

# THE SHAKY FOUNDATIONS OF THE REGULATED INTERNET

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INTRODUCTION .....	101
I. THE COMCAST ORDER'S VISION OF FCC INTERNET REGULATION .....	106
A. <i>A (Very) Little Communications Act Set-up</i> .....	106
B. <i>The Comcast Order</i> .....	112
II. A NARROWER, DOCTRINALLY-SOUND FCC INTERNET JURISDICTION.....	120
III. THE POLICY GROUNDS.....	126
A. <i>A Supplemented (But Still Narrow) Internet Jurisdiction</i> .....	128
B. <i>Substantive Provisions</i> .....	131
C. <i>The Comcast Order Redux</i> .....	133
CONCLUSION .....	134

## INTRODUCTION

This is a true story: In 1972, a group purporting to represent all television viewers in the Chicago area petitioned the Federal Communications Commission to forbid the construction of the Sears Tower,<sup>1</sup> on the ground that, if built, it “would throw ‘multiple ghost images’ on television receivers in many areas of the Greater Chicago Metropolitan Area.”<sup>2</sup> Against the argument that (surely) the FCC had no authority to regulate the building of skyscrapers, petitioners relied on the relatively recent Supreme Court decision in *United States v. Southwestern Cable Co.*,<sup>3</sup> in which the Court held that the Commission could forbid cable television companies from importing distant broadcast signals—even though the Communications Act nowhere mentioned cable television.<sup>4</sup> The court in the Sears Tower case summed up the petitioner’s theory:

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1. Just re-named the “Willis Tower.” Also true. See <http://www.willistower.com/propertyprofile.html>.

2. Ill. Citizens Comm. for Broad. v. FCC, 467 F.2d 1397, 1398 (7th Cir. 1972).

3. 392 U.S. 157 (1968).

4. Reflecting that they rarely originated their own programming at the time, the systems were known as “community antenna” television. See *id.* at 159, 161–62.

The Act's provisions apply not only to "persons engaged in communications or transmission" and "radio stations" but also "the communications in themselves." [Therefore], if the "communications" are within the FCC's power to regulate, so are all activities which "substantially affect communications," in this case, the construction of a very tall office building.<sup>5</sup>

The FCC rejected the claim that it had jurisdiction over the Sears Tower,<sup>6</sup> and the Seventh Circuit also had little trouble concluding that the idea was "far too broad."<sup>7</sup>

The FCC's recent *Comcast* decision<sup>8</sup> raises some of the same questions as this little-remembered episode. Whatever may have been the truth or merit of the Internet as "unregulated"<sup>9</sup>—or even as "unregulable"<sup>10</sup>—those days are officially over. In the *Comcast* decision, the Federal Communications Commission accepted all of the broadest arguments for its regulatory authority over the Internet. In doing so, however, the *Comcast* order reveals a conundrum. On the one hand, if accepted, the FCC's broadest theories give it unlimited authority to regulate the Internet, nearly as broad as the theory that the FCC could control buildings to prevent interference with broadcasters. On the other hand, a more limited FCC authority does not address purely Internet issues, such as that involved in the decision—possible cable carrier discrimination against Internet video. I do not wish to overstate the parallels to the Sears Tower case, for several reasons. First, skyscrapers are not engaged in communications, and the Internet is, of course, a communications medium. Surely this matters to the FCC's regulatory authority. In fact, the FCC could (except that it has decided that it would be bad policy to do so) easily find that Internet transmission was common carrier service<sup>11</sup>—and all dispute over its regulatory authority would disappear.<sup>12</sup> Second, regulation of pieces of the Internet is of

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5. *Ill. Citizens Comm. for Broad.*, 467 F.2d at 1399.

6. Apparently, a similar notion arose in 1967, around the construction of the World Trade Center in New York, and the FCC held hearings on the construction's effects on television reception. One FCC Commissioner was prompted to write that the FCC had no authority over building issues. *Id.* at 1400–01.

7. *Id.* at 1400.

8. Formal Complaint of Free Press and Pub. Knowledge Against Comcast Corp., *Memorandum Opinion & Order*, 23 FCC Rcd. 13,028 (2008) [hereinafter *Comcast Order*].

9. See Jason Oxman, *The FCC and the Unregulation of the Internet* (FCC Office of Policy and Plans Working Paper No. 31, 1999), available at [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp31.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf).

10. See John Perry Barlow, *A Declaration of the Independence of Cyberspace*, EFF, Feb. 8, 1996, <http://homes.eff.org/~barlow/Declaration-Final.html>.

11. See James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 269–71 (2002) [hereinafter Speta, *A Common Carrier Approach*].

12. The FCC has undoubted authority to impose nondiscrimination requirements such as those imposed in the *Comcast* order and generally desired by network neutrality advocates

course nothing new. Many countries regulate the whole Internet, at least within their own borders.<sup>13</sup> Even in the United States, many Internet activities are subject to specific legislation and regulation (and of course to much general legislation). What is new with the *Comcast* decision is the FCC's assertion of plenary authority over any aspect of even pure Internet transmission services. Although the holding of the decision—that a cable Internet provider may not selectively and surreptitiously degrade certain applications carried over its system—seems narrower, the FCC's description of its Internet authority knows no limit.

This is noteworthy because a limited notion of even potential Internet regulation held sway for more than 40 years, beginning with the FCC's articulating a distinction between “basic” and “enhanced” services.<sup>14</sup> Under this model, the FCC maintained that it had *some* regulatory authority over enhanced (now “information” and “Internet”) services, but it also maintained that its regulatory authority was limited—that it did not extend to the agency's nearly plenary authority over common carriers and spectrum licensees. This was consistent with the Supreme Court's definition of the agency's “ancillary jurisdiction” as only that regulatory power “necessary to” the FCC's other, more affirmatively-granted, regulatory powers. The *Comcast* decision—or at least the language of that decision—blows the doors off any notion of the FCC's limited role over Internet services.

This article assesses the FCC's jurisdictional contentions as a roadmap for, as this panel was named, looking at the future of regulatory institutions for the Internet. This may seem like an old fight, especially measured in Internet time. In an earlier article, I argued that the FCC had no authority to regulate the Internet.<sup>15</sup> The Supreme Court has since written that it does, although without any exposition.<sup>16</sup> The project for now is to assess whether a principled delimitation—principled boundaries—can be found for the FCC's regulatory jurisdiction.<sup>17</sup>

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under 47 U.S.C. § 202(a) (requiring common carriers to provide service on a nondiscriminatory basis) and § 201(b) (its general rulemaking authority for Title II).

13. See generally JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD (2008).

14. See generally Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED. COMM. L.J. 167 (2003).

15. James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 22–26 (2003) [hereinafter Speta, *FCC Authority to Regulate*].

16. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., Inc.*, 545 U.S. 967 (2005); see *infra* notes 68–69 and accompanying text.

17. Even those who contend that the Communications Act already grants to the FCC broad authority to regulate Internet carriers acknowledge that the FCC's regulatory jurisdiction must be bounded by something—that the Act cannot be read to give the FCC plenary jurisdiction to adopt any regulations of Internet carriers. See Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 63 (2003) (“In order to withstand judicial scrutiny, the Commission must develop a limiting standard to contain the

Why re-till this ground now? I believe that adequate formalist grounds exist: “It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”<sup>18</sup> Indeed, given that the Constitution vests legislative authority in the Congress, one might say that adherence to the rule of law requires that any agency lawmaking trace its origins back to a statute delegating that authority.<sup>19</sup> More importantly, good Internet policy requires it. If, as many are coming to believe, some structure is needed for the resolution of Internet policy issues, those structures need a solid legal basis. Even if one is focused on efforts largely led by the industry itself (which I think is the right approach), those structures eventually require the backstop of law. As Professor Philip Weiser, who has done the most detailed work on these co-regulatory models, has written, “the ability of the agency to adjudicate disputes effectively may well prove critical to empowering” private solutions in the first place.<sup>20</sup> That even any voluntary effort will be shaped by the possibility of government action is simply a corollary of a broader point, that regulation’s potential scope inevitably affects behaviors in the market: firms will modify their behaviors to forestall more active regulatory attention. Although Congressional attention is always possible, the costs of new legislation are higher than the cost of agency action. Confirmed FCC authority, even if unexercised, would therefore have a greater expected effect on market behavior than the always-present potential for new legislation. In other words, both those who desire greater Internet regulation and those who oppose it should attend to the FCC’s statements concerning its power in this realm.

While timely, I do not here intend to review all of the debate over the FCC’s regulatory powers—either in general or in relation to the *Comcast* order.<sup>21</sup> Much has been written about the FCC’s so-called

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reach of its authority over the Internet.” [hereinafter Weiser, *Regulatory Strategy*].

18. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

19. Thomas Merrill makes essentially this argument in support of his “exclusive delegation” reading of Article I’s vesting clause. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004). A statute is not the only possible source for agency lawmaking, for it is possible that some executive branch lawmaking could be traced to an independent source of authority in article II, but the FCC’s authority to regulate the Internet does not implicate that possibility. *See id.* at 2101.

20. Philip J. Weiser, *The Future of Internet Regulation* 37 (Colorado Legal Studies Research Paper Series, Working Paper No. 09-02, 2009), available at <http://ssrn.com/abstract=1344757> [hereinafter Weiser, *Internet Regulation*].

21. Other recent articles addressing the FCC’s regulatory authority in the *Comcast* order include Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871 (2009); Barbara Esbin & Adam Marcus, “*The Law Is Whatever the Nobles Do*”: *Undue Process at the FCC*, 17 COMM.LAW CONSP. 535 (2009); Andrew Gioia, Note, *FCC Jurisdiction over ISPs in Protocol-Specific Bandwidth Throttling*, 15 MICH. TELECOMM. & TECH. L. REV. 517

ancillary authority in general<sup>22</sup> and, as noted, about how that ancillary authority might be exercised over the Internet.<sup>23</sup> And the parties have and will argue the *Comcast* decision. I wish to focus on the broader conundrum: choosing between the type of incredibly broad regulatory jurisdiction the FCC claims in the order, and a narrower, more doctrinally sound theory, but one that does not necessarily address the needs of good Internet policy.

This article has four pieces. First, I review the FCC's *Comcast* decision and argue that it offers a wholly untenable view of the FCC's Internet jurisdiction. If that decision were taken on its terms, the FCC would have at least as much power to regulate Internet services as it does common carrier services—and perhaps more. That notion is inconsistent with any prior notion of the agency's “ancillary” jurisdiction as a jurisdiction that merely provides a supporting role to common carrier and spectrum regulation. Second, I consider whether the *Comcast* order can nevertheless support a narrower version of the FCC's Internet authority, one that is consistent with the law on ancillary jurisdiction. For contrast, I also examine the FTC's claim to Internet jurisdiction. Third, I ask whether either of these visions—the broad or the narrower version of the FCC's Internet jurisdiction—accord with good Internet policy, or at least with a range of good Internet policy choices.

Last, I conclude with my vision for the FCC in the Internet age (or, perhaps more accurately, my broader agenda for Congressional action to create an FCC agenda for the Internet age). I believe that the FCC should and will play an important role in the Internet age, although I also agree with several of the vigorous critiques of its behavior in recent years.<sup>24</sup> I necessarily reject, then, proposals to abolish the FCC and replace it with either antitrust-only enforcement or with a new, even broader innovation agency. I believe that adding *some* Internet jurisdiction to the FCC's powers makes sense; but I also believe that the FCC should not have general “innovation” authority, authority that might extend to markets (such as content and applications) where it has

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(2009); Aaron K. Brauer-Rieke, Note, *The FCC Tackles Net Neutrality: Agency Jurisdiction and the Comcast Order*, 24 BERKELEY TECH. L.J. 593 (2009).

22. See, e.g., Thomas G. Krattenmaker & A. Richard Metzger, Jr., *FCC Regulatory Authority over Commercial Television Networks: The Role of Ancillary Jurisdiction*, 77 NW. U. L. REV. 403 (1982); Mark D. Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 DENV. U. L. REV. 477 (1976); Joseph R. Fogarty & Marcia Spielholz, *FCC Cable Jurisdiction: From Zero to Plenary in 25 Years*, 37 FED. COMM. L.J. 113 (1985).

23. See Speta, *FCC Authority to Regulate*, *supra* note 15; Weiser, *Internet Regulation*, *supra* note 20; Jim Chen, *The Authority to Regulate Broadband Internet Access Over Cable*, 16 BERKELEY TECH. L.J. 677 (2001).

24. See PHILIP J. WEISER, REFORMING THE FCC, FCC REFORM AND THE FUTURE OF COMMUNICATIONS POLICY (2009), <http://fcc-reform.org/f/fccref/weiser-20090105.pdf>.

no historic role or expertise. I also believe that Congress should relieve the FCC of the burdens that come from much of its broadcast regulation, so that it might focus on the future of communications—the Internet.

## I. THE COMCAST ORDER'S VISION OF FCC INTERNET REGULATION

### A. *A (Very) Little Communications Act Set-up*

As is well-known, the substantive provisions of the Communications Act are grouped into three titles, each of which is centered on a particular kind of service: Title II covers interstate common carriers (telephone and telegraph companies); Title III covers spectrum licensees (largely broadcasters); and Title VI covers cable television companies. Each of these titles contains a grant of rulemaking authority.<sup>25</sup> Title I, at the beginning of the Act, states the purpose of the Commission and describes its organization and operation. Title I also includes a general rulemaking grant, saying that “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”<sup>26</sup>

This general rulemaking grant could be read very broadly or very narrowly. The broad reading looks to sections 1 and 2 of the Act. Section 1 states that the FCC is established “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio;”<sup>27</sup> section 2 states that “[t]he provisions of this chapter shall apply to all interstate and foreign communications by wire or radio.”<sup>28</sup> Section 4 thus could be read as giving the FCC regulatory authority over all “communications by wire or radio.” The narrow version is to conclude that Title I’s rulemaking authority is merely a procedural provision, not giving the agency any substantive lawmaking authority. The section in which it appears (section 4),<sup>29</sup> after all, merely describes the FCC’s structure and procedure. And no penalty provision in the Communications Act is linked to the FCC’s Title I rulemaking provision. Starting from first principles of administrative law and attending to the convoluted history of the Act, Professors Thomas Merrill and Kathryn Tongue Watts argued (in my view correctly) that

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25. 47 U.S.C. §§ 202(b), 544 (2008).

26. 47 U.S.C. § 154(i) (2008).

27. 47 U.S.C. § 151 (2008).

28. 47 U.S.C. § 152(a) (2008).

29. *See generally* 47 U.S.C. § 154 (2008).

Title I does in fact confer only “procedural rulemaking powers,”<sup>30</sup> and not the authority to act with the force of law.<sup>31</sup>

Our brief review of the FCC’s authority, however, must start elsewhere, for the Supreme Court has, since the *Southwestern Cable* decision in 1968, held that Title I gives the FCC an “ancillary jurisdiction” to act generally in the communications field but has cabined that authority short of the broadest version over all communications.<sup>32</sup> The decision’s holding is that the FCC could regulate cable companies’ carriage of broadcast programming, even though cable companies were nowhere mentioned in the Communications Act. In supporting this expansion of the FCC’s powers, the *Southwestern Cable* decision relied, in part, on language from the Court’s earlier (1943) *National Broadcasting Co.* case.<sup>33</sup> There, the Court said that, in passing the Communications Act, “Congress was acting in a field of regulation which was both new and dynamic. . . . In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly, but expansive powers,”<sup>34</sup> and the Court affirmed regulations designed to limit the relationship between broadcasters and networks. But *NBC* itself is not really an ancillary jurisdiction case, for all of the FCC’s regulations were directed to broadcast licensees themselves. In *Southwestern Cable*, the Court for the first time affirmed FCC regulation of an entity that was not a common carrier or a spectrum licensee.

The cases following *Southwestern Cable* seem to me to establish four important principles to govern the FCC’s ancillary jurisdiction.

*First*, the FCC does have some regulatory authority over those who provide “communications by wire or radio,”<sup>35</sup> even if the providers are

30. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 517–519 (2002).

31. *Id.*

32. *See generally* Krattenmaker & Metzger, *supra* note 22.

33. *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943).

34. *Id.* at 219; *see* *United States v. Sw. Cable Co.*, 392 U.S. 157, 173 (1968) (quoting this language).

35. The mission statement for the FCC reads:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the “Federal Communications Commission”, which shall be constituted as hereinafter provided, and which shall execute and

not common carriers, spectrum licensees, or cable television providers. In the three ancillary jurisdiction cases to reach the Supreme Court, the Supreme Court found that the FCC could regulate (to some degree) cable television services, notwithstanding that those services were not (then) mentioned anywhere in the Communications Act's specific provisions.<sup>36</sup> The Merrill-Watts argument suggests that these cases were wrongly decided,<sup>37</sup> and I have suggested that they may be inconsistent with more modern and well-developed administrative law (a point I elaborate on below<sup>38</sup>). But the Supreme Court has never questioned the cases.

*Second*, as a corollary, the FCC does not have jurisdiction over entities that are not communications carriers (meaning entities that do not transmit communications by wire or radio), even if their activities may *affect* communications by wire or radio. Thus, the Seventh Circuit held that the FCC could not block the building of the Sears Tower in Chicago just because its presence would create a transmission shadow, interfering with television reception by many thousands in the Chicago area.<sup>39</sup> More recently, the D.C. Circuit struck down the FCC's attempt to require digital televisions and digital television recorders to incorporate and follow a "broadcast flag" that would have prevented the copying of programs on digital over-the-air television.<sup>40</sup> The FCC's theory was that copy protection was necessary to ensure that high-quality programming was made available to broadcast television, which furthered the general goal of promoting broadcasting. The D.C. Circuit disagreed. Even

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enforce the provisions of this Act.

47 U.S.C. § 151 (2008). Congress further intended that the authority of the FCC would apply broadly:

The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI.

*Id.* § 152(a).

36. See *supra* notes 33–34 and accompanying text.

37. See Merrill & Watts, *supra* note 30; see also Merrill, *supra* note 19, at 2169 (calling the ancillary jurisdiction cases "spectacular breaches" of the principle that agencies can act only with power delegated to them by Congress).

38. See Speta, *FCC Authority to Regulate*, *supra* note 15, at 25 n.56; see also *infra* notes 101–10 and accompanying text.

39. See *supra* notes 1–2 and accompanying text.

40. *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691–92 (D.C. Cir. 2005).



though “communications by radio” includes “instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission,”<sup>41</sup> the D.C. Circuit held that the broadcast flag rule operated *after* the transmission was complete and was outside the FCC’s power to regulate communications entities.<sup>42</sup> While the court acknowledged the FCC’s power to set standards for the reception of broadcasts (e.g., radio and television standards),<sup>43</sup> the court said that the FCC does not have the power to regulate equipment except in the equipment’s receiving function. Similarly, the D.C. Circuit held that FCC mandatory video-description rules regulated content and not communications and were therefore outside the agency’s ancillary authority.<sup>44</sup>

I think of these first two requirements as a statement of the FCC’s *general* jurisdiction, derived from the broadest provisions of Title I. Thus, the first section of the Communications Act states that the FCC was created “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio.”<sup>45</sup> And section 2 says that “[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio.”<sup>46</sup> In other words, the FCC’s ancillary jurisdiction *only* arises over those entities that transmit communications by wire or radio.<sup>47</sup> The third and fourth principles governing ancillary jurisdiction define the limits of the FCC’s authority to regulate communications entities generally.

*Third*, the FCC’s authority over entities engaged in

41. 47 U.S.C. § 153(33) (2008).

42. *Am. Library Ass’n*, 406 F.3d at 691–92.

43. The FCC does not, as a practical matter, need the authority to mandate the manufacture of televisions that can decode broadcast signals. It has the authority to set transmission standards, and manufacturers who want to sell televisions that can receive such signals will need to manufacture sets that receive the signals. Nevertheless, the FCC has frequently exercised authority to set receiver requirements.

44. *MPAA 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, not to regulate program content. . . . To regulate in the area of programming, the FCC must find its authority in provisions other than § 1.”).

45. 47 U.S.C. § 151 (2008). The provision, however, cuts back on the breadth of this statement by saying that “there is created a commission to be known as the ‘Federal Communications Commission,’ which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.” *Id.* Section 151 has never been read as its own grant of regulatory authority.

46. 47 U.S.C. § 152(a) (2008). Again, this section has not been read as an independent grant of regulatory authority.

47. Professor Thomas Krattenmaker and Richard Metzger argued that the FCC’s ancillary jurisdiction should also include entities that “use” transmission facilities, at least as a fundamental part of their business. This argument was made to ensure that the FCC had the authority *directly* to regulate broadcast networks (and not merely to indirectly regulate them as conditions on the licensees themselves). *See* Krattenmaker & Metzger, *supra* note 22.

“communications by wire or radio” who are not common carriers, spectrum licensees, or cable television providers is limited to such regulations “necessary to ensure the achievement of the Commission’s statutory responsibilities.”<sup>48</sup> Those statutory responsibilities must be found in the substantive titles of the Act, and they must entail FCC authority to act with the force and effect of law. This encompasses two important limitations. First, Title I, standing alone, does not give the agency regulatory power: The Court made this clear in *FCC v. Midwest Video Corp. (Midwest Video II)*: “[W]ithout reference to the provisions of the Act directly governing broadcasting, the Commission’s jurisdiction under § 2(a) would be unbounded. Though afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority.”<sup>49</sup> Other cases have echoed the same view.<sup>50</sup> Second, as a more general corollary, the FCC’s ancillary authority does not flow merely from *policies* announced in the Communications Act. Rather, the FCC’s ancillary authority flows from policies that the FCC has been given legal authority to implement. And because Title I does not itself grant regulatory authority over all communications carriers, the FCC’s ancillary authority over those carriers (i.e., those not common carriers or spectrum licensees) must flow from regulatory authority that *is* granted over common carriers, spectrum licensees, and cable television and must protect or further those specifically-enumerated regulatory powers.<sup>51</sup>

This second limiting principle is evident in each of the Supreme Court’s ancillary jurisdiction cases and in the leading court of appeals cases. Thus, in *Southwestern Cable*, the Court noted that “[t]he Commission has . . . been granted authority to allocate broadcasting zones or areas, and to provide regulations ‘as it may deem necessary’ to prevent interference among the various stations.”<sup>52</sup> The FCC’s rules forbade cable television systems from importing distant signals, because the practice would practically eliminate the effect of its rules setting local

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48. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

49. *Id.* (citation omitted).

50. In the *Sears Tower* case, the Seventh Circuit said of *Southwestern Cable* that “[t]he Court appeared to be treading lightly even where the activity at issue easily falls within [Title I].” *Ill. Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972). The D.C. Circuit said of the Supreme Court’s decisions: “In each of these decisions, the Court followed a very cautious approach in deciding whether the Commission had validly invoked its ancillary jurisdiction, even when the regulations under review clearly addressed ‘communication by wire or radio.’” *Am. Library. Ass’n v. FCC*, 406 F.3d 689, 702 (D.C. Cir. 2005).

51. This is, perhaps, the key dividing line, for the FCC’s theory is, essentially, that section 4(i) gives it regulatory authority so long as it can trace the exercise of that regulatory authority to a policy in the Act itself. See *Comcast Order*, *supra* note 8, ¶ 15 at 13,035 (stating that the Commission has regulatory authority because of the articulation of a “national Internet policy”).

52. *United States v. Sw. Cable Co.*, 392 U.S. 157, 174 (1968).

areas for broadcasters.<sup>53</sup> Similarly, in *United States v. Midwest Video Corp. (Midwest Video I)*,<sup>54</sup> the most controversial of the Court's cases, the FCC required large cable systems that carried local broadcast channels to also provide locally originated cable programs.<sup>55</sup> The plurality said that "[t]he goals specified [of increasing local programming] are plainly within the Commission's mandate for the regulation of television broadcasting."<sup>56</sup> Of course, Chief Justice Burger's concurrence is even narrower, and he said that "[c]andor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts."<sup>57</sup> He found the regulation permissible because it only applied where the cable system took a broadcasting signal:

Those who exploit the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution—are not exactly strangers to the stream of broadcasting. The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission.<sup>58</sup>

This theory is much narrower than the plurality's; it essentially says that the FCC could forbid the carriage of broadcast signals on cable (a seemingly uncontroversial proposition) and, as such, it can also impose conditions.

*Fourth*, because the exercise of ancillary authority must further the policies of the Act's substantive provisions, the FCC cannot use its ancillary authority to contradict specific provisions or general policies found in the Act. This was a central point of *Midwest Video II*.<sup>59</sup> There, the Court relevantly held that, because the Communications Act forbade the Commission to treat broadcasters as common carriers,<sup>60</sup> the Commission could not require cable television companies to offer part of their capacity on a common carriage basis.<sup>61</sup> This also confirms both aspects of the third principle, for if Title I gave the FCC the authority to regulate communications by wire, a specific prohibition on treating broadcasters as common carriers should not prohibit common carrier

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53. *See id.* at 175–76.

54. 406 U.S. 649 (1972).

55. *Id.* at 653.

56. *Id.* at 668.

57. *Id.* at 676 (Burger, C. J., concurring).

58. *Id.*

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

60. 47 U.S.C. § 153(10) (2008) (“[A] person engaged in . . . broadcasting shall not . . . be deemed a common carrier.”).

61. *FCC v. Midwest Video Corp.*, 440 U.S. at 707–09.

rules for cable operators. Similarly, *Midwest Video II* rejects the argument that the Commission has ancillary jurisdiction just because “rules promote statutory objectives.”<sup>62</sup>

In short, the test for the FCC’s ancillary jurisdiction is usually stated as having two parts: (1) that the FCC seeks to regulate communications by wire or radio, and (2) that the regulation furthers the FCC’s recognized substantive powers over common carriers, spectrum licensees, or cable television.

### B. *The Comcast Order*

Before the *Comcast* order itself, the FCC had previously asserted ancillary jurisdiction to regulate certain Internet services, but the issue had not been tested in court. For example, the FCC required the providers of VOIP “to contribute to the Universal Service Fund.”<sup>63</sup> In part, the FCC asserted its ancillary jurisdiction to do so.<sup>64</sup> The D.C. Circuit, however, affirmed the rule based only on the FCC’s authority to require universal service contributions from “[a]ny other provider of interstate telecommunications . . . if the public interest so requires.”<sup>65</sup> Similarly, the FCC preempted state regulation of VOIP services and in part relied on its ancillary authority, because it did not (in that order) decide whether VOIP was a telecommunications service or an information service.<sup>66</sup> But in affirming the FCC’s order the Eighth Circuit did not address the FCC’s ancillary jurisdiction to regulate VOIP, a necessary predicate to its ability to preempt state regulation if VOIP is an information service.<sup>67</sup> Similarly, the FCC has routinely asserted its authority to regulate information services—should it need to do so.<sup>68</sup> Notably, however, in almost every instance, the FCC’s assertion came in orders in which it did not actually regulate.

As a contrast to the FCC’s unreviewed assertions of ancillary authority over Internet services, the Supreme Court has written that the Commission has at least some ancillary jurisdiction to regulate Internet services, although the question really was not presented to the Court. In *Brand X*, the Court upheld the FCC’s decision to treat cable Internet

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62. *Id.* at 702.

63. *See* Vonage Holdings Corp. v. FCC, 489 F.3d 1232, 1235 (D.C. Cir. 2007).

64. *Id.* at 1236.

65. *Id.* at 1241 (citing 47 U.S.C. § 254(d) (2002)) (noting that the court was not addressing the FCC’s ancillary jurisdiction theory).

66. *See* Minn. Pub. Utilities. Comm’n v. FCC, 483 F.3d 570, 577–78 (8th Cir. 2007).

67. *See id.*

68. *See, e.g.*, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Policy Statement*, 20 FCC Rcd. 14,986, 14,986–88 (2005) (asserting that the FCC “has jurisdiction necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner”).

access service as an “information service” and not as a “telecommunications service.”<sup>69</sup> Responding to the argument that all facilities-based providers of information services should be treated as common carriers, the Court said the FCC’s previous policy of doing so (at least in large part) was not enshrined in the Communications Act itself. But the Court also added that “the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction. In fact, it has invited comment on whether it can and should do so.”<sup>70</sup>

With this background, we can turn to the *Comcast* decision. As an initial matter, the Commission is surely right that Comcast and other Internet companies provide “communications by wire” (or radio)<sup>71</sup> and are therefore within the agency’s “general jurisdiction.”<sup>72</sup> At this first level, the issue is closer to the FCC’s regulation of cable than of skyscrapers or digital video recorders. As already noted, the FCC probably could regulate much Internet service as common carrier service.<sup>73</sup> In several earlier cases, the courts have affirmed the FCC’s use of ancillary authority to preempt state regulation of services that the FCC had previously treated as a common carrier service, such as customer premises equipment and inside wiring.<sup>74</sup>

The *Comcast* decision therefore turns on the FCC’s description of how its Internet regulation meets the third and fourth criteria described above, namely how the regulation furthers the FCC’s regulatory powers. In brief, the FCC’s decision faces the difficult choice of appropriate breadth—either too broad or too narrow. Largely, the FCC’s decision is simply too broad: it claims the power to both regulate the price and quality of Internet services, and it does not otherwise provide a limit on the FCC’s Internet regulation. And the decision does not offer a narrower theory of its jurisdiction that would allow it to control Internet

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69. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 970–71 (2005).

70. *Id.* at 996. A second reference to ancillary jurisdiction in *Brand X* does not provide any clues to the possible scope of the FCC’s regulatory authority, but is merely a summary: “Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications, see §§ 151–161.” *Id.* at 976.

71. 47 U.S.C. § 153 (2008) (defining these terms).

72. *See supra* notes 35–37 and accompanying text.

73. The consequences of that decision would be that Title II’s economic regulation would apply—including tariff-filing, rate-setting, and other requirements. The FCC could forebear from such requirements, under authority granted by the Telecommunications Act of 1996. *See* 47 U.S.C. §§ 160–161 (2008). But, forbearance can occur only after the FCC determines the state of competition in a market, which the FCC may be reluctant to do. *See id.* § 160(b).

74. *See, e.g.*, Computer & Commc’ns Indus. Ass’n v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

video service.

The FCC's broadest, most significant claim is that the Communications Act itself demonstrates Internet policies that allow the Commission to regulate.<sup>75</sup> The FCC does not (in this regard) assert that some section of the Act gives it the express power to regulate Internet carriers. Rather, the agency makes what might be called a second-order ancillary jurisdiction argument. Instead of tracing its ancillary authority to a provision of the Act that grants it the power to similarly regulate common carriers, broadcasters, or cable companies, the FCC claims that, in certain sections of the Communications Act, Congress has set out specific policies concerning the Internet and that its ancillary jurisdiction can be exercised in pursuit of those goals.

At one level, this is an appealing argument, for one could see the court-imposed restrictions on ancillary jurisdiction as motivated by nondelegation doctrine concerns.<sup>76</sup> If the FCC did have unfettered jurisdiction to regulate all communications companies, the problem would arise that the statute gives the FCC no direction on *how* to regulate—except of course in its specific provisions in Titles II, III, and VI, which is why the courts have tied ancillary jurisdiction to these substantive titles. As Justice Brennan's plurality opinion in *Midwest Video I* said: "The conclusion [that Congress intended the FCC to have authority over communications generally] did not end the analysis [in *Southwestern Cable*], for § 2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over CATV might properly be exercised."<sup>77</sup> The *Midwest Video II* Court put it more strongly: "Though afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority. The Court regarded the Commission's regulatory effort at issue in *Southwestern* as consistent with the Act because it had been found necessary to ensure the achievement of the Commission's statutory responsibilities."<sup>78</sup>

Even apart from these precedents, I think it difficult to read the very few instances in which the Act mentions the Internet into a general delegation by Congress to the FCC to regulate the Internet. At the threshold, these provisions do not, of course, instruct the FCC to regulate the Internet. More importantly, the policies are either so broad

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75. See *Comcast Order*, *supra* note 8, ¶¶ 12–21 at 13,033–36.

76. The nondelegation doctrine, if one exists (see generally Eric A. Posner & Adrian Vermuele, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Merrill, *supra* note 19), maintains that the Constitution limits Congress's ability to make broad, unconditional, and undirected delegations of legislative authority to the executive and administrative agencies.

77. *United States v. Midwest Video Corp.*, 406 U.S. 649, 661 (1972).

78. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

as to be directionless (rebutting the idea that Congress was instructing the FCC to regulate) or so particular that they could not support a broad authority for the FCC. As many commentators have noted, Congress in passing the 1996 Act did not address the Internet.<sup>79</sup>

The most conspicuous place in which the Internet appears in the Communications Act derives from the Communications Decency Act, that part of the 1996 Act that sought to regulate Internet indecency.<sup>80</sup> The content provisions were, of course, struck down in *Reno v. ACLU*,<sup>81</sup> but the CDA's immunity for online service providers remains intact and is codified in section 230 of the Communications Act.<sup>82</sup> In this section, the *Comcast* order found a "national Internet policy,"<sup>83</sup> which Title I's general rulemaking gave it authority to implement. Section 230(b) does, in fact, make several policy statements concerning the Internet:

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;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.<sup>84</sup>

The FCC's reliance on these policy statements, however, has two

79. E.g., John C. Roberts, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 53 SMU L. REV. 143, 149 (2000) ("Indeed, since the 1996 Act was developed by House and Senate committees in 1994 and 1995, it almost completely failed to anticipate the Internet and the impact that Internet-based telecommunications services would have on this complex web of technological and industrial development.").

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

81. 521 U.S. 844 (1997).

82. 47 U.S.C. § 230 (2006).

83. *Comcast Order*, *supra* note 8, at 13,034 (¶ 13).

84. 47 U.S.C. § 230(b).

difficulties. First, nothing in section 230 grants the FCC any regulatory authority to do anything: that section merely grants immunities to online service providers if they block and screen (or if they do not block and screen) user-generated content.<sup>85</sup> As I have already noted, the FCC's ancillary authority must be ancillary to regulatory authority that the Act otherwise gives to it: it cannot merely be ancillary to a general policy expressed somewhere in the Act.<sup>86</sup>

Second, section 230(b) itself states the purpose "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."<sup>87</sup> It is hard to believe that Congress intended this section, which explicitly states that the Internet should be "unfettered by Federal . . . regulation," to give the FCC the authority to regulate the Internet.<sup>88</sup>

In fact, one of the fundamental problems with the FCC's theory, both in its use of section 230 and more generally, is that the policies stated are so broad and encompassing that the FCC would have the authority to adopt nearly any conceivable Internet regulation. Section 230(b)'s breadth is evident. But the Commission also relies on section 1 of the Act itself,<sup>89</sup> which the decision says "directs 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.'"<sup>90</sup> Setting aside the rhetorical sleight of hand—the section does not "direct" the Commission to do these things, but rather says that the Commission

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85. *Id.* § 230(c).

86. The FCC did not rely on section 201(b), as interpreted by the Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), for regulatory authority to implement § 230(b). The issue in that case was the FCC's power to make rules to implement the local competition provisions of the Telecommunications Act of 1996. *Id.* at 370. The Court held that section 201(b), which says that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter," included the authority to make rules for intrastate telecommunications (which previously had been outside the Commission's jurisdiction). *Id.* at 377–86. The Court reasoned that, by placing the 1996 Act within the Communications Act, Congress triggered section 201(b)'s regulatory authority. *Id.* Professors Merrill and Watts have already shown that this reading is based on what is probably an improper codification of a 1938 amendment to the Act. See Merrill & Watts, *supra* note 30, at 482–83. But one need not find *Iowa Utilities Board* to be incorrect to recognize that its reasoning would not apply here. The 1996 Act indisputably brought local telecommunications within federal regulation (that is, brought the subject within the Communications Act). But, as discussed in the text, nothing in the Act indicates a desire for FCC regulation of the Internet.

87. 47 U.S.C. § 230(b)(2).

88. *Id.*

89. 47 U.S.C. § 151 (2006).

90. *Comcast Order*, *supra* note 8, ¶ 16 at 13,036 (quoting 47 U.S.C. § 151 (2006)).



is established for these “purposes”<sup>91</sup>—the interpretation simply wipes away any limits on the FCC’s ancillary powers, for nearly anything could be said to make communications “efficient” in the language of section 1 or “to promote the continued development of the Internet” in the language of section 230.

This catch-22 is revealed by other aspects of the order. For example, citing section 1, the Commission said that “we find that exercising jurisdiction over the complaint would promote the goal of achieving ‘reasonable charges,’” reasoning that “free” Internet video (which the order makes more available) “should result in downward pressure on cable television prices.”<sup>92</sup> Similarly, relying on section 706,<sup>93</sup> the FCC said that it had authority to “prohibit[] network operators from blocking or degrading consumer access to desirable content and applications” because such actions would “increase[] consumer demand for high-speed Internet access and, therefore, increase[] deployment to meet that demand.”<sup>94</sup> Taken together, the FCC has said that it has authority both to control the economics and quality of Internet service (because any aspect could affect its price or consumer demand). This is nothing short of unfettered authority to regulate any aspect of the Internet—even to recreate the rate-setting and other economic regulation characteristic of common carrier regulation.

The FCC’s alternative bases for regulatory authority seem at the outset more promising, because they rely on more specific sections of the Act, but ultimately they suffer the same difficulty. In order to link them up to the particular action the FCC took (of regulating the Internet carrier’s delivery of a video service), the FCC has to offer a theory that gives it essentially unlimited authority over the Internet. Noting the possibility that some DSL providers could offer that service on a Title II basis, the FCC said that Comcast’s disabling some peer-to-peer sessions could shift some traffic to DSL service “increasing the costs of its Title

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91. 47 U.S.C. § 151.

92. *Comcast Order*, *supra* note 8, ¶ 16 at 13,036.

93. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996) (codified as amended at 47 U.S.C. § 157). The section generally states that “[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” The FCC did not contend that section 706 itself gave it regulatory authority. *See Comcast Order*, *supra* note 8, at 13,038 ¶ 18 & n.81. Because that section specifically requires a study and then specifies a particular course of action—Commission action to “remov[e] barriers to infrastructure investment” if the study reveals that advanced telecommunications capability is not being adequately deployed—the section could not support a broader authority. Telecommunications Act of 1996 § 706. *Cf.* Motion Picture Ass’n of Am. v. FCC, 309 F.3d 796, 802 (D.C. Cir. 2002) (holding that specific Congressional instructions on video description regulation precluded inference that FCC had broader, discretionary authority).

94. *Comcast Order*, *supra* note 8, ¶ 18 at 13,039.

II-regulated competitors with whom it interconnects.”<sup>95</sup> The Commission said this implicated its Title II authority to ensure that “[a]ll charges” are “just and reasonable.”<sup>96</sup> The problem again is that nearly everything affects the interconnected Internet: increasing the amount of traffic on non-Title II carriers could increase the traffic on Title II carriers (increasing the amount they pay for transit, as the FCC suggests) or it could decrease the amount of traffic by taking away customers (reducing their revenues and hurting capital recovery). Last, in relying on the Act’s statements that the Commission should encourage market entry for entrepreneurs<sup>97</sup> and the general purposes of the cable Title,<sup>98</sup> the FCC has not identified a particular regulatory power from which its ancillary jurisdiction flows.<sup>99</sup>

When all of these pieces are considered together, the *Comcast* order rests on a number of theories of FCC regulation that give the agency the authority to regulate the Internet in virtually any way. The FCC claims authority to determine the price and quality of Internet services, including the quality of content services. The FCC also claims the authority to regulate traffic flows handled by those who are not common carriers, because such traffic flows could affect Internet traffic being carried on a common carrier basis by other carriers. At its broadest, the FCC claims the authority to take steps to “promote” Internet service and to make it “efficient.”

Recent Supreme Court administrative law cases suggest a reluctance to find such a broad delegation of authority to an administrative agency without more explicit statutory instruction. The clear administrative law trend is to treat the question of agency authority—whether Congress has in fact delegated to an administrative agency the power to act with the force and effect of law—as a question for the courts to decide without giving deference to the agency’s own views. In *United States v. Mead Corp.*, for example, the Court said *Chevron* deference applies to agency interpretations only after the court has satisfied itself that “Congress delegated authority to the agency generally to make rules carrying the force of law.”<sup>100</sup> And two cases confirm the Supreme Court’s reluctance to find expansive agency authority in the absence of a clear statement by

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95. *Id.* ¶ 17 at 13,038.

96. 47 U.S.C. § 201(b) (2006).

97. 47 U.S.C. § 257 (2006); *Comcast Order*, *supra* note 8, ¶ 20 at 13,041.

98. 47 U.S.C. § 521 (2006); *Comcast Order*, *supra* note 8, ¶ 21 at 13,042.

99. Section 257 says, specifically, that the Commission’s actions must be “pursuant to its authority under this chapter (other than this section).” 47 U.S.C. § 257. As a result, the FCC would have to trace this policy through a Title II authority in order to satisfy the requirements of ancillary jurisdiction. Similarly, the cable section is entirely a “purposes” section. 47 U.S.C. § 521.

100. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

Congress. In *Gonzales v. Oregon*, the Court held that “Congress did not delegate to the Attorney General authority to carry out or effect all provisions of the [Controlled Substances Act].”<sup>101</sup> In so doing, the Court remarked that “the Attorney General claims extraordinary authority” including “unrestrained” power to criminalize physician conduct.<sup>102</sup> And the Court thought it “would be anomalous for Congress to have so painstakingly described the Attorney General’s limited authority” over individual physician registration and then to have also granted broad authority in ambiguous terms.<sup>103</sup> The Court made a similar point in *FDA v. Brown & Williamson Tobacco Corp.*,<sup>104</sup> when it held that the FDA did not have authority to regulate tobacco and cigarettes even though the statute gave it lawmaking authority over all “drugs”—defined as “articles (other than food) intended to affect the structure or any function of the body”<sup>105</sup>—and all “devices”—defined in similarly broad terms.<sup>106</sup> The Court identified a number of statutes that seemed to assume that the FDA did not have authority to regulate tobacco. But more fundamentally, the Court noted that “[c]ontrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy.”<sup>107</sup> The Court simply found it impossible to believe, without clear evidence, that Congress intended the agency to have such significant power.

Without a doubt, the FCC’s *Comcast* decision is the sort of jurisdiction-expanding decision to which the courts should not defer.<sup>108</sup> In fact, this episode shares much in common with both *Gonzalez* and *Brown & Williamson*. In *Gonzales*, the Court thought it significant that the statute specifically mentioned actions that the Attorney General was empowered to take, and inferred from this statutory evidence that the Attorney General did not have broader authority. The few mentions of the Internet in the Communications Act support similar inference. As noted, section 230, which articulates a vague Internet policy, grants the

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101. *Gonzales v. Oregon*, 546 U.S. 243, 259 (2006).

102. *Id.* at 262.

103. *Id.*

104. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

105. *Id.* at 126.

106. *Id.* (defining device to include “an instrument, apparatus, implement, machine, contrivance, . . . part, or accessory, which is . . . intended to affect the structure or any function of the body”).

107. *Id.* at 129.

108. Tom Merrill suggests that an agency’s opinion on its own jurisdiction should receive *Skidmore* deference. See Merrill, *supra* note 19, at 2174–75. But *Skidmore* deference depends on the agency’s opinion being consistent, long-standing, and logically reasoned. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). The FCC’s opinion does not meet these standards for deference.

FCC no authority and shows no awareness that the FCC would implement that policy in any manner.<sup>109</sup> Section 706, on advanced telecommunications capability, enumerates a very limited number of steps the FCC could take—all deregulatory actions directed to telecommunications and not to information services.<sup>110</sup> The universal service section does give the FCC the authority to raise funds from services that begin to substitute for traditional telecom services, but this is a very limited grant of authority (and one which would not be necessary if the FCC otherwise had plenary authority over the Internet).<sup>111</sup> In *Brown & Williamson*, the Court found it significant that several bills that would have given the FDA express authority over tobacco had failed to pass Congress. Here, net neutrality legislation has been repeatedly proposed, but has yet to pass.

## II. A NARROWER, DOCTRINALLY-SOUND FCC INTERNET JURISDICTION

One could conclude that the FCC simply has no authority to regulate Internet carriers, at all. But that would ignore the Supreme Court's statements in *Brand X*, and only the Supreme Court is free to call its own statements *dicta*. And arguments that the FCC has no authority over anything that Internet carriers do runs head-long against the ancillary jurisdiction cases which say that the FCC does have some regulatory authority over entities engaged in communications by wire or radio, even if those entities are not otherwise mentioned in the Act.

What is needed, then, is a doctrinally sound, more narrowly-tailored view of the FCC's ancillary jurisdiction over Internet carriers. Internet carriers are those entities providing "communications by wire or radio" that the FCC has classified as providing information services. A cable company, broadband over power line, or any wireless company providing Internet access service would qualify, but content and applications providers would not. The FCC's ancillary authority should be recognized in circumstances where the Internet carrier is providing or carrying a service regulated by the Communications Act. I mean this in the technical sense of a common carrier, broadcast, or cable service, and not in the broader sense of a service similar in functionality to common carrier, broadcast, or cable service.<sup>112</sup> It would not be sufficient that the Internet regulation involve voice, or video, or another service (such as

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109. See *supra* notes 80–83 and accompanying text.

110. See *supra* notes 93–94 and accompanying text.

111. See *supra* notes 63–64 and accompanying text.

112. As noted, it is this broader sense that Professor Weiser proposes. See Weiser, *Regulatory Strategy*, *supra* note 17; Weiser, *Internet Regulation*, *supra* note 20, and accompanying text.

text chat) that was identical to or a substitute for common carrier, broadcast, or cable service.

A few operational examples should make clear the scope of this rule. For a first example, the FCC would have jurisdiction over Internet carriers' treatment of what it calls "interconnected VOIP"—voice over Internet protocol services that interconnect with the traditional common carrier service (the public switched telephone network).<sup>113</sup> I would restrict this to interconnected VOIP services where the subscriber takes a traditional telephone number—that is, where there is clearly Title II traffic being delivered to the Internet carrier for completion of a telephone call—and not just to those VOIP services that allow out-calling. But the FCC would not have any authority (under ancillary jurisdiction) to regulate non-interconnected VOIP—services such as voice GChat, AIM chat, or packet8 that are solely on-the-Internet voice connections.<sup>114</sup>

For a second example, the FCC would have jurisdiction over Internet carriers' real-time transmission of broadcast programming and their offering of cable television service. To the extent that broadcast streams are being placed onto Internet carriers' facilities, the analogy to Supreme Court cases upholding jurisdiction over cable television would be clear. But this would not give the FCC jurisdiction over the Internet carriers' treatment of other video services, such as YouTube or even sites that host previously-aired broadcast content. In the cable television cases, cable television systems took advantage of their copyright exemption to carry broadcast programs without permission,<sup>115</sup> upsetting the FCC's ability to set territories for and ensure the health of broadcasters.<sup>116</sup> By contrast, previously-broadcast content available on the Internet (at sites such as Hulu.com)—at least the *legal* content—is provided through contractual agreement with the content-providers; broadcasters can and do protect their interests through negotiation with the content providers. Additionally, to the extent that a broadband provider offers a "cable service," as Verizon's FIOS and AT&T's U-verse products do, the FCC would have authority to regulate, although ancillary jurisdiction would probably not be necessary as these services meet the statutory definition

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113. See 47 C.F.R. § 9.3 (2006) (defining Interconnected VOIP).

114. This is the decision the FCC made explicit in the *Free World Dialup* order: Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecomms. Nor a Telecomms. Serv., *Memorandum Opinion & Order*, 19 FCC Rcd. 3307 (2004).

115. See *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974) (cable television systems do not infringe copyright by carrying broadcast programs).

116. See *United States v. Sw. Cable Co.*, 392 U.S. 157, 175 (1968) ("The Commission has reasonably found that . . . [cable] importation of distant signals into the service areas of local stations may also 'destroy or seriously degrade the service offered by a television broadcaster,' . . . and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations.").

of cable services.<sup>117</sup>

This, more limited ambit for the FCC's ancillary jurisdiction actually fits with most of the FCC's current policy and with the precedents. Consider VOIP: on policy grounds, the FCC has made the distinction between interconnected VOIP and non-interconnected VOIP. Under CALEA, the FCC has held that interconnected-VOIP providers must engineer their services to allow law-enforcement wiretapping. In fact, the FCC interpreted the term "telecommunications" to include VOIP for purposes of CALEA, even though it has held that, under the Communications Act more generally, VOIP is not telecommunications.<sup>118</sup> The FCC has also held that interconnected VOIP services must make universal-service fund contributions, while non-interconnected VOIP need not.<sup>119</sup>

Similarly, each of the ancillary jurisdiction cases arises from circumstances in which the regulation applied to the carriage of a common carrier, broadcast, or cable service by a communications provider. *Southwestern Cable* and *Midwest Video I & II* concerned regulations of, or conditions on, cable television providers' retransmission of broadcast streams. At this time, cable companies did little more than carry broadcast transmissions, and several of the opinions speak as if the cable regulations are tied to the use of real-time broadcast content. For example, the court in *Southwestern Cable* commented:

CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers. CATV systems characteristically do not produce their own programming, and do not recompense producers or broadcasters for use of the programming which they receive and redistribute.<sup>120</sup>

Chief Justice Burger's concurring—and controlling—opinion in *Midwest Video I* makes the same point: "CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act."<sup>121</sup>

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117. See 47 U.S.C. § 522(6) (2006) (defining cable service).

118. See *Am. Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006) (affirming the FCC's decision).

119. See *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

120. See *Cable Co.*, 392 U.S. at 161–62.

121. *United States v. Midwest Video Corp.*, 406 U.S. 649, 675 (1972) (Burger, C.J., concurring); see also *id.* at 676 ("Those who exploit the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution—are not exactly strangers to the stream of broadcasting. The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission.").

Similarly, if one looks at the specific facts and context of the ancillary jurisdiction cases, one sees that FCC authority has been upheld only where the FCC is asserting regulatory authority over something that is adjunct to a service that the FCC has express statutory authority to regulate.<sup>122</sup> This sort of common-law exercise—of looking at the actual scope of the FCC’s authority in context—is particularly important given the varying (and occasionally ambiguous) manner in which the test for ancillary jurisdiction has been framed. Thus, for example, several courts of appeals have affirmed the FCC’s ancillary jurisdiction to regulate broadcast networks, but the Commission’s rules really were directed at the regulated broadcast licensee’s offering of broadcast programming.<sup>123</sup> Another allowed ancillary jurisdiction over a telephone company’s provision of cable television service, which of course also involved retransmission of broadcast signals.<sup>124</sup> The D.C. Circuit upheld the FCC’s preemption of state regulation of customer premises equipment (CPE), which the FCC had just deregulated. CPE had previously been a Title II service, was physically connected to the Title II telephone network, and FCC preemption was designed to prevent “any misallocation of costs between an entity’s competitive and monopoly services [which] would allow the carrier to justify higher rates for its monopoly services.”<sup>125</sup> Later FCC preemption of inside wiring (also only used to convey Title II services and attached to the Title II network) was similarly upheld.<sup>126</sup> Ancillary authority to create a universal service fund was also affirmed, but was probably unnecessary, as funding universal service had long been an element of Title II ratemaking.<sup>127</sup> Finally, the FCC used (and the court approved) ancillary jurisdiction to order common carriers that provided enhanced services to do so through a

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122. By the “ancillary jurisdiction” cases, I mean the cases in which this theory was expressly discussed. One can slice the cases somewhat differently by, for example, looking for cases that rely on the FCC’s authority under section 4(i), 47 U.S.C. § 154(i), but do not describe the theory as one of “ancillary jurisdiction.” *See, e.g.,* *Lincoln Tel. Co. v. FCC* 659 F.2d 1092, 1107–09 (D.C. Cir. 1981). There, the court cites to 4(i) as the FCC’s source of authority to fill a gap left by section 205. But in this case (as in other section 4(i) cases), the FCC is pointing at another statutory section that gives it express authority to regulate. These cases, therefore, do not stand for an expansion of FCC authority to pursue “goals” or “policies.”

123. *See Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 479–82 (2d Cir. 1971) (prime time access and financial and syndication regulations); *CBS, Inc. v. FCC*, 629 F.2d 1, 25–27 (D.C. Cir. 1980) (applying equal time rules to networks). In fact, networks are arguably within the text of the Communications Act, for several sections speak of “chain broadcasting.” *See Mt. Mansfield Television*, 442 F.2d at 481; *CBS*, 629 F.2d at 27; *see also generally* Krattenmaker & Metzger, *supra* note 22.

124. *General Tel. Co. v. U.S.*, 449 F.2d 846, 854 (5th Cir. 1971) (also concluding that § 214 gave the FCC express authority to regulate).

125. *Computer & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982).

126. *Nat’l Assoc. of Regulatory Util. Comm’rs v. FCC*, 880 F.2d 422, 429–30 (D.C. Cir. 1989).

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

separate subsidiary; in this case, the common carriers' own enhanced services were clearly adjunct to their Title II services.<sup>128</sup>

In fact, I believe that it also makes sense of the Supreme Court's statement in *Brand X*.<sup>129</sup> In the particular passage, the Supreme Court was responding to an argument that the FCC had earlier regulated the provision of enhanced services by facilities-based providers of such services. The FCC did do so, but that regulation was imposed on common carriers that both used their facilities to provide enhanced services and provided the raw transport necessary for others to do so.<sup>130</sup> In other words, the FCC's regulation of facilities-based enhanced service providers grew out of those companies' common carrier services, and the common carriers' own enhanced services were similarly "adjunct" to their common carrier services. The FCC wanted to ensure that common carriers did not subsidize their enhanced services with common carrier revenues or deny common carrier services to their competitors. In short, the FCC regulation controlled common carrier services, and the Supreme Court's statement about the FCC possibly regulating Internet access service should be read in the same limited manner.<sup>131</sup>

Under this view, the FCC's authority to enter orders such as the one in *Madison River Telephone Co.* would be confirmed. There, a consent decree ordered a local telephone company to cease interrupting the delivery of VOIP calls on its DSL service.<sup>132</sup> The FCC relied on both its Title II and its ancillary jurisdictions. But it is not clear that Title II jurisdiction would have been enough, because Madison River's actions were most likely on its non-common-carrier DSL service,<sup>133</sup> and Title II jurisdiction itself applies only to common carrier services. Title II does not apply to non-common carrier services, even if provided by entities

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128. *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730-31 (2d Cir. 1973).

129. See *supra* note 69 and accompanying text.

130. See generally Cannon, *supra* note 14, at 177-78 ("Telephone companies had both the ability and the incentive to act in an anticompetitive manner. They sat in an unusual place in the market of being both supplier and competitor to the data processing services. The Commission expressed misgivings about whether permitting telephone companies to enter the data processing market was prudent, questioning whether telephone companies should be permitted into this market at all."); see also *id.* at 192 (discussing restrictions imposed in the *Computer II* proceedings).

131. To be sure, the statement is "dicta" because the question of the FCC's ancillary authority to regulate was not before the Court, but only the Supreme Court is allowed to call its statements dicta.

132. *Madison River Commc'ns, LLC and Affiliated Co., Order*, 20 FCC Red. 4296 (2005).

133. See Declan McCullagh, *Telco Agrees To Stop Blocking VoIP Calls*, CNET NEWS, March 3, 2005, [http://news.cnet.com/Telco-agrees-to-stop-blocking-VoIP-calls/2100-7352\\_3-5598633.html](http://news.cnet.com/Telco-agrees-to-stop-blocking-VoIP-calls/2100-7352_3-5598633.html) (describing Madison River's actions as "port-blocking" on its Internet access service).



that are also common carriers.<sup>134</sup> But the FCC has adequate ancillary jurisdiction under this narrower theory, because the interrupted VOIP service was interconnected VOIP service—that is, it is an extension of the dominant common-carrier telephone service.

One objection to this theory is that it does not actually limit the FCC's jurisdiction over Internet services. Recall that in the *Comcast* order, the FCC said that it allowed Internet services to be provided on a Title II basis and, as a result, some Internet traffic handled by common carriers (as common carrier service) might interconnect with non-common carrier Internet service. Under this theory, then, one could argue that the FCC has jurisdiction over all Internet services because they interconnect with common carrier Internet services. For two reasons, I am not moved by this objection. First, it is not at all clear that any Internet access services are provided on a common carrier basis. The *Comcast* order does not provide any reference for the claim, other than to orders that say that carriers *could* offer Internet service in that manner. Given how hard the major DSL companies pushed to have their services re-classified as information services, it is hard to believe that they would choose common carrier status.

Second, such a broad theory of ancillary jurisdiction should collapse on itself, because it would deny the consequences of the FCC's initial classification decision. The FCC has consistently held that its regulatory powers under Title I are less extensive than the public utility regulation under Title II.<sup>135</sup> If the FCC's ancillary authority were as broad as it has claimed, then the distinction between its regulatory powers under the two Titles would evaporate, as would any consequence from the differing classification of the services. But we know that the Communications Act recognizes the existence of both telecommunications (common carrier) services and information services—and differentiates between the two. Information services are, at least, defined in Title I,<sup>136</sup> although no regulatory authority in the Act expressly attaches to the definition. Title II imposes traditional utility regulation on telecommunications services. And one definitional provision says that “[a] telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services.”<sup>137</sup> At a minimum, this provision indicates Congressional desire to limit the extent of regulatory authority over information services to something short of

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134. *See, e.g., Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (if an “entity is a private carrier for that particular service, . . . the Commission is not at liberty to subject the entity to regulation as a common carrier,” even if it also offers common carrier services).

135. *See supra* note 69.

136. 47 U.S.C. § 153(20) (2006).

137. *Id.* § 153(44).

common carrier regulation.

The FCC has similarly maintained that it has limited regulatory authority over information services. For example, in the *Computer II* decision the FCC recognized that pushing “enhanced services” outside of the common carrier definition also denied to the agency some regulatory authority, “while those who provide basic services would continue to be regulated, enhanced service vendors would not be subject to rate and service provisions of Title II of the Communications Act.”<sup>138</sup> More recently, in the IP-enabled services notice, the Commission noted the difference between common carrier regulation and the alternative of ancillary-regulation:

Various regulatory obligations and entitlements set forth in the Act—including a prohibition on unjust or unreasonable discrimination among similarly situated customers and the requirement that all charges, practices, classifications, and regulation applied to common carrier service be “just and reasonable”—attach *only* to entities meeting this [common carrier] definition.<sup>139</sup>

### III. THE POLICY GROUNDS

I want now to examine whether either of these visions of regulatory authority over the Internet is sensible as a policy matter. Both a maximalist vision of Internet regulation and a minimalist vision are present in the debate. On the one hand, Professor Lawrence Lessig has called for a new innovation agency with broad powers over the Internet. On the other, a number of commentators have long suggested eliminating the FCC and, by extension, sector-specific regulators for the Internet. In my view, the FCC has an important role to play, a role that should be both confirmed and strictly delimited by new legislation.

So far, I have framed the question as one of Internet regulation as communications regulation; but that, of course, is only one part of the picture. Internet “regulation” could occur in a number of different ways—giving the FCC some general jurisdiction over the Internet is only one model. One could have case-specific legislation addressing particular Internet issues as they arise, following on the current treatment of wiretapping, privacy, and universal services issues, in which the statutes contained language broad enough to include non-legacy communications platforms such as the Internet. Alternatively, one could be content with

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138. Amendment of Section 64.702 of the Commission’s Rules & Regulations (Second Computer Inquiry), *Final Decision*, 77 FCC 2d 384, 430 (1980).

139. IP-Enabled Services, *Notice of Proposed Rulemaking*, 19 FCC Rcd. 4863, 4879 (2004) (emphasis added); *see also id.* at 4892 (“The Act distinguishes between ‘telecommunications service[s]’ and ‘information service[s],’ and applies particularly regulatory entitlements and obligations to the former class but not the latter.”).

only general legislation applied to the Internet, such as the use of antitrust to address any competition problems that arise on the Internet.

In fact, the Federal Trade Commission responded to the FCC's classifying the Internet as an information service by asserting that it had "jurisdiction over most broadband Internet access services."<sup>140</sup> The Federal Trade Commission Act exempts from its ambit only "common carriers subject to the [Communications Act of 1934]."<sup>141</sup> The FTC therefore maintains that the Act, and its general prohibitions on unfair and deceptive practices and unfair competition, applies to any "broadband Internet access service offered as an information service rather than on a common carrier basis."<sup>142</sup> The FTC has brought a number of cases against Internet access providers for deceptive marketing and billing practices.<sup>143</sup> And the FTC has used its merger-review authority to consider conditions in a number of cases involving Internet access providers (in fact imposing them in one merger).<sup>144</sup>

FTC and general antitrust jurisdiction over broadband competition issues has both attractions and difficulties. The antitrust authorities are a separate center of power, and, to the extent that the FCC is not addressing competition problems, those authorities could provide additional oversight. Antitrust authorities addressed the problems of the integrated Bell System, and one of the premises of that litigation was that the FCC had been unable and unwilling to control AT&T.<sup>145</sup> The FTC and the Department of Justice's antitrust division are also agencies of more general jurisdiction; perhaps they will be less susceptible to capture by particular industry segments or less likely to regulate simply to continue their existence.<sup>146</sup> On the other hand, as I and others have

140. *Reconsidering Our Communications Laws: Ensuring Competition and Innovation: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 204 (2006) (prepared statement of the Federal Trade Commission) [hereinafter *FTC Statement*] (discussing FTC Jurisdiction over Broadband Internet Access Services).

141. 15 U.S.C. § 45(a)(2) (2006); see also *id.* § 44 (2006).

142. *FTC Statement*, *supra* note 140, at 205.

143. See *id.* at 205–8.

144. See *id.* at 206–8.

145. See *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1359 (D.D.C. 1981) ("There is also the consideration that, as several witnesses (including the former chief of the FCC's Common Carrier Bureau) have testified, that agency may realistically be incapable of effectively regulating a company of AT&T's size, complexity, and power.").

146. See James B. Speta, *Modeling an Antitrust Regulator for Telecoms*, in *ANTITRUST AND REGULATION IN THE EU AND US: LEGAL AND ECONOMIC PERSPECTIVES* (François Lévêque & Howard Shelanski eds., 2009) (forthcoming) [hereinafter Speta, *Modeling an Antitrust Regulator*]; see also RAYMOND L. GIFFORD, REGARDING "RECONSIDERING OUR COMMUNICATIONS LAWS: ENSURING COMPETITION AND INNOVATION" 4 (2006), <http://www.ftc.gov/os/comments/broadbandwrkshop/527031-00022.pdf> (testimony of Raymond L. Gifford) ("[A]s an agency of general jurisdiction, the FTC is less prone to interest-group capture and the intense rentseeking that besets the FCC and Congress. The FTC's mandate extends across the economy. Accordingly, narrow interest groups—be they

previously written, antitrust doctrine may not be able to tackle all of the problems that we want communications regulation to cover—even if we limit the scope of problems to competition problems.<sup>147</sup> Courts have not been particularly sympathetic to essential facilities claims nor to attempts to impose limits on oligopolistic markets;<sup>148</sup> these are, in fact, two of the scenarios that may arise in the broadband Internet.

A sensible scope for the FCC's jurisdiction, to my mind, involves supplementing the Commission's current jurisdiction to ensure that it has sufficient authority to address serious broadband issues, while cabining it in a way that does not give it the kind of plenary jurisdiction that the Commission has claimed in the *Comcast* decision. Additionally, I believe that the FCC's jurisdiction ought to be limited in ways that acknowledge the changing communications landscape and that allow it to focus more directly on the core mission.

#### A. *A Supplemented (But Still Narrow) Internet Jurisdiction*

The FCC's ancillary jurisdiction over the Internet, as I have described it, does not address some of the more significant issues for the Internet in coming years. In 2002, I argued that the Internet was already seeing a number of interconnection disputes, including disputes over peering, open access, instant messaging, and reciprocal compensation.<sup>149</sup> Phil Weiser has more recently identified some continuing interconnection and service disputes, such as the Cogent/Sprint dispute over interconnection pricing, which led the parties to stop exchanging traffic.<sup>150</sup> Some such disputes are likely in the future, so long as the possibilities for strategic action remain available.<sup>151</sup>

In order to address disputes such as these, the FCC needs an authority directed to Internet interconnection issues. Acknowledging that the FCC has already claimed such authority in the *Comcast* order,<sup>152</sup> I believe that the Act contains two significant gaps. The first gap, of course, is the omission of authority over Internet carriers. The second gap is a theory of what the FCC should do with Internet carriers. Not only the *Comcast* order, but most proposals for FCC regulation of the Internet seem to suggest a very broad, general jurisdiction for the FCC in the Internet age.<sup>153</sup>

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self-professed 'consumer' groups or industry—will find it much more difficult to 'capture' the FTC's regulatory agenda.”).

147. Speta, *Modeling an Antitrust Regulator*, *supra* note 146.

148. *Id.*

149. Speta, *A Common Carrier Approach*, *supra* note 11, at 229–42.

150. Weiser, *Internet Regulation*, *supra* note 20, at 2–3.

151. *Id.*; see also Speta, *A Common Carrier Approach*, *supra* note 11, at 226–30.

152. See *Comcast Order*, *supra* note 8, and accompanying text.

153. See generally Weiser, *Regulatory Strategy*, *supra* note 17 (calling for FCC regulation of

Professor Lawrence Lessig has also proposed a broad regulatory agency for the Internet, although he says that it should not be the FCC.<sup>154</sup> Lessig sees an irredeemable “culture of favoritism”<sup>155</sup> at the FCC, largely protecting established interests and helping to maintain, not destroy, monopoly power. He proposes a new “Innovation Environmental Protection Agency . . . with a simple founding mission: ‘minimal intervention to maximize innovation.’ The iEPA’s core purpose would be to protect innovation from its two historical enemies—excessive government favors, and excessive private monopoly power.”<sup>156</sup> These principles, it seems to me, are uncontroversial in general. Lessig does seem focused on Internet carriers and not on giving regulatory authority over applications and content providers or other parts of the Internet.<sup>157</sup> The question, of course, with this proposal is: how far does it go?

I do not think that the FCC needs to be demolished in order for good regulatory policy to prevail, although I will concede that much of its behavior, historically and especially recently, has ranged from impeding competition to the simply bizarre.<sup>158</sup> But I believe that a significant part of the problem, especially historically, has been the very wide mission and very broad discretion granted to the Commission. Under the “public interest” standard, for example, the courts permitted the Commission to articulate policies intended alternatively to reduce or to enhance competition among providers.<sup>159</sup> I worry that an agency with as broad a portfolio as “enhancing innovation” will similarly lack direction and fall victim to some of the same problems. As even the debates over network neutrality show, parties are able to muster arguments for innovation on both sides.<sup>160</sup> If one did want to move the center away from the FCC, a

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all Internet services that substitute for traditional communications).

154. Lawrence Lessig, *Reboot the FCC*, NEWSWEEK, Dec. 23, 2008, <http://www.newsweek.com/id/176809>.

155. *Id.*

156. *Id.*

157. *See id.* (The two examples that he gives—of network neutrality and spectrum allocation—are classic carrier regulation issues.).

158. *See, e.g.*, WEISER, *supra* note 24.

159. For example, in *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93–94 (1953), the Supreme Court said both that “the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications” and that:

[T]he fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest necessarily requires in each case a blend of private forces and public intervention.

160. To be sure, each side generally focuses on different loci of innovation. Network neutrality advocates argue that such rules promote innovation at the application and content

more realistic scenario would be to deny the FCC jurisdiction over Internet services and to rely on the FTC's general competition and unfair and deceptive practices authority. Both of these statutory provisions, while broad, have well-established substantive content. My own view, however, is that, appropriately delimited, the FCC is the most appropriate institution. The FCC has institutional expertise, experience, and a structure that can be reformed.

To turn, then, to the delimitation itself: I have already said that the FCC's current ancillary jurisdiction allows it to regulate Internet carriers when they are interconnected with and carry common carrier or broadcast (or cable television) services.<sup>161</sup> Congress should expand the FCC's jurisdiction to cover Internet carriers providing any two-way public service, meaning a service that the Internet provider offers generally to the public. This tracks the first part of the definition of common carrier service, and ensures that the agency does not expand regulation to wholesale data services generally. I would limit this jurisdiction to the retail level—to services as they are offered to the consumer public—again to keep the regulation off of the wholesale level. Although a few incidents have cropped up with peering and transit, such as the Cogent/Sprint dispute, these are relatively few and the indications are that sufficient competition and carriage alternatives exist at these levels of the Internet.

This authority would not extend to a purely private data-transport arrangement, such as might exist between a carrier and a large business or educational customer. The FCC essentially deregulated the large-customer common carrier market in the 1990s, by first allowing the development of custom tariffs<sup>162</sup> and then eventually using its detariffing authority to eliminate economic regulation of this submarket.<sup>163</sup> Today, no basis exists for extending FCC regulation to this large-customer data market. The market is reasonably competitive, with several nationwide networks capable of providing service and competing vigorously. Moreover, the consumer-protection concerns are absent. Although a company may make Internet access available to its employees through such arrangements, that Internet access is a company service and not comparable to an individual's home Internet service. Increasingly, companies are limiting employee Internet access, and the FCC would have no expertise to supervise those limits.

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levels; opponents argue that rules could reduce innovation among carriers.

161. See *supra* notes 62–74 and accompanying text.

162. *Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058 (D.C. Cir. 1993).

163. Policy & Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Second Report & Order*, 11 FCC Rcd. 20,730 (1996), *aff'd*, *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

Defining the FCC's authority as limited to "two-way" maintains a distinction between Internet services and those provided as the equivalent of contemporary mass media services. This may be a dying distinction, as even multi-channel video services may transition to pure IP services. Except to the extent that it considers market structure in making spectrum allocations (and it should move away from doing so), the FCC's authority over media should be drastically reduced. The FCC's time is not well used in regulating indecency in the media, even if such regulation continues to be constitutional. Without denying the importance of keeping inappropriate content away from minors, technological and market mechanisms combined with parent supervision probably do a good enough job. And, despite intermittent calls for new statutory action, the Supreme Court has struck down all attempts at Internet content regulation.<sup>164</sup> The FCC's indecency docket is simply too time-consuming and too political to justify its continuation. And, in my view, the FCC's structural media regulation makes less and less sense as traditional mass media occupies less and less of the news and information market.

#### B. *Substantive Provisions*

Establishing the agency's subject-matter jurisdiction is only the first step; equally important is providing adequate substantive direction to the agency. The *Comcast* order's ancillary jurisdiction theories largely founder on the lack of substantive direction in the Communications Act for Internet regulation.<sup>165</sup> A "public interest" mandate would inject too much uncertainty into the market, uncertainty not justified by any existing competition or consumer protection concerns. But I think that the agency's substantive powers can be appropriately described.

The FCC should have the authority to enjoin "unfair competition" by Internet carriers upon a showing that the Internet carrier has the power and the incentive to impede competition. The use of the antitrust-equivalent language from the FTC Act is intentional. FCC Internet regulation should be directed to instances in which evidence and sound theory demonstrate that a carrier's practice creates a competition problem. This would not simply re-create the authority of the FTC or the antitrust division, for the FCC would be permitted to act on the basis of a predictive record, at least in some regards.<sup>166</sup> And FCC authority

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164. *Reno v. ACLU*, 521 U.S. 844 (1997).

165. *See supra* notes 83–89 and accompanying text.

166. *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) ("Substantial evidence does not require a complete factual record—we must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency.").

would allow it to effectively supervise the private-sector led processes that need to take the lead in developing standard practices for the Internet, the arena in which the FCC's institutional expertise of engineering and economics should prove most useful.<sup>167</sup>

In fact, a rough (but not, of course, universal) consensus is emerging that future Internet regulation should proceed largely on a case-by-case basis, and largely as a back stop to private standard-setting or other coordination mechanisms.<sup>168</sup> The FCC could, of course, participate in private efforts without being granted regulatory authority. But, without true regulatory authority, the FCC could address strategic behavior only through moral suasion and publicity. These techniques are not, of course, meaningless. But regulatory authority is necessary to address significant competition issues.

A last issue is the extent to which the FCC would be permitted to adopt rules under this new regulatory authority over Internet carriers. The Commission has, at times, been criticized for proliferating rules that increase costs and stifle innovation.<sup>169</sup> The 1996 Act responded to this criticism by requiring a biennial review of rules and the elimination of any rules no longer necessary to protect consumers.<sup>170</sup> The mechanism has resulted in some rules being eliminated, although one could not say that the mechanism has resulted in the major deregulation that some of its supporters hoped for at the time.

Most administrative agencies do have the power to adopt rules, and I would continue this for the FCC, although subject to appropriate substantive burdens. Most competition problems arise from companies that exercise market power. In these cases, case-by-case adjudication would be appropriate, because the first step in any analysis would be a showing that the company to whom the order is directed has market power.<sup>171</sup> Rulemakings that establish standards for all carriers would only be appropriate in circumstances in which the FCC could show, with acceptable theory and evidence, that the market structure was likely to allow companies to maintain and exercise market power in an anticompetitive manner. The process that regulators in the European Union went through—of defining a large number of communications markets, gathering data, and determining market power on a case-by-case basis<sup>172</sup>—would not be necessary, for the FCC could decide to

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167. See *supra* notes 17–20 and accompanying text.

168. See, e.g., Weiser, *Internet Regulation*, *supra* note 20.

169. E.g., Alden Abbott & Gordon B Grady, *The Liberalization of the Telecommunications Sector: A Rent-Seeking Perspective*, 8 EUR. J.L. & ECON. 63 (1999).

170. 47 U.S.C. § 161 (2009).

171. Cf. Frank H. Easterbrook, *The Limits of Antitrust*, 6384 TEX. L. REV. 1, 6 (1984) (saying that the existence of market power should be the first screen in any antitrust analysis).

172. J. SCOTT MARCUS, EUROPE'S NEW REGULATORY FRAMEWORK FOR



initiate rulemakings when competition problems presented themselves. But the EU process provides a reasonably good model of an evidence-driven, competition-law based analysis of communications markets.

### C. *The Comcast Order Redux*

The implementation of this framework can be highlighted by applying it to the *Comcast* order. This framework also reveals other problems in the *Comcast* order beyond its jurisdictional deficits, and suggests a better mode for the FCC's proceeding in the future.

Under this framework, the FCC would have jurisdiction to address the practices at issue in the *Comcast* order. Comcast provides its Internet service to the public at large, and it is a two-way service by nature. And Comcast's interruption of certain peer-to-peer sessions certainly affects the Internet access service. The FCC would therefore have jurisdiction, if Comcast's practice constituted unfair competition. In fact, the FCC, in large part, told an unfair competition story in its order. The FCC wrote that Comcast intended to interrupt the peer-to-peer sessions because video being exchanged on peer-to-peer protocols competed with Comcast's own video services, especially its video-on-demand service. But the FCC did not make the findings that one would expect an unfair competition or antitrust analysis to make. For one, the FCC did not address whether Comcast has market power in either the Internet access or video delivery markets.<sup>173</sup> Without such market power, interrupting the peer-to-peer sessions probably cannot be explained as an anticompetitive strategy, for Comcast would not gain by denying consumers a service to which consumers want access<sup>174</sup>—unless there were offsetting benefits in quality of service. Comcast did allege that such benefits existed, particularly the management of system bandwidth. Cable systems have shared bandwidth among a certain number of customers, and Comcast alleged that peer-to-peer traffic from a small number of customers created congestion for the majority. Comcast also wrote that it implemented the peer-to-peer management scheme only when the level of peer-to-peer traffic threatened to create congestion. Such consumer benefits would be taken into account in an unfair competition analysis, and balanced against any anticompetitive effect.

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ELECTRONIC COMMUNICATIONS IN ACTION 8–10 (2004), [ftp://ftp.zew.de/pub/zew-docs/div/IKT04/Paper\\_Marcus\\_Invited.pdf](ftp://ftp.zew.de/pub/zew-docs/div/IKT04/Paper_Marcus_Invited.pdf).

173. See James B. Speta, *A Sensible Next Step on Network Neutrality: The Market Power Question*, 8 REV. NETWORK ECON. 113 (2009).

174. I am, of course, setting aside here Comcast's nondisclosure of its practices.

## CONCLUSION

The FCC's *Comcast* order does not seek to regulate skyscrapers, or content, or electronics devices; its order is directed at a provider of communications by wire. But the order is inconsistent with the Communications Act, which gives the agency, at most, only limited authority over those communications providers who are not common carrier, spectrum licensees, or cable television providers. In order to link its authority to a practice that does not touch on the core services of the Communications Act, the FCC was forced to articulate a theory that would give it virtually unrestricted authority over Internet services. Because nothing in the Act hints at such broad authority, these theories are untenable. Instead, the FCC has authority over Internet carriers only to the extent they transport services central to the Act, such as carrying interconnected VOIP calls or live broadcast programs.

This limited jurisdiction is not the best structure for governing the Internet going forward. Congress should confer on the agency express authority to address unfair competition practices, when Internet carriers commit such practices on two-way public services. This limited jurisdiction would take advantage of the FCC's institutional history and expertise, while cabining it to an evidence-based approach to Internet regulation.