & n.2 (1970).}\textsuperscript{278} See \textit{GTE Serv. Corp. v. FCC}, 474 F.2d 724, 730–32 (2d Cir. 1973).\textsuperscript{279} \textit{See Rural Tel. Coal. v. FCC}, 888 F.2d 1307, 1310 (D.C. Cir. 1988) (universal service); \textit{In re Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations by Time Warner Inc. & Am. Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, 16 F.C.C.R. 6547, 6610, para. 148 (2001) (mem. opinion & or}
is hardly a model of clarity or consistency.\textsuperscript{280} The forty-year-old cable-television decisions remain the benchmarks for understanding the contours of ancillary jurisdiction.\textsuperscript{281}

The FCC’s latest foray into ancillary jurisdiction involved the so-called broadcast flag. In 2003, the FCC mandated that manufacturers of television receivers or other devices capable of receiving digital broadcast TV signals include broadcast-flag capability in their devices.\textsuperscript{282} The broadcast flag was designed to prevent unauthorized copying of digital programming. Broadcasters and content producers argued that, without strong protections against copying, digital content would not be widely distributed.\textsuperscript{283} The FCC was eager to promote the switch to digital television. It concluded that a content-protection system was important to ensure sufficient digital programming to entice consumers to purchase the new digital sets.\textsuperscript{284} The jurisdictional problem was that the broadcast flag applied to hardware. The flag regulated television sets, not the television broadcasters covered under Title III of the Act.\textsuperscript{285}

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

\begin{itemize}
  \item \textsuperscript{280} Weiser, \textit{supra} note 7, at 49.
  \item \textsuperscript{281} See id. at 52.
  \item \textsuperscript{282} See \textit{In re Digital Broadcast Content Protection}, 18 F.C.C.R. 23,550, 23,552, para.4 (Nov. 4, 2003) (report & order & further notice of proposed rulemaking) [hereinafter Broadcast Flag Order].
  \item \textsuperscript{284} See Broadcast Flag Order, \textit{supra} note 282, at 23,552; Werbach, \textit{supra} note 17, at 63.
  \item \textsuperscript{285} The FCC’s order applied to all “Demodulator Products,” which were essentially all devices able to display a digital-television broadcast signal on a screen. See Broadcast Flag Order, \textit{supra} note 282, at 23,565; see also 47 C.F.R. § 73.9000(f) (2008) (defining “covered demodulator product” as “a product that is required . . . to comply with the demodulator compliance requirements, and to be manufactured in accordance with the demodulator robustness requirements”); \textit{id.} § 73.9002(b) (prohibiting sale or distribution in interstate commerce of “covered demodulator products” except in accordance with demodulator compliance and robustness requirements).
  \item \textsuperscript{286} See Broadcast Flag Order, \textit{supra} note 282, at 23,562–63.
  \item \textsuperscript{287} 47 U.S.C. § 153(35) (2006); Am. Library Ass’n v. FCC, 406 F.3d 689, 703 (D.C. Cir. 2005) (quoting § 153(35)).
  \item \textsuperscript{288} See \textit{Am. Library Ass’n}, 406 F.3d at 692.
\end{itemize}
that, because the broadcast flag operated after a digital-broadcast transmission arrived at a television set, the statutory provision did not cover the flag.  

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

B. Internet Communications as Ancillary to Interconnection

1. Internet Communications Services

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

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

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289 See id. at 703–04.
290 Id. at 692.
291 See Crawford, supra note 6, at 712–14.
293 See Wireline Broadband Order, supra note 32, at 14,860.
294 See id. at 14,860–61.
295 See id.
296 Interestingly, this was the opposite of the FCC's original decision in Computer I. There, the Commission held that a service of a common carrier that included both communications and data processing would be treated as regulated communications. That "contamination" approach generated significant difficulties in application. See generally Cannon, supra note 32.
formation service. When a user accesses Google through a dial-up Internet-service provider, that ISP purchases access from a regulated telecommunications provider. In other words, the physical network operator is classified differently than the service offered over the network. When that same user connects to Google over a broadband connection, however, the situation changes. The FCC now classifies broadband-access providers as information services, the very same category that applies to Google.

In the Comcast Order, the FCC did not define the class of information-service providers that it thought it could regulate to promote an open Internet. The Commission adjudicated a dispute involving a single provider, Comcast. Under the Commission's case-by-case approach, the scope as well as the contents of the requirement could presumably be considered each time.

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

Two specific kinds of information services should be within FCC jurisdiction as Internet communications services. One includes those information services so identical to telecommunications services as to make the distinction purely an invitation for arbitrage. AT&T's "fake VoIP" backbone service is an example: even though it involved some mechanical protocol conversion, it was effectively a telecommunications service.

Having a class of information services that straddles the boundary in this way would eliminate uncertainty about where a service falls. Manipulating offerings to fall on the information-services side of the divide would not itself eliminate regulatory obligations. This category would not apply to all information services that are similar to traditional regulated services. There are many VoIP offerings, for example, that differ in significant ways from circuit-switched telephone

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298 See id.
299 See Cannon, supra note 38, at 56.
300 See Cannon, supra note 32, at 188 (giving examples of enhanced services).
301 That is not to say that no regulation would be appropriate. Antitrust rules may apply, for example.
302 See Petition for Declaratory Ruling, supra note 48, at 7465.
service, even if they compete with it.\(^303\) Applying the same obligations to those services could put a damper on competition and innovation.\(^304\) Internet communications services would consider only those services that were indistinguishable from regulated services or clearly designed to evade regulatory obligations.\(^305\)

The second category of Internet communications services would be broadband-access platforms. Services that integrate telecommunications and information services in order to provide end-users with access to the Internet are hybrids. They can remain in the information-services bucket, so long as they are carved out as a special case over which the FCC can exercise ancillary jurisdiction. This narrow approach would avoid the need to impose the full panoply of common-carrier obligations or cable-TV rules on broadband-access providers. As discussed above, this approach would be fully consistent with the real congressional intent behind section 230 of the 1996 Act.\(^306\) At the same time, such an approach would acknowledge that the FCC's path of declaring all broadband-access networks as information services created a significant hole in the regulatory scheme.

Broadband access is not a "pure" information service. Instead, it is telecommunications transport integrated with data-processing functionality.\(^307\) The major companies that offer it are regulated telephone, cable, and wireless providers.\(^308\) Even if one accepts the FCC's conclusion that the broadband-access bundle should be treated for regulatory purposes as an information service, it is a different kind of information service than Amazon.com or Wikipedia offers. Especially for a carrier such as Verizon or AT&T, the information-service classification is favorable because it means a net reduction in regulatory obligations, since they would otherwise be Title II common carriers. But treating them as information-service providers subject to limited Title I obligations would still subject them to far fewer rules than the alternative.

The debate today over regulation of information services ignores the requirements established in Southwestern Cable and Midwest Video. The FCC's analysis in the Comcast Order focused on the nature of broadband Internet-access service and online applications, but it did

\(^{303}\) See Crawford, supra note 6, at 700 n.17.

\(^{304}\) See id. at 724.

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

\(^{306}\) See supra Part II.A; see also Crawford, supra note 6, at 704–05.

\(^{307}\) Wireline Broadband Order, supra note 32, at 14,860.

\(^{308}\) See supra note 49.
not consider regulated services that might be affected. Comcast critics asserted that the broadband operator’s network-management techniques were adopted to protect its cable-video revenues against competition from Internet-based P2P delivery. The FCC, however, did not use this argument as a basis for its decision. It found Comcast’s network-management practices improper regardless of their motivation because they were not necessary to achieve the company’s legitimate technical requirements. The FCC’s goal in asserting ancillary authority was to protect the integrity of the unregulated Internet, based on the language it found in section 230 and elsewhere.

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

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

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309 See Comcast Order, supra note 2, at 13,045–46. The FCC did note in passing that because Comcast’s information service interconnects with the public-switched telephone network, it affects the market for telecommunications services, as required under section 256. See id. at 13,039.
310 See id. at 13,030.
311 See id. at 13,054.
312 See id. at 13,034.
313 The Commission did note in the Comcast Order that Comcast’s practices could “have the effect of shifting traffic to other carrier’s telecommunications networks.” Id. at 13,039, para. 19. Its primary focus, however, was on the potential impacts of broadband network management practices on the Internet ecosystem. And even as a subsidiary justification, the FCC’s traffic-shifting argument is something of a stretch. Other telecommunications networks and their customers were not complaining about Comcast’s practices. Any Internet network-management practice can have the effect of changing traffic patterns on other networks because the Internet is fundamentally interconnected.
314 See supra Part II.A.
Moreover, as developed in *Midwest Video II*, the ancillary authority must track the contours of those primary mandates.316 There are no actual mandates within section 230. On the FCC's reading, the primary content of a statutory command would be developed under ancillary authority. This reading makes no sense. Such a reading would give general policy pronouncements in a regulatory statute effectively the same status as specific mandates.317 The decision of whether to impose obligations, or simply to express an objective, is properly the domain of Congress, not the administrative agency.

An analysis faithful to Supreme Court precedent would proceed differently. There is a basis for bringing broadband-access services within the Communications Act but with a different foundation than the one the Commission used in the *Comcast Order*. Internet-based services clearly satisfy the first prong of *Southwestern Cable*. They are "'communication[s] by wire or radio'" that cross state lines.318

The second prong is met as well. In *Southwestern Cable*, the problem was that a new unregulated service (cable) could mimic and therefore competitively undermine a regulated service (broadcasting).319 FCC exercise of ancillary authority was deemed necessary to preserve the statutory public-interest mandates on broadcasters.320 The analogous issue today is whether new, unregulated broadband-Internet services would have the same effect.321 The answer is unquestionably yes.

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

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315 See supra notes 258–78 and accompanying text.
317 Language from the general provisions of Title I of the Act can be used in support of ancillary jurisdiction. Law professor John Blevins made this argument in a comment to the FCC. See Ex Parte Letter of John Blevins Regarding the Commission's Ancillary Jurisdiction, Before Fed. Commc'n Comm'n (Jul. 17, 2008), available at http://fjallfoss.fcc.gov/ecfs/document/view?id=6520034634. However, the cases Blevins cites tie back to *Southwestern Cable*, where jurisdiction rested primarily on the impacts on regulated broadcasts. The Title I provisions are not meaningless but neither are they equivalent to the statutory commands of Titles II, III, and VI.
319 See id. at 175–77.
320 See id. at 180–81.
321 The situation today is akin to the one the FCC faced in the early days of the television industry. The Communications Act granted the FCC the power to regulate broadcasters. See 47 U.S.C. § 301. The Act clearly covered technical rules for spectrum licensing but did not expressly address business arrangements. In *NBC v. US*, the Supreme Court upheld the FCC's Chain Broadcasting Regulations on the grounds that "Congress was acting in a field of regulation which was both new and dynamic" and, "[i]n the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers." See Nat'l Broad. Co. v. United States, 319 U.S. 190, 219 (1943).
mimic and compete with regulated telecommunications services, and (2) simultaneously, those regulated services can either escape from regulation or harm competition in the markets higher up. Either outcome would belie congressional objectives. The FCC cannot carry out its statutory duties for telecommunications service providers if information services remain a content-less regulatory gray area.\textsuperscript{322} For example, if Verizon or Cablevision refused to allow independent-application and content providers to reach customers through their pipes or discriminated against unaffiliated providers on their platform, the substantive provisions of Title II of the Act would ultimately be meaningless.

The FCC should not try to stop the “Digital Broadband Migration,” to borrow a phrase from former FCC Chairman Michael Powell.\textsuperscript{323} On the contrary, the Commission should cheer the substitution of closed network silos with a converged, layered, interconnected universal-data network.\textsuperscript{324} The perception that regulatory concern with the Internet will somehow contaminate the FCC is a residue of the CDA debate and the early work of “cyber-exceptionalists” such as John Perry Barlow, David Johnson, and David Post.\textsuperscript{325} It is no longer 1996. We can now see that future telecommunications and broadcast networks will all be based on Internet-like data networking technologies. Yet we can also see that classic policy concerns of ensuring affordability, ubiquity, reliability, interoperability, innovation, investment, and consumer protection will remain important. The challenge for the FCC today is not how to keep the Internet out but how to bring it in.\textsuperscript{326}

\textsuperscript{322} Cf. GTE Serv. Corp. v. FCC, 474 F.2d. 724, 731 (2d Cir. 1973) (“[E]ven absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service.”).


\textsuperscript{324} See Werbach, \textit{Layered Model}, supra note 69, at 54–64.

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

\textsuperscript{326} See Weiser, \textit{supra} note 230, at 2–6.
2. *GTE Service Corp. v. FCC*

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

The *Computer II* rules governed the behavior of common carriers when acting as providers of data processing, even though data-processing providers were not regulated under the Communications Act. The Court of Appeals had no difficulty upholding this action: "The burgeoning data processing activities of the common carriers pose, in the view of the Commission, a threat to efficient public communications services at reasonable prices and hence regulation is justified under its broad rule-making authority." In 1971, there was no "information service" category in the statute. Had there been, the FCC's *Computer II* rules would have constituted regulation of telecommunications carriers who were acting as information-services providers—the exact parallel to today's broadband-access providers. The FCC cannot have less authority to regulate something specified in the statute than a noncategory.

Even the portion of *GTE* that found that the FCC exceeded its authority supports the exercise of ancillary jurisdiction over Internet communications services today. The court invalidated the *Computer II* rules that sought to regulate the behavior of the structurally separate data-processing affiliates that the FCC required common carriers to establish. The FCC was concerned that these new affiliates would have an unfair advantage if they could use the brands of, or purchase services from, their regulated parents. The problem was that the affiliates were pure data-processing companies, and the FCC had itself declared that it would not regulate data processing at the time. The FCC's justification for the challenged rules was based on antitrust theory, not the requirements of the Communications Act. As the court

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327 See *GTE*, 474 F.2d at 729–35.
329 *GTE*, 474 F.2d at 730.
330 See *id.* at 733.
331 See *id.* ("[The FCC's] concern here therefore is not for the communications market which Congress has entrusted to its care, but for data processing which is beyond its charge and which the Commission itself has announced it declines to regulate.").
noted, the data-processing affiliates were not means to escape regulation but corporate vehicles that the FCC itself required.\textsuperscript{332} The Commission could not then turn around and treat them as creatures of the regulated carrier.

The circumstances today are quite different. What in 1971 was a tiny, formative data-processing industry is today a vast information-services marketplace. The \textit{GTE} court based its action on the FCC's prior decision to avoid exercise of ancillary jurisdiction over data processing.\textsuperscript{333} Nevertheless, the FCC expressly stated at that time that, "[i]f there should develop significant changes in the structure of the data processing industry, or, if abuses emerge which require the exercise of corrective action by the Commission," it would reevaluate the regulatory status of the market.\textsuperscript{334}

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

Whenever an administrative agency draws a new dividing line between regulated and unregulated services, it creates two possibilities: unregulated companies may become regulated for the first time, and regulated companies may escape regulation. The \textit{GTE} court allowed the FCC to act in the latter case but not in the former.\textsuperscript{335} Imposing rules on data-processing affiliates would have expanded the base of regulated entities. Such a move could be justified, as it was in \textit{Southwestern Cable}, but it stands to reason that the bar should be high absent express congressional mandates. With broadband access, the Commission faces the same dichotomy. It can properly distinguish rules regulating pure information services for the first time from those maintaining limited oversight over integrated providers.

3. \textit{Limits on FCC Authority}

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

This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions. . . . Under its undefined and

\textsuperscript{332} See id.
\textsuperscript{333} See id.
\textsuperscript{334} See Regulatory & Pol'y Problems Final Order, \textit{supra} note 275, at 268.
\textsuperscript{335} See \textit{GTE}, 474 F.2d at 733.
sparingly used “ancillary” powers, the Commission might conclude that it can order cable companies to “unbundle” the telecommunications component of cable-modem service. And presto, Title II will then apply to them, because they will finally be “offering” telecommunications service.\textsuperscript{336}

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

Unlike the broadcast/common-carriage distinction, nothing in the Telecommunications Act expressly forbids imposition of any regulation on information-service providers. The Act lists obligations for providers of telecommunications service, such as the requirement to interconnect.\textsuperscript{340} It distinguishes telecommunications service from information service\textsuperscript{341} but offers no particular requirements for those information services. The assumption has been that information services were designed as an inherently unregulated zone. Members of the information-service industry often describe information services as “Title I” services, as if any regulation must come under that section of the Act.\textsuperscript{342}

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


\textsuperscript{337} See id. at 1000–03.

\textsuperscript{338} See FCC v. Midwest Video Corp. (\textit{Midwest Video II}), 440 U.S. 689, 704–09 (1979).

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


\textsuperscript{341} See id. § 153(20), (46).

\textsuperscript{342} See \textit{NUECHTERLEIN & WEISER}, supra note 6, at 213 ("[I]ndustry participants often use ‘Title I’ (as in a ‘Title I service’) as a shorthand for ‘deregulated’ and ‘Title II’ as a shorthand for ‘regulated.’").


\textsuperscript{344} See id. § 201.
that some regulatory obligations would be consistent with the congressional mandate. 345

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

C. The Interconnection Mandates of Sections 251 and 256

1. The Statutory Scheme

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

The statute is still called the Communications Act, but portions of it were dramatically changed in the 1996 overhaul. 349 In particular, Congress added a new set of rules for the interconnected environment of competing providers that it envisioned would replace the traditional environment of regulated common carriers. 350 These rules modified and expanded Title II of the original Act. Although the title of the relevant section of the Act is still “Common Carriers,” only the first of three parts describes common-carriage requirements. 351 Section 201, for example, requires common carriers (and only common carriers) to furnish service “upon reasonable request” and charge “just and reasonable” rates. 352 The rest of Title II, though, has broader applicability and can therefore serve as a basis for rules governing Internet-based communications.

345 If information services were intended to be wholly outside the statutory scheme, their inclusion in the definitions section would be superfluous.
346 See Weiser, supra note 7, at 56 (“[A] Title I-based regime begins from the premise that no regulation applies and that the FCC can develop any reasonable regulations that are ancillary to its statutory mandate.”).
347 See Comcast Order, supra note 2, at 13,036–44.
348 Weiser, supra note 7, at 65–66.
349 See Nuechterlein & Weiser, supra note 6, at 69–113.
351 See id. § 201. The definition of a common carrier is circular: it is “any person engaged as a common carrier for hire, in interstate or foreign communication.” Id. § 153(10).
352 Id. § 201(a)–(b).
The general regulatory pronouncements governing telecommunications networks are in Part II of Subchapter II of the Communications Act as codified, "Development of Competitive Markets." The substantive provisions that apply generally, not just to incumbents, are section 251 (requiring interconnection), and section 256 (requiring coordination for interconnectivity). The sections have a common theme of open interconnection. Providers of telecommunications services must interconnect, they must do so through open standards, and they must share infrastructure. There is, therefore, a clear congressional vision to promote open, interconnected networks.

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

By limiting the scope of sections 251 and 256 to telecommunications carriers, Congress limited regulation of pure information-services markets, such as instant messaging and social networks. But nothing suggests that Congress intended to limit openness of network

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353 Id. §§ 251-61.
354 Id. § 251.
355 Id. § 256. Section 259 requires sharing of infrastructure with "qualifying carrier[s]" but has limited applicability. Id. § 259(a).
356 See Motion Picture Ass’n of Am., Inc. v. FCC, 309 F.3d 796, 804 (D.C. Cir. 2002) ("Both the terms of § 1 and the case law amplifying it focus on the FCC’s power to promote the accessibility and universality of transmission . . . ."). In Motion Picture Ass’n of America, the D.C. Circuit rejected the FCC’s claim of ancillary jurisdiction to issue rules for television video descriptions. Even that skeptical court recognized that there is a place for ancillary authority in the area considered here. See id.
357 This is the significance of the statutory provision that, “A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. § 153(44).
358 See Bob Fernandez, Comcast First-Quarter Revenue Up 5 Percent, PHILA. INQUIRER, May 1, 2009, LexisNexis Academic.
360 Id. § 256(a)(2).
361 See generally Werbach, supra note 54 (discussing Internet backbone and application interconnection). The FCC was able to impose interconnection obligations on AOL’s instant-messaging service in connection with its merger with Time Warner. See AOL-Time Warner Merger Order, supra note 279, at 6603–04. There, however, the FCC had specific statutory authority to review and impose conditions on mergers involving change of control over spectrum licenses. See id. at 6610–11. The Commission only had to show that instant messaging fell within its general section 152 authority and that the conditions were

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

The most recent congressional action concerning broadband networks reinforces this interpretation. The American Recovery and Reinvestment Act, the massive economic stimulus package adopted in early 2009, includes significant funding for broadband deployment.\textsuperscript{363} The grants are to be administered by the Department of Agriculture and the National Telecommunications and Information Administration (NTIA) of the Department of Commerce, but the funding is contingent on FCC open-access and interoperability mandates: "[The NTIA Administrator], in coordination with the [FCC], publish the non-discrimination and network interconnection obligations that shall be contractual conditions of grants awarded under this section, including, at a minimum, adherence to the principles contained in the Commission’s broadband policy statement (FCC 05-15, adopted August 5, 2005)."\textsuperscript{364} Rather than chastise the FCC for adopting the Policy Statement and the Comcast Order, Congress incorporated the Commission’s policies as its own.

Because the public debate around the Telecommunications Act of 1996 focused on the potential emergence of competition for local telephone and cable-television services, as well as the removal of regulatory obligations on the successors to the AT&T monopoly,\textsuperscript{365} provisions geared to those specific transitional situations garnered a disproportionate share of attention and statutory text.\textsuperscript{366} Now that those processes are mostly complete, the Act’s core common-carrier obligations and broader requirements such as sections 251 and 256 remain.

A conception of FCC jurisdiction over the Internet grounded in sections 251 and 256 would address Justice Scalia’s desire to check the agency’s ability to manipulate the scope of its authority.\textsuperscript{367} This approach would not, for example, support FCC imposition of rules regulating online content or social policies such as 911 emergency services related to the merger. \textit{See id.} Rules covering instant messaging in other contexts would be more difficult to justify.

\textsuperscript{362} \textit{See supra} text accompanying notes 215–24. In the 1996 Act, Congress also directed the FCC to forbear from enforcing any provision of the statute that it determines is not necessary, if doing so would serve the public interest. \textit{See} 47 U.S.C. § 160(a). This authorization to shrink the Commission’s authority mirrors the flexibility embodied in ancillary jurisdiction to interpret statutory mandates more broadly.


\textsuperscript{364} \textit{Id.} § 6001(j).

\textsuperscript{365} Nuechterlein & Weiser, \textit{supra} note 6, at 69–74.

\textsuperscript{366} \textit{See} Huber et al., \textit{supra} note 18, at 226–32, 256–58.

\textsuperscript{367} \textit{See supra} text accompanying note 336.
and access for law enforcement.\textsuperscript{368} Nor would it allow the FCC to impose obligations such as the broadcast flag or other digital-rights management technologies.\textsuperscript{369} None of these regulations would have a sufficient nexus with the goal of promoting open interconnection to fall under the statutory authority.\textsuperscript{370}

2. \textit{Section 251: Interconnection}

Section 251(a)(1) requires telecommunications carriers “to interconnect directly or indirectly” with other carriers.\textsuperscript{371} This broad mandate, the first substantive provision Congress added to the Communications Act in 1996, demonstrates a recognition of the centrality of interconnection to competition in telecommunications.\textsuperscript{372} Without effective interconnection, network effects crowd out smaller players.\textsuperscript{373} Interconnection becomes even more important with the rise of packet-data networks such as the Internet, built on the assumption that traffic may flow between multiple networks dynamically to reach its destination.\textsuperscript{374} Requiring a broadband-access provider such as Comcast to offer effective interconnection with other networks, and with application providers, is the contemporary analogue of interconnection among telephone companies.

That section 251(a)(1) covers telecommunications carriers only is not an impediment to ancillary jurisdiction over Internet communications services. First, the reference in the statute to “indirectly” interconnecting indicates a broader understanding of interconnection than just links among classic telecommunications carriers.\textsuperscript{375} Second, the point of ancillary jurisdiction is that the statute admits of new obligations to address new situations. The precise interconnection obligations that section 251 places on telecommunications carriers should

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

\textsuperscript{369} See Crawford, \textit{supra} note 6, at 709–27; Werbach, \textit{supra} note 17, at 58–68.

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


\textsuperscript{372} See Werbach, \textit{supra} note 54, at 1241–43.

\textsuperscript{373} See id.; Werbach, \textit{supra} note 9, at 403.

\textsuperscript{374} See Werbach, \textit{supra} note 54, at 1250–57.

\textsuperscript{375} 47 U.S.C. § 251(a)(1).
not be mechanically extended to information services, lest the statutory language become meaningless.

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

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

3. Section 256: Standards

Section 256 concerns the FCC’s involvement in network management and standards development. The section expresses a desire “to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications service.” Specifically, section 256 directs the Commission to establish procedures “for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications

376 Previously, such operators were classified as telecommunications-service providers.
377 See supra Part III.A.
379 Id.
380 See supra Part III.A.
service" and authorizes the Commission to continue its practice of participating in telecommunications-standards processes.

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

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

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

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382 Id. § 256(b)(1).
383 Id. § 256(b)(2).
384 Id. § 256(d). In fact, section 256 uses the term “telecommunications” nineteen times.
385 Id. § 256(c).
389 47 U.S.C. § 256(c).
390 See Wireline Broadband Order, supra note 32, at 14,919, para. 120.
391 Comcast Order, supra note 2, at 13,039, para. 19.
In a world where traditional public telecommunications networks and newer Internet-data-transmission networks are pervasively interconnected, it makes no sense to preclude the FCC’s interoperability efforts from affecting information services. The limiting language in section 256 prevents the FCC from defining standards for private networks, or information services networks that do not interconnect with the public-telephone network. It should not be read to preclude addressing Internet communications services.

4. Delegation

Tying ancillary authority over the Internet to sections 251 and 256 also cures the delegation problem with the FCC’s current approach. These provisions arguably represent the legislative directive and the “intelligible principles” to cabin the authority of the regulatory agency. Unlike the FCC’s view, in which the rules for information services arise either from an inaccurate reading of section 230 or an abstract generalization of the “national Internet policy” that Congress intended in the 1996 Act, this interpretation limits the FCC’s discretion according to the congressional language of two specific statutory provisions.

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

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

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392 See Werbach, supra note 54, at 1261–66.
393 See supra Part II.B.
394 See supra Part II.A.
396 See Weiser, supra note 7, at 49–52.
397 United States v. Mead Corp., 533 U.S. 218, 237 (2001) (precluding Chevron deference “where statutory circumstances indicate no intent to delegate general authority to make rules with force of law”); see Weiser, supra note 7, at 50.
398 See supra Parts III.C.1–3.
400 But see Crawford, supra note 6 (invoking Brown & Williamson to argue against FCC ancillary jurisdiction over the Internet).
found that "Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products."  

The Court refused to grant the agency Chevron deference where "based on the . . . overall regulatory scheme and the subsequent tobacco legislation" congressional intent to bar the FDA from taking such steps could be inferred.  

In the present case, however, Congress considered and eliminated statutory language from the Telecommunication Act of 1996 that would have barred FCC rulemaking authority over the Internet. The section of the Cox–Wyden bill dropped in the Conference Committee would have had such an effect. Had Congress wished to limit FCC Internet rulemaking, it would have left that provision in the statute. Any analogy to Brown & Williamson therefore rests on the overly speculative interpretation of section 230 attacked in Part III.

D. Finding Reason in the Communications Act

1. Critiques of Title I Authority

Some commentators criticize the ancillary-jurisdiction doctrine. They argue that it should never have been adopted, or at a minimum, it should be limited to situations directly analogous to Southwestern Cable. Thomas Merrill and Kathryn Watts assert that section 4(i) grants the FCC authority only on matters of internal procedure. Jim Speta acknowledges some validity for ancillary jurisdiction but argues that its application cannot be extended to the Internet. Crawford expresses concern that Title I authority over Internet-based services such as VoIP will be used to impose unnecessary regulatory impediments on new competitive entrants.

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

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402 Id. at 160.
403 See supra text accompanying note 164.
404 See supra text accompanying note 164.
405 See, e.g., Crawford, supra note 6, at 734–35.
406 See id. at 730–35; Rob Frieden, Neither Fish Nor Fowl: New Strategies for Selective Regulation of Information Services, 6 J. ON TELECOMM. & HIGH TECH. L. 373 (2008); Speta, supra note 7, at 24–26.
408 See Speta, supra note 7, at 24 ("If the section 4(i) grant of authority included legislative rulemaking, then the specific inclusion of these other substantive grants would be redundant."). Speta favors interconnection obligations for Internet-based providers. Id. at 38–39. His concern is that such mandates must be specified in a new congressional delegation, rather than imposed by the FCC under its existing authority. Id. at 16–17.
409 See Crawford, supra note 6, at 715–16.
1996 overhaul granted the FCC legislative-rulemaking authority over only three classes of companies: interstate common carriers, spectrum licensees, and cable-television providers. However, that changed when Congress revamped the statute. The 1996 legislation added several new categories, including telecommunications and information services. It was only in 1996 that the statute expressly mentioned information services; the predecessor category of enhanced services was purely an FCC interpretive creation. And the 1996 Act layered rules on telecommunications providers, such as the section 251 interconnection mandate, on top of the more intensive but less broadly applicable rules for common carriers. "Telecommunications carrier" is expressly broader than "common carrier" under the 1996 Act.

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

When considering the scope of the FCC's ancillary authority today, the current statutory blueprint is the baseline. In 1968, the Supreme Court could only consider what FCC actions were necessary to achieve its statutory mandates for common carriers and broadcasters. Today, the FCC can act as necessary to carry out its functions regarding not just these categories, but also cable providers, telecommunications-service providers, and information-service providers. A view that Internet-based services are beyond the reach of the Commission's authority would undermine the modern statutory scheme. The FCC's ancillary jurisdiction is not unlimited, as the broadcast-flag case demonstrated, but neither is it so narrow as to be nonexistent.\footnote{Speta argues that assertion of ancillary authority over Internet-based services “runs square into the central theme of the Telecommunications Act of 1996 . . . , which was the introduction of competition into all telecommunications markets.”\footnote{Speta, supra note 7, at 26.} See Broadcast Flag Order, supra note 282, at 23,566–67. If Internet-based services such as VoIP compete with regulated telecommunications services, he notes, the preferred solution under the 1996 Act is deregulation rather than new regulation.\footnote{See id.} Although this argument may have some purchase in the VoIP-regulation cases with which Crawford is concerned, it is inapposite to the broadband-access scenario.\footnote{See Crawford, supra note 6, at 715–16.} The danger is not competition but regulatory arbitrage. If telecommunications carriers can escape from interconnection obligations by offering broadband service, section 251 becomes meaningless. Competition does not change this outcome.

In essence, the critiques of FCC authority rest on the agency's flawed assumption that such authority must flow from section 230. Congress must affirmatively transfer some legislative authority to an agency before that agency can act.\footnote{See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984); Thomas W. Merrill, Rethinking Article I, Section I: From Nondelagation to Exclusive Delegation, 104 COLUM. L. REV. 2097, 2100 (2004).} The view adopted by the FCC in the Comcast Order and other decisions is that Congress did so when it

Congress, by not passing legislation to delegate authority over broadband access to the FCC, intended to withhold such authority, the response to the Comcast Order should have been moves to roll back the Commission's decision. Instead, the pattern is consistent with the idea that Congress was concerned that the FCC would not act to address broadband discrimination because it was unsure of the limits of its authority. This further distinguishes the FCC from the FDA scenario of Brown & Williamson. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160–61 (2000); Crawford, supra note 6, at 698.
told the FCC, in section 230(b)(1), "to promote the continued development of the Internet."\textsuperscript{425} Opponents of that view emphasize that what Congress giveth in section 230(b)(1), Congress taketh away in section 230(b)(2), which demands an Internet "unfettered by Federal or State regulation."\textsuperscript{426} There is ultimately no way to square these two statements, which makes them ideal for selective quotation.\textsuperscript{427}

Grounding exercise of ancillary jurisdiction over the Internet in the substantive-interconnection provisions of Title II avoids these problems. The congressional directive is clear. Regulation of Internet communications services gains continuity with the long history of FCC rules to promote open interconnection.\textsuperscript{428}

2. The Disaggregated Alternative

The FCC retains the option to go back to the old regime of separating regulated platforms from unregulated devices and content, although such a course would be unwise. In theory, the Commission could reverse its \textit{Wireline Broadband Order}, reimposing the \textit{Computer III} non-structural safeguards on the telecommunications component of broadband services offered by common carriers. The \textit{Brand X} decision upheld the FCC's exercise of discretion in doing so as not arbitrary and capricious.\textsuperscript{429} The courts have not yet passed on whether, as a matter of law, integrated broadband offerings could be separated into their telecommunications and information-services components.

While re-separating the components of broadband access is legally permissible, it would represent an inferior alternative to the ancillary-jurisdiction approach. Legally separating broadband access from its underlying telecommunications platform would simply reopen the vexing issues that led the Commission down its current path. Drawing lines between telecommunications and information services, in a world where both use digital-packet data networks, is next to impossible. Even a few years ago, AT&T was able to transform its backbone traffic into packets to arbitrage around access-charge requirements for telecommunications services.\textsuperscript{430} Network operators

\begin{itemize}
\item \textsuperscript{426} Id. § 230(b)(2).
\item \textsuperscript{427} An interpretation that Congress intended for the FCC to "promote" the Internet entirely by keeping it "unfettered by... regulation," \textit{id.} § 230(b)(1), (2), would be inconsistent with the history of section 230 and its relationship with the Communications Decency Act, \textit{see supra} Part II.A. Moreover, in the current broadband environment, it is impossible to demarcate where the regulated telephone and cable networks end and the unfettered Internet begins. The Internet is a network of networks run by network operators. Regulation of the largest of those network operators is regulation of the Internet.
\item \textsuperscript{428} \textit{See} Werbach, \textit{supra} note 54, at 1249–50.
\item \textsuperscript{429} Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005).
\item \textsuperscript{430} \textit{See supra} note 48 and accompanying text.
\end{itemize}
such as Verizon and AT&T are moving toward all-IP networks for business and technical reasons. If FCC rules distinguished between regulated and unregulated components of a broadband pipe, they would be impossible to enforce.

The *Computer III* rules are problematic for other reasons. They were cumbersome to apply and burdened legitimate service innovation, because they required detailed filings. The Commission could attempt to reopen the proceeding and develop a less cumbersome set of rules. However, it is difficult to see how the challenges involved would be any easier today. The Commission could instead require structural or functional separation among the offerings of broadband access providers. Several telecommunications-policy scholars now advocate this approach, although so far it has enjoyed little political support in the United States.

3. *Institutional Competence*

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

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

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

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

433 See supra note 77 and accompanying text.

434 See Weiser, supra note 7, at 49.


437 There is also room for hybrid models. Weiser, for example, proposes that the FCC could superintend mechanisms that use post-hoc, antitrust-like standards or that involve self-regulatory organizations. See Weiser, supra note 230, at 33–39; Philip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN. L. REV. 273, 318 (2008); Weiser, supra note 7, at 74–80.
first substantial overhaul of the telecommunications provisions of the Act adopted.\textsuperscript{438}

When Congress does get involved, the powerful competing interests tend to create a lobbying food fight, the results of which are unpredictable and often problematic.\textsuperscript{439} As discussed above, there have been rumblings for several years about a "fix" for the problems with the 1996 Act, and numerous bills introduced,\textsuperscript{440} but so far the critical mass has been absent to overcome this political burden. It seems dangerous to rely on Congress to amend the FCC's authority on a regular basis to impose specific mandates for cutting-edge Internet-based services.

Nor are the courts likely to take on a major role. In 1983, antitrust was the sword that broke up the mighty AT&T monopoly.\textsuperscript{441} A quarter-century later, the Supreme Court has sharply limited the prospects for antitrust litigation as a means to ensure the openness of broadband-Internet platforms.\textsuperscript{442} In two recent cases, the Court rejected antitrust claims against incumbent local-exchange carriers. In 2004, the Court held in \textit{Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP} that the FCC's comprehensive regulatory scheme precluded assertion of an antitrust claim on a refusal-to-deal theory.\textsuperscript{443} \textit{Pacific Bell v. Linkline}, issued in February 2009, extended that holding for a price-squeeze claim by a broadband-access competitor.\textsuperscript{444} The Court further concluded that AT&T had no duties toward competitors under antitrust law because, "as the FCC has recognized . . .[,] the market for high-speed Internet service is now quite competitive."\textsuperscript{445} Rightly or wrongly, the Court views the FCC as the proper forum for competitive issues arising out of the broadband-access market.\textsuperscript{446}

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

\textsuperscript{438} See \textit{supra} text accompanying note 411.


\textsuperscript{440} See \textit{supra} note 419.


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


\textsuperscript{444} See \textit{Pac. Bell Tel. Co. v. Linkline Commc'n s, Inc.}, No. 07-512, slip op. at 9–10 (Feb. 25, 2009).

\textsuperscript{445} Id. at 8 n.2.

\textsuperscript{446} The Federal Trade Commission, another potential avenue for antitrust-like regulation of the Internet-access market, is also poorly positioned to engage the competitive aspects of broadband networks, as opposed to their consumer-protections implications. See Jon Leibowitz, Comm'r, Fed. Commc'n Comm'n, \textit{Broadband Connectivity Competition Policy} (2007), available at http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf.
that market must take seriously the legal foundations for FCC involvement. A desired outcome is useless without a path to achieve that outcome.

CONCLUSION

Twentieth-century regulation is holding back the twenty-first century information ecosystem. For the first time, a universal platform—the Internet—connects every kind of communications network.\(^\text{447}\) Moreover, it is by design an open network, allowing any user to reach any point, using any compatible device, running any software and delivering any content the user chooses.\(^\text{448}\) Innovation has flourished, from the Blackberry to Facebook, iTunes to Google, Wikipedia to Tivo, with the promise of even more extraordinary things to come.\(^\text{449}\) The problem is that all those services and devices require one thing: a network pipe to reach their customers. And those pipes, be they wired or wireless, broadband or narrowband, copper or fiber, belong to network operators who operate in a very different environment. Without restraints, those network providers could destroy or pervert the activities on top of their networks.

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

\(^{447}\) See Werbach, *supra* note 9, at 348–49.
\(^{448}\) See Van Schewick, *supra* note 10, at 1; Lemley & Lessig, *supra* note 9, at 931; Werbach, *supra* note 9, at 400–02.