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# FCC REGULATION VERSUS ANTITRUST: HOW NET NEUTRALITY IS DEFINING THE BOUNDARIES

BABETTE E.L. BOLIEK\*

**Abstract:** This Article challenges the various jurisdictional theories that underpin the FCC's net neutrality regulation. The assertion of jurisdiction by the FCC over any aspect of the Internet ecosystem has raised populist, congressional, and even judicial rhetoric to a crescendo and resulted in a recent vote to defund the FCC's efforts. This Article places the current crisis squarely in the context of the long-standing jurisdictional struggle between regulation and antitrust law. These two regimes are often at jurisdictional cross-purposes because, even though they both purport to maximize the social good, they do so by inapposite means. Indeed, there is a policy choice inherent in the very jurisdictional authority permitted each regime—a choice that the FCC's jurisdictional bases for net neutrality may actually circumvent and obfuscate. Focusing on the Supreme Court's seminal decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* and the D.C. Circuit's decision in *Comcast Corp. v. FCC*, this Article examines the jurisdictional boundaries between the regulatory and antitrust camps. In analyzing the jurisdictional limits of each through the lens of the net neutrality debate, this Article reveals opportunities for congressional reforms beyond mere rhetoric. To identify problematic uses of regulatory authority, this Article: (1) creates an innovative grouping of possible bases for regulatory authority labeled "satellite jurisdiction" and (2) proposes a new framework to classify possible jurisdictional overreach in what the author brands as either "procedural opportunism" or "substantive opportunism." Finally, this Article recommends a new standard by which both procedural and substantive jurisdictional opportunism may be tempered and antitrust authority maximized where most salutary and appropriate.

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## INTRODUCTION

There is a crucial battle playing out in the world of Internet access provision. While the Internet is the natural home of competing business giants and warring digital avatars, the contest that will have the most sweeping ramifications for the future of the Internet is the turf war being waged between the Federal Communications Commission (FCC), on the one hand, and the Federal Trade Commission (FTC) and the Department of Justice (DOJ), on the other.<sup>1</sup> Nothing less than jurisdiction over the development of the Internet is at stake.

Jurisdiction over Internet access provision is not the first confrontation between these particular government agencies; in fact, they have clashed many times.<sup>2</sup> But it is the current iteration of the FCC's "net neutrality" regulations that has generated the latest contest. Roughly defined, net neutrality encompasses principles of commercial Internet access that include equal treatment and delivery of all Internet applications and content.<sup>3</sup> For some, net neutrality stands further for the proposition that Internet access operators should not be permitted to provide different qualities of service for certain application providers (e.g., guaranteed speeds of transmission), even if those application providers can freely choose their desired quality of service.<sup>4</sup> Net neutrality has reinvigorated what may be described as an underlying inter-agency tug of war that reaches deep within, and far beyond, the communications industry.

Although the two regimes share a commonality of purpose—to protect consumers and to promote allocative efficiencies in production—the two have quite distinct, predominately opposing, means of securing social benefits. As Justice Stephen Breyer stated when serving

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<sup>1</sup> The FTC and the DOJ are the two agencies specifically entrusted with the enforcement of federal antitrust laws. See DOJ, ANTITRUST ENFORCEMENT AND THE CONSUMER 2-3 (2005), available at [http://www.justice.gov/atr/public/div\\_stats/211491.pdf](http://www.justice.gov/atr/public/div_stats/211491.pdf) (explaining how the DOJ and FTC share jurisdiction over violations of antitrust laws).

<sup>2</sup> See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 401-05 (2004) (describing how the plaintiff brought an antitrust suit to enforce duties under the Telecommunications Act of 1996); *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 135-47 (D.D.C. 1982), *aff'd mem. sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983) (describing how the DOJ brought an antitrust action against a regulated telecommunications company, AT&T, resulting in a breakup and restructuring of the company).

<sup>3</sup> See Bruce M. Owen, *Antecedents to Net Neutrality*, REGULATION, Fall 2007, at 14, 14 ("Net neutrality is a slogan that stands for the proposition that the Internet and physical means of access to it should be available to all on uniform, nondiscriminatory terms.").

<sup>4</sup> *Id.* Note that in this Article, "application" signifies both applications (such as Google, Yahoo, and YouTube) and the content delivered by those applications.

as a judge on the U.S. Court of Appeals for the First Circuit, although regulation and the antitrust laws “typically aim at similar goals—i.e., low and economically efficient prices, innovation, and efficient production methods”—regulation looks to achieve these goals *directly* “through rules and regulations; [but] antitrust seeks to achieve them *indirectly* by promoting and preserving a process that tends to bring them about.”<sup>5</sup> The battle between these two regimes may be broadly summarized in a single issue thusly: in the face of the industry-specific regulator, what is (or what should be) the role of antitrust law?<sup>6</sup>

Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs. In contrast, industrial regulation by its nature is a public declaration that, in a given industry, market forces are too weak or underdeveloped to produce the consumer benefits that are realized in competitive markets—regulated industries are carved out from the rest of the economy and are subject to proactive, regulatory intervention that goes above and beyond antitrust enforcement measures.<sup>7</sup> Not surprisingly, regulatory agencies were historically created as *substitutes* for market forces in the few markets that, by the nature of the product or technology, were natural monopolies or severely prone to monopoly.<sup>8</sup> In the vast major-

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<sup>5</sup> *Town of Concord, Mass. v. Bos. Edison Co.*, 915 F.2d 17, 22 (1st. Cir. 1990); *see also* *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980)

Since “the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible,” we have insisted that the agencies consider antitrust policy as an important part of their public interest calculus.

*United States v. FCC*, 652 F.2d at 88 (quoting *N. Natural Gas, Co. v. Fed. Power Comm’n*, 399 F.2d 953, 959 (D.C. Cir. 1968)).

<sup>6</sup> For the purposes of this Article, the term “antitrust law(s)” or “competition law” has the meaning given it in section 1 of the Clayton Act, 15 U.S.C. § 12(a) (2006), namely all sections of the Sherman Act, 15 U.S.C. §§ 1–7. In addition, the term includes the Robinson-Patman Act, 15 U.S.C. §§ 13–13b, 21a (originally enacted as the Act of June 19, 1936, 49 Stat. 1526) and the Federal Trade Commission Act (“FTC Act”) § 5, 15 U.S.C. § 45 (to the extent that section 5 of the FTC Act applies to unfair methods of competition). The definition is modeled on that used in other antitrust acts, such as the National Cooperative Research and Production Act of 1993, 15 U.S.C. §§ 4301–4306.

<sup>7</sup> *See Trinko*, 540 U.S. at 411–16 (noting that the FCC regulatory regime is more restrictive of anticompetitive conduct than general antitrust laws).

<sup>8</sup> The seminal antitrust case *Standard Oil Co. of N.J. v. United States* captured the public concern regarding monopolization in general:

[T]he conviction was universal that the country was in danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few

ity of markets, however, the antitrust law is the default government control, designed to *supplement* market forces to inhibit or prevent the growth of monopoly.

Again, although the goals of the two regimes may be similar, the means by which each can achieve those goals are in opposition. Therefore, the threshold determination of which industries are to be singled out for industry-specific regulation, and to what degree, is of vital importance as it simultaneously determines the predominance of the regulator versus the antitrust authority in securing the social good.

This Article sets forth a framework to identify the boundaries between FCC regulatory power and antitrust authority. The goal is to pinpoint for Congress the problematic use of regulatory discretion in defining, or redefining, those boundaries and to propose the standard by which Congress may address inappropriate use of existing FCC jurisdiction. Specifically, this Article creates a new categorization of “procedural opportunism” and “substantive opportunism” to identify problematic, regulatory assertions of jurisdiction. The central issue examined in this Article is to posit what is (or should be) the boundaries of antitrust law in relation to the FCC’s regulatory authority. This important issue has reached a point of public crises in the current net neutrality debate.<sup>9</sup> Rather than act reflexively, this is an opportunity for Congress to act clearly to redefine the boundaries between the two regimes that have otherwise been blurred by regulatory overreach.

The net neutrality debate has brought attention to the larger concerns related to the boundaries between the FCC and antitrust authorities. The shaping of net neutrality regulatory policy<sup>10</sup> has operated un-

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individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life.

221 U.S. 1, 83 (1911) (Harlan, J., concurring in part and dissenting in part).

<sup>9</sup> See Kenneth Corbin, *House Moves to Defund FCC Net Neutrality Rules*, INTERNETNEWS.COM, (Feb. 18, 2011), <http://www.internetnews.com/government/article.php/3925561/House-Moves-to-Defund-FCC-Net-Neutrality-Rules.htmxx> (noting the acrimonious political debate over funding the FCC’s net neutrality plans).

<sup>10</sup> Two Chairmen of the FCC believed there should be regulations guiding our use of the Internet. See Michael K. Powell, Chairman, FCC, *Preserving Internet Freedom: Guiding Principles for the Industry*, Remarks at the Silicon Flatirons Symposium 5 (Feb. 8, 2004), <http://www.americanrhetoric.com/speeches/PDFfiles/MichaelPowellFourInternetFreedoms.pdf> (listing “Freedom to Access Content,” “Freedom to Use Applications,” “Freedom to Attach Personal Devices,” and “Freedom to Obtain Service Plan Information” as four principles for the Industry); Julius Genachowski, Chairman, FCC, *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity*, Prepared Remarks at The Brookings Institution, (Sept. 21, 2009), <http://www.openinternet.gov/read-speech.html> (argu-

der the assumption that the FCC has the authority, by virtue of its ancillary jurisdiction, to regulate Internet transmission providers.<sup>11</sup> This confidence in the FCC's scope of authority proved misplaced in *Comcast Corp. v. FCC*, decided by the U.S. Court of Appeals for the D.C. Circuit in 2010.<sup>12</sup> Finding no relation between the FCC's net neutrality policies and the agency's legislative mandate, the court clarified that the FCC may use its ancillary jurisdiction only when the proposed action is specifically related to the agency's mandated responsibilities as Congress delineated in the Communications Act of 1934 ("Communications Act").<sup>13</sup> In an act of superior confidence or of sheer foolishness, the

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ing that "we must choose to preserve the open Internet" and adding the "Fifth Principle of Non-Discrimination" and the "Sixth Principle of Transparency" to Powell's four original freedoms); see also Press Release, FCC, Statement of Commissioner Robert M. McDowell on the Recent D.C. Circuit Court of Appeals Decision in the Comcast/BitTorrent Case (Apr. 6, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-297364A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297364A1.pdf) (expressing pleasure that the decision established that the FCC has no power under Title I of the Communications Act to regulate network management practices of Internet service providers and hoping that broadband service will not be classified as a monopoly telephone service under Title II); Preserving the Open Internet Broadband Indus. Practices, Notice of Proposed Rulemaking, 24 FCC Rcd. 13,064, 13,067 ¶ 11 (Oct. 22, 2009) [hereinafter *Preserving Open Internet, NPR*] (adding nondiscrimination and transparency to four original net neutrality rules); Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers & Other Providers of Mobile Data Servs., Order on Reconsideration & Second Further Notice of Proposed Rulemaking, 25 FCC Rcd. 4181, 4182–83 ¶¶ 1–8 (Apr. 21, 2010) [hereinafter *Reexamination of Roaming Obligations*] (calling for discussions on the highlighted wireless debate and FCC's issuance of a Second NPRM to focus squarely on the issue of wireless net neutrality).

<sup>11</sup> Section 4 of the Communications Act of 1934 authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (2006); see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 973–74 (2005) (affirming the FCC's determination that broadband Internet access is not a common carrier service and will be regulated by ancillary jurisdiction); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330–41 (2002) (holding that the FCC has jurisdiction over wired and wireless Internet); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 700–05 (D.C. Cir. 2005) (establishing a two-part test for FCC ancillary jurisdiction). See generally Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.), amended by Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 5647 (codified as amended in scattered sections of 47 U.S.C.) (detailing Title I through Title VI classifications of radio dependent services).

<sup>12</sup> 600 F.3d at 642.

<sup>13</sup> *Id.* at 654 (stating that the FCC's "authority must ultimately be ancillary" to Title II, Title III, or Title VI of the Communications Act). Among those duties of interest to the net neutrality debate are the FCC's review of interstate telephone service charges and practices for "reasonableness"; its authority to prescribe "just and reasonable" rates for service; its task to allocate and assign spectrum licenses; its authority to approve mergers within the broad definition of telecommunications industries; and its authority to make rate and other special regulations with respect to cable broadcasters. See, e.g., Communications Act, 47 U.S.C. §§ 201(b), 214, 205(a), 301, 303(a),(c),(i), 309, 310, 332, 543.

FCC has subsequently enacted three formal net neutrality rules<sup>14</sup> based on the same jurisdictional premise that was defeated in *Comcast*.<sup>15</sup>

Indeed, four of the five FCC commissioners have expressed grave misgivings as to the jurisdictional authority for the agency's December 2010 rulemaking<sup>16</sup> and these doubts are shared by members of Congress. In a recent committee hearing, for example, Greg Walden, a Republican Congressman from Oregon, called the FCC net neutrality rules a "regulatory overreach" and "little more than an end run around" Congress and the courts.<sup>17</sup> In the face of FCC Chairman Julius Genachowski's confidence in his agency's legal standing, Representative Walden claimed that "[i]n essence, the FCC argues it can regulate anything."<sup>18</sup>

There is perhaps some precedent for the FCC's bold move, however. In the case of cable broadcast, for instance, the FCC was able to use its broad, "public interest" mandate to assert ancillary jurisdiction over what was at the time a new technology, similar but not identical to the technologies expressly defined by the Communications Act.<sup>19</sup> The

<sup>14</sup> See Preserving the Open Internet Broadband Indus. Practices, Report & Order, 25 FCC Rcd. 17,905, 17,932–62 ¶¶ 42–106 (Dec. 23, 2010) [hereinafter *Open Internet Order*] (excluding mobile broadband from everything except transparency and basic no-blocking rules, and creating three net neutrality rules, including (1) Transparency, (2) No Blocking and No Unreasonable Discrimination, and (3) Reasonable Network Management); *Preserving Open Internet*, NPR, *supra* note 10, at 13,067 ¶ 11 (adding nondiscrimination and transparency to four original net neutrality rules).

<sup>15</sup> *Comcast*, 600 F.3d at 659 (holding that "[t]he Commission's reliance on section 706 [as a statutory basis for jurisdiction] thus fails"). The FCC itself has concluded in a still-standing order that section 706 "does not constitute an independent grant of authority." *Id.* at 658 (quoting Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, 13 FCC Rcd. 24,012, 24,047 ¶ 77 (Aug. 7, 1998)).

<sup>16</sup> *Open Internet Order*, *supra* note 14, at 18,039–98 (Statement of Chairman Julius Genachowski, Concurring Statement of Commissioner Michael J. Copps, Dissenting Statement of Commissioner Robert M. McDowell, Statement Approving in Part, Concurring in Part of Commissioner Mignon L. Clyburn, Dissenting Statement of Commissioner Meredith Attwell Baker).

<sup>17</sup> David Eldridge, *FCC Chief Defends New 'Rules of Road' on Net Neutrality*, WASH. TIMES, Feb. 17, 2011, at A03.

<sup>18</sup> *Id.* Representative Walden added, "I am relieved, however, that the FCC declined under its newfound authority to regulate coffee shops, bookstores, airlines and other entities." *Id.*

<sup>19</sup> See *United States v. Sw. Cable Co.*, 392 U.S. 157, 172–74 (1968) (upholding FCC's ancillary jurisdiction over cable based on the agency's Title III authority to regulate broadcast); *United States v. Midwest Video Corp. (Midwest Video I)*, 406 U.S. 649, 670 (1972) (finding cable rules reasonably ancillary to Title III regulation of broadcast); see also Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Government Demarcation and Roles*, 44 FED. COMM. L.J. 1, 17–19 (1991) (explaining the FCC's position that it could regulate cable through ancillary jurisdiction).

open-ended nature of the FCC's mandate, for better or worse, has historically allowed the FCC to expand its jurisdictional reach far beyond the industries and problems within the contemplation of the original, legislative draftsmen.<sup>20</sup> Such jurisdictional expansion is what critiques of net neutrality insist is occurring now as the FCC would assert jurisdiction over aspects of the Internet ecosystem.<sup>21</sup>

The legal uncertainty of FCC authority has led the FCC Chief Commissioner and some commentators to search for more secure jurisdictional grounds for net neutrality rulemaking—to figuratively place the marketplace for Internet service providers (“ISPs”) deeper within the regulated state and, concomitantly, perhaps further out of reach of antitrust law.<sup>22</sup> If by the *Comcast* standard, ancillary jurisdiction provides insufficient basis for net neutrality regulation then, commentators argue, the FCC should redefine ISP services to be functionally the same as those services for which Congress has provided *express* regulatory jurisdiction.<sup>23</sup> In practical terms this means that the FCC would reclassify Internet access from an “information service” (Title I) to a “common carrier” status (Title II).<sup>24</sup> This is not an endeavor to be taken lightly,

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<sup>20</sup> The most notable example of expansive jurisdiction over new technologies is the FCC's jurisdiction over the incipient cable industry. See Copple, *supra* note 19, at 18–19 (describing the FCC's dramatic expansion of authority over the cable industry). Another example of the expansive boundaries of ancillary regulatory authority, whether real or perceived, is the DOJ's restraint from acting against Western Electric, an unregulated equipment supplier of the original Bell System monopoly. The DOJ concluded that anti-trust action was unwarranted because Western Electric was “indirect[ly] regulated” by virtue of its sales to the regulated Bell operating companies. *United States v. W. Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956).

<sup>21</sup> The FCC mandate of regulating telecommunications for the “public interest, convenience, and necessity” is a standard praised by some for its adaptability and central focus on the public wellbeing. As its sponsor Senator Clarence Dill approvingly noted, the public interest standard of the new 1927 Radio Act was a great advancement in the law as “[i]t covers just about everything.” LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 61 (1987); see also C.C. Dill, *A Traffic Cop for the Air*, 75 AM. REV. REVIEWS 181, 181, 184 (1927) (explaining Senator Dill's views about the regulation of radio broadcasting). For critics, this broad, amorphous mandate permits “neither guidance nor constraint on the agency's action.” Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, at 3, 14 (Max D. Paglin ed., 1989) [hereinafter *LEGISLATIVE HISTORY*].

<sup>22</sup> See *infra* notes 68–125 and accompanying text (discussing the tug-of-war between antitrust and regulatory authority).

<sup>23</sup> See *infra* notes 140–148 and accompanying text (discussing the reclassification of ISPs from Title I “information services” to Title II “common carriers”).

<sup>24</sup> See *Open Internet Order*, *supra* note 14, at 17,932–62 ¶¶ 44–106 (reducing the net neutrality rules to three); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14,986, 14,986–88 ¶¶ 1–4 (Aug. 5, 2005) (using ancillary jurisdiction to blur the line between Title I and Title II services in the



nor is it evident that the regulator is (or should be) empowered to make such a decision. To the extent that the regulated state is the exception to the norm, permitting the regulator to define which services and industries fall within its own mandate is to place the proverbial fox in charge of the hen house.

Ironically, jurisdiction over wireless Internet access, the transport system not subject to the recent net neutrality rules, is the one technology where FCC jurisdiction is most easily asserted.<sup>25</sup> Wireless Internet access can be regulated under the FCC's Title III authority over all broadcast licenses by direct insertion of regulatory terms and conditions into the operators' spectrum license agreements.<sup>26</sup> In addition to licenses, the FCC shares oversight responsibilities with antitrust authorities with respect to any merger involving a regulated communication company, and it can dictate onerous terms to which the parties must accede to close the deal.<sup>27</sup> The recent NBC/Comcast merger provides an example of how the FCC has imposed net neutrality obligations on a single firm outside of the traditional rulemaking procedures and classification limitations.<sup>28</sup> Although as a matter of law regulatory jurisdiction is properly asserted with respect to spectrum licenses and mergers, it is questionable as a matter of good public policy that these bases of authority should be used to impose terms by contract that would otherwise be outside the scope of the regulator's statutory authority.

As argued in this Article, the recent *Comcast* decision should not be dismissed as an inconvenient hurdle to be sidestepped by reclassification; rather it marks a pivotal invitation to Congress to redefine the boundaries between the FCC and antitrust authorities. In the long wake of assorted jurisdictional tugs of war between the two regimes, and amidst a legacy of accusations of regulatory capture and adminis-

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context of net neutrality). See generally Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.) (detailing Title I through Title VI classifications of radio dependent services).

<sup>25</sup> Moreover, there is cause for concern that wireless net neutrality may interfere with the proposed development of wireless broadband under the recently released National Broadband Plan. See A Nat'l Broadband Plan for Our Future, Notice of Inquiry, 24 FCC Rcd. 4342, 4349-50 ¶¶ 23-26 (Apr. 8, 2009) [hereinafter *Broadband Plan NOI*] (questioning whether the net neutrality guidelines adopted in other contexts should be applied to broadband services, which pose different technological challenges).

<sup>26</sup> The genesis of Title III of the Communications Act reaches back to the 1927 Radio Act and, to some extent, the 1912 Radio Act before that. See *supra* note 21. Technologies that are broadcast over the electromagnetic spectrum may do so only upon licensing by the FCC. See 47 U.S.C. § 303 (2006).

<sup>27</sup> See 15 U.S.C. §§ 18, 21(a) (2006) (granting FCC authority to approve mergers).

<sup>28</sup> See *infra* note 198 and accompanying text.

trative overreach,<sup>29</sup> the net neutrality debate accentuates historic preferences for antitrust versus regulation, a subject which should be revisited and squarely addressed. Before that can be done, however, the rules of the road—the issue of jurisdiction—must be clearly decided.

The analysis of the relevant jurisdiction is broken into two rival camps: (1) regulatory jurisdiction and (2) antitrust jurisdiction. The first camp, regulatory jurisdiction, the more complex of the two, is further divided into two subparts of particular concern (a) legacy-based regulation and (b) “satellite jurisdiction.” The first subpart of regulatory jurisdiction, legacy-based regulation, refers to the FCC’s congressionally designated core industry. The concern with legacy-based regulation is that the FCC will engage in *procedural opportunism*: that is, the agency may exploit the service classification process to extend its own regulatory authority.

The second subpart of regulatory jurisdiction analyzed is “satellite jurisdiction.”<sup>30</sup> This is a new and unique grouping of various theories of regulatory jurisdiction. This novel grouping brings keen focus to those exertions of FCC authority that are the most legally and politically troubling—areas where the FCC may engage in *substantive opportunism*. These areas include certain uses of the FCC’s Title I service classification, its spectrum licensing authority, and the FCC’s authority to approve mergers in the telecommunications arena.<sup>31</sup>

In contrast to regulatory jurisdiction, however, antitrust jurisdiction is not tethered to categorical classifications but, when triggered, is plenary over all private commercial actors.<sup>32</sup> The jurisdictional question for antitrust authorities is not in what legacy-based category Internet access properly exists, but whether an Internet access provider, in a properly defined market, is acting or is likely to act counter to competitive norms. Antitrust jurisdiction is largely conduct-based and not lim-

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<sup>29</sup> As Judge Harold Greene concluded in the decision that structurally reformed wire telephony, “For a great many years, the Federal Communications Commission has struggled, largely without success, to stop [anticompetitive practices] through the regulatory tools at its command.” *See Am. Tel. & Tel. Co.*, 552 F. Supp. at 222–34 (creating and describing the “Modified Final Judgment”).

<sup>30</sup> *See infra* notes 170–203 and accompanying text.

<sup>31</sup> *See infra* notes 170–203 and accompanying text.

<sup>32</sup> In general terms, the jurisdictional reach of the Sherman Act is plenary across industries and has been interpreted as co-extensive with the scope of the federal commerce power. *See Rasmussen v. Am. Dairy Ass’n*, 472 F.2d 517, 521 (9th Cir. 1972) (“The reach of the Sherman Act is ‘as inclusive as the constitutional limits of Congress’ power to regulate commerce.” (quoting DOJ, REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 62 (1955))).

ited to technical distinctions between industries<sup>33</sup> but, rather, assessed against anticompetitive conduct within relevant markets.

By careful examination of various jurisdictional bases for regulation of net neutrality enforcement, this Article demonstrates that net neutrality as currently articulated is likely outside the scope of even the heightened authority the FCC enjoys for legacy-based regulation. Moreover, to the extent antitrust authority is the default regime in regulation's absence, antitrust principles also do not reach all so-called "anti-neutral" network conduct. As interesting as these findings may be in and of themselves, they are presented here to emphasize the current degree of agency overreach and the need for Congress, and Congress alone, to define the FCC's jurisdictional basis for net neutrality. Until that occurs, the substantively opportunistic use of license and merger authority is particularly problematic as it may mask a lack of regulatory authority to enact policy through more formalized administrative processes.

This Article is organized as follows: Part I sets forth a synthesis of the primary policy goals for net neutrality regulation as articulated in the legal and economic scholarship.<sup>34</sup> Part II both describes the current state of communications regulation and antitrust law and recounts the historic development of Internet access regulation.<sup>35</sup> Part III explores the different jurisdictional theories for net neutrality regulation, both legacy-based regulation and satellite jurisdiction.<sup>36</sup> Part IV provides a similar jurisdictional analysis of net neutrality as potentially enforced by antitrust authorities.<sup>37</sup>

In conclusion, this Article argues that FCC discretion to classify new services as legacy services should be limited and bounded by a presumption that new services are to be lightly regulated, unless rebutted by legislatively determined evidentiary criteria. Far from avoiding the *Comcast* standard, this Article argues that Congress should embrace and expand *Comcast's* application. The standard is a simple one: to assert

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<sup>33</sup> By contrast, the FCC's jurisdiction varies according to whether a network is a wireline telephony service (Title II) or a wireless service (Title III). Compare 15 U.S.C. § 1 (2006) (declaring all contracts, conspiracies, or combinations in restraint of trade to be illegal under antitrust law), with 47 U.S.C. § 303 (2006) (describing powers of the FCC relating to wireless communications), and 47 U.S.C. §§ 201–276 (describing powers of the FCC relating to common carriers under Title II). If, for instance, wireline phones and wireless phones are determined by the antitrust authorities to be sufficiently close substitutes as to constitute one market, these services may be evaluated together for antitrust purposes.

<sup>34</sup> See *infra* notes 39–67 and accompanying text.

<sup>35</sup> See *infra* notes 68–125 and accompanying text.

<sup>36</sup> See *infra* notes 126–203 and accompanying text.

<sup>37</sup> See *infra* notes 204–273 and accompanying text.

ancillary jurisdiction, the FCC must establish a statutory mandate to which its proposed action is securely tethered.<sup>38</sup> This standard provides an important but relatively low-level restraint on agency overreach. The current congressional interest in the FCC's expansive view of its own authority provides an excellent opportunity for Congress to memorialize the *Comcast* standard and to provide express criteria by which the standard may be met.

Congress should also limit all areas of FCC satellite jurisdiction including the FCC's merger and licensing powers. It is not necessary to remove these powers from the FCC entirely, but rather, this Article proposes that Congress extend the *Comcast* standard to limit FCC merger and licensing demands to those that are necessary for the agency to fulfill its statutory mandate. Without such jurisdictional discipline, the FCC may circumvent congressional intent by opportunistic use of the agency's legitimate authority. Finally, consumers may be at risk if regulatory authority is restrained but antitrust authority is not fully invigorated to fill the void. To the extent necessary, Congress and the executive branch must reassert confidence in the plenary scope of antitrust jurisdiction in the face of the industry-specific regulator.

## I. NET NEUTRALITY—KEY POLICY CONCERNS

After years of debate, and amidst a lengthy rulemaking procedural process,<sup>39</sup> in late December 2010 a sharply divided FCC enacted net neutrality rules for ISPs.<sup>40</sup> The rules issued represent only incremental progress to net neutrality purists and are too intrusive in the view of diehard net neutrality skeptics. Both sides of the debate, however, including four of the FCC commissioners, agree that the jurisdictional authority of the FCC and the public policy wisdom of the rules will be extensively challenged in years to come.<sup>41</sup>

It is the totality of the scholarly debate, and not simply the recent rulemaking results, that illustrates how net neutrality straddles the separate camps of the regulated state and antitrust law. As previously stated, net neutrality encompasses principles of commercial Internet

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<sup>38</sup> See *Comcast*, 600 F.3d at 646, 651–61 (describing and applying a two-part test to determine if the FCC could exercise its ancillary jurisdiction).

<sup>39</sup> See *Preserving Open Internet*, NPR, *supra* note 10, at 13,065 ¶¶ 2–3 (describing the “extensive” measures taken by the FCC to solicit public opinion and hold hearings on the proposed new rules); *Reexamination of Roaming Obligations*, *supra* note 10, at 4, 182–85 ¶¶ 1–8 (describing the issuance and subsequent reconsideration of a 2007 Report and Order).

<sup>40</sup> *Open Internet Order*, *supra* note 14, at 17,932–62 ¶¶ 44–106.

<sup>41</sup> *Id.* at 18,039–98 (Commissioner Statements).

access that include equal treatment and delivery of all Internet applications and content.<sup>42</sup> For some, net neutrality stands further for the proposition that Internet access operators should not be permitted to provide different qualities of service (e.g., guaranteed speeds of transmission) for certain application providers, even if those application providers can freely choose their desired quality of service.<sup>43</sup> Many populist advocates of net neutrality regulation stress the importance of various “open access” concepts as necessary to support a “free” and democratic Internet ecosystem.<sup>44</sup> The same open access concerns are shared by scholarly proponents of net neutrality and by the FCC itself, but characterized differently. For scholars the central concern is that owners of broadband networks may use their market power to undermine competition for Internet-enabled services and content.<sup>45</sup> The underlying agreement is that many of the net neutrality concerns would not arise in a competitive market.

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<sup>42</sup> Owen, *supra* note 3, at 14.

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 568 (2000) (arguing that an open, peer-to-peer network “will best secure both robust democratic discourse and individual expressive freedom”). Many commentators have countered the populist cries to preserve the “free” Internet, by noting that net neutrality does not enforce the status quo, but rather, net neutrality reflects a change to the Internet ecosystem brought about by government fiat. In short, the Internet has not been, and is not today, neutral. See Douglas A. Hass, *The Never-Was-Neutral Net and Why Informed End Users Can End the Net Neutrality Debates*, 22 BERKELEY TECH. L.J. 1565, 1586–94 (2007). There are many instances in which exclusive deals between application providers and ISPs have existed, applications have been prioritized relative to others by virtue of application type, and Internet traffic is redirected by private agreement and alternative transmission systems. *Id.*

<sup>45</sup> See Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 927–28 (2001) (describing anticompetitive “bundling” of broadband and cable services); Robert Penchuk, *Unleashing the Open Mobile Internet*, 10 J. HIGH TECH. L. 74, 75–76 (2009) (advocating more choice in the field of mobile device ISPs); Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. TELECOMM. & HIGH TECH. L. 15, 16–17 (2006) (arguing that net neutrality rules should focus on ending discriminatory, anticompetitive practices by those who control the infrastructure of the Internet). *But see* Babette E.L. Boliek, *Wireless Net Neutrality Regulation and the Problem with Pricing: An Empirical, Cautionary Tale*, 16 MICH. TELECOMM. TECH. L. REV., 1, 4–6 (2009) (arguing that factors other than anti-competitiveness in the market could justify net neutrality regulation); Gerald R. Faulhaber & David J. Farber, *The Open Internet: A Customer-Centric Framework*, 4 INT’L J. COMMUNICATIONS 302, 303–04 (2010) (finding that wireless broadband services are subject to intense competition and therefore should not be regulated); Michael J. Santorelli, *Rationalizing the Municipal Broadband Debate*, 3 I/S: J.L. & POL’Y FOR INFO. SOC’Y 43, 45 (2007) (noting that the broadband market is competitive and robust).

One true concern for scholarly proponents of net neutrality is potential access problems.<sup>46</sup> This concern is rooted in potential exploitation of market power in Internet access provision by digital subscriber line (“DSL”) and cable Internet access providers.<sup>47</sup> In particular it is argued that cable and DSL Internet providers form a de facto duopoly in many markets, giving rise to the possible exertion of market power in a deleterious manner.<sup>48</sup> In this regard, net neutrality is primarily a form of economic regulation of Internet access providers. When regulation focuses on competition concerns, the role of antitrust as an alternative or supporting agent is naturally implicated.<sup>49</sup> The three current net neutrality rules promulgated by the FCC are as follows:

- i. Transparency. Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services;
- ii. No blocking. Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services; and

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<sup>46</sup> See, e.g., “Network Neutrality”: *Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 109th Cong. 2 (2006) [hereinafter “*Network Neutrality*”] (testimony of Prof. Lawrence Lessig), available at <http://commerce.senate.gov/pdf/lessig-020706.pdf> (opposing “access-tiering” by ISPs).

<sup>47</sup> See *id.* The greatest concern is market power in the “last-mile” of transmission. *Net Neutrality*, CYBERTELECOM (Genny Pershing, ed.), <http://www.cybertelecom.org/ci/neutral.htm> (last visited Sept. 22, 2011) (noting that “last mile” access is a great concern among proponents of net neutrality). A “last-mile” provider is one which controls the hard-wire media or communications access into a given residence or commercial building. In other words, in a communications transport system it is the “last-mile” in the delivery of content to the consumer. Such hard-wire access is relatively unique, and for various reasons, it is difficult to replicate. Many proponents of net neutrality argue that there is a broadband duopoly in the DSL cable access market. See “*Network Neutrality*,” *supra* note 46, at 5. This bottleneck creates market power in the local access market, which is viewed as problematic. See, e.g., *Net Neutrality*, *supra* (explaining that the owners of the wires into one’s house are unlikely to share that access with their rivals). Wireless telecommunications, by contrast, is based on a broadcast technology rather than a physical hard-wire reaching the interior of a residence or commercial building and, therefore bypassing some of these concerns. See *id.*

<sup>48</sup> See, e.g., Alfred E. Kahn, *Network Neutrality 2* (AEI-Brookings Joint Center for Regulatory Studies, Working Paper No. RP07-05, 2007), available at <http://ssrn.com/abstract=973513> (noting that “[t]here is no consensus among economists about the likely sufficiency of competition under duopoly”).

<sup>49</sup> For example, a stated goal of establishing the National Broadband Plan is “advancing . . . consumer welfare” through the use of broadband infrastructure and services. *Broadband Plan NOI*, *supra* note 25, at 4345 ¶ 9.

- iii. No unreasonable discrimination. Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.<sup>50</sup>

In addition, the FCC rules expressly allow ISPs to engage in “reasonable” network management practices to prevent malware, viruses, and transmission congestion.<sup>51</sup>

Although it is unclear whether these particular rules will stand, they are helpful in framing some of the distinctions between antitrust and regulatory action. The first rule is a relatively uncontroversial consumer protection provision and does not raise any great jurisdictional or policy concerns.<sup>52</sup> It is the second and third rules that are of greater interest. Broadly characterized, these two rules concern “access” to the Internet transmission system.<sup>53</sup> The two rules work in concert to combat overarching concerns expressed in the net neutrality literature with regard to differentiated application-access services.<sup>54</sup> This would include access services that would guarantee quality of service levels for faster upload and transmission speeds. The first concern is that ISPs will “exploit their dominant [market] position” to favor affiliated application providers<sup>55</sup> or, conversely, to block, degrade, or raise the cost of access for rival application services.<sup>56</sup> The second concern is that allow-

<sup>50</sup> *Open Internet Order*, *supra* note 14, at 17,932–62 ¶¶ 44–106.

<sup>51</sup> *Id.* at 17,951–55 ¶¶ 80–92.

<sup>52</sup> Rather than asking whether the policy benefits consumers or not, the more relevant question is perhaps better stated as, “Does the FCC have the power to decide that it, rather than the FTC, is the agency best situated to promulgate and enforce such rules in the first instance?” See Comments of the Federal Trade Commission, A Nat’l Broadband Plan for Our Future, GN Docket No. 09-51, at 8–9 (no filing date available) [hereinafter *FTC Comments*], available at <http://www.ftc.gov/os/2009/09/090904fccnbp.pdf> (extolling the FTC’s success in providing meaningful consumer disclosure regimes in many industries).

<sup>53</sup> The policy goal is popularly stated in the literature as “equal” access to the network by application providers (e.g. Google, BitTorrent) and end users. This goal has been refined by some legal scholars to mean that Internet access providers should charge nondiscriminatory prices. See, e.g., Nicholas Economides, “*Net Neutrality, Non-Discrimination, and Digital Distribution of Content Through the Internet*,” 4 I/S: J.L. & POL’Y FOR INFO. SOC’Y 209, 210–14 (2008).

<sup>54</sup> See, e.g., Letter from Free Press to FCC 2–3 (Dec. 10, 2010) [hereinafter *Free Press Open Letter*], available at [http://www.freepress.net/files/FCC\\_Letter\\_Real\\_Net\\_Neutrality.pdf](http://www.freepress.net/files/FCC_Letter_Real_Net_Neutrality.pdf) (regarding Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52; Framework for Broadband Internet Service, GN Docket No. 10-12) (expressing concern that the FCC’s previously posed rules would not sufficiently prevent blocking and discrimination).

<sup>55</sup> *Id.*

<sup>56</sup> For example, the concern is that Verizon Wireless may block consumers from accessing Skype, a voice over Internet protocol (“VoIP”) provider, as it may compete with Verizon’s voice services. See, e.g., Madison River Commc’ns, LLC, Order & Consent Decree, 20

ing ISPs to charge a fee for services now priced at zero will raise the costs for application innovators and prevent some players from effectively competing against well-financed application incumbents.<sup>57</sup>

Some net neutrality proponents also decry the limitation and outright omission of wireless ISP obligations under all but the first of the three new regulations.<sup>58</sup> The FCC cites the distinctions of wireless broadband from traditional ISPs, but many net neutrality proponents begrudge the distinction.<sup>59</sup> Critics of wireless net neutrality rules assert that inclusion of wireless would put consumers at risk of paying higher prices for Internet access and would handicap the development of wireless broadband as an alternative to DSL and cable ISPs.<sup>60</sup> The FCC has announced a wait-and-see policy with respect to wireless ISPs.<sup>61</sup> The agency would like to give the technology time to mature before imposing requirements that might compromise investment and expansion.<sup>62</sup> Commentators who oppose net neutrality regulation argue that wireless should not be regulated, not only because the technology is distinct, but also because the market for wireless is competitive—in other words, it does not require regulation.<sup>63</sup>

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FCC Rcd. 4295, 4297 ¶¶ 4–6 (Mar. 3, 2005) (stating that Madison River agreed to a voluntary payment to FCC to avoid investigation of complaints that Madison River was blocking customers' access to VoIP applications).

<sup>57</sup> See Economides, *supra* note 53, at 217 (stating that a change to the pricing scheme of Internet access would stifle innovation in web applications).

<sup>58</sup> See Nate Anderson, *Paranoid Android: The Worst Way to Complain About Net Neutrality*, ARS TECHNICA (Jan. 2010), <http://arstechnica.com/tech-policy/news/2010/12/net-neutrality-and-the-fcc.ars?comments=1#comments-bar> (summarizing the critique of the FCC's limited regulation of mobile broadband).

<sup>59</sup> See *Open Internet Order*, *supra* note 14, at 17,956–58 ¶¶ 93–96 (stating that based on competition, technology distinctions, and open access licensing considerations, “it is appropriate to take measured steps at this time to protect the openness of the Internet when accessed through mobile broadband”); Anderson, *supra* note 58 (criticizing the FCC's limited regulation of mobile Broadband); *5 Minutes with Harold Feld: Title II Classification for Broadband Internet Access*, PUBLIC KNOWLEDGE (May 6, 2010), <http://www.publicknowledge.org/node/3055> [hereinafter *5 Minutes with Harold Feld*] (questioning the merits of refusing to forebear from applying regulations to mobile broadband).

<sup>60</sup> See Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. TELECOMM. & HIGH TECH. L. 19, 30 (2009) (describing alternative pricing schemes to cover the increased cost of more data usage); Philip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN. L. REV. 273, 282–83 (2008) (describing how price discrimination could enable ISPs to efficiently shift infrastructure costs to the heaviest users of the service).

<sup>61</sup> See *Open Internet Order*, *supra* note 14, at 17,962 ¶¶ 104–105 (announcing a policy of “ongoing monitoring” for mobile broadband regulations).

<sup>62</sup> See *id.*

<sup>63</sup> *E.g.*, Faulhaber & Farber, *supra* note 45, at 303–04.



Again, the themes of “market power,” “effective competition,” “investment,” “innovation,” and “access by non-affiliates” are replete throughout the scholarly net neutrality literature and the FCC’s current rulemaking.<sup>64</sup> These are many of the classic themes of antitrust enforcement as well.<sup>65</sup> Perhaps predictably, a regulatory solution is called for primarily by legal scholars, whereas economic scholars have emphasized the virtues of competition and antitrust enforcement to guarantee an “open Internet.”<sup>66</sup> The issue of jurisdictional boundaries and limitations of both regimes is explored here by asking to what extent *either* regime has the authority to impose net neutrality principles.<sup>67</sup> In particular, the overwhelming themes of access (interconnection, “open access,” and nondiscriminatory access) are analyzed.

## II. REGULATION AND ANTITRUST IN THE COMMUNICATIONS INDUSTRY: CURRENT AND HISTORIC BOUNDARIES

The role of antitrust in the face of an industry-specific regulator is the issue presented here. This issue has played out in this industry for more than 100 years as communications regulation and antitrust authority have played a perpetual, jurisdictional tug of war.<sup>68</sup> The communications industry of the twenty-first Century encompasses many different technologies: wire telephony, mobile telephony, broadcast television and radio, and cable television, just to name a few. Each new technology came into existence at different points in history, and each was regulated from within its own “silo,” independent from other pre-existing technologies. This silo regulatory model was memorialized in the Communications Act, and each technology is regulated by a sepa-

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<sup>64</sup> See, e.g., *Preserving Open Internet*, NPR, *supra* note 10, *passim*.

<sup>65</sup> See, e.g., Thomas M. Jorde & David J. Teece, *Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 ANTITRUST L.J. 579 *passim* (1993); Thomas M. Jorde & David J. Teece, *Innovation and Cooperation: Implications for Competition and Antitrust*, J. ECON. PERSPS., Summer 1990, at 75 *passim*.

<sup>66</sup> Again, the definition of what constitutes an “open” or “neutral” Internet may differ among scholars. Given their respective definitions and emphasis, scholars usually endorse a regulatory or an antitrust regime to achieve those defined goals.

<sup>67</sup> This Article does not argue that it is a failure of antitrust if net neutrality cannot be imposed under current antitrust precedent. In fact, that to some scholars is the most essential quality of antitrust law in this area—restraint and limitation to only “anticompetitive” conduct, whether or not that content is in opposition to net neutrality principles.

<sup>68</sup> See Sherman Act § 1, 15 U.S.C. § 1 (2006) (granting antitrust authorities the power to prevent all conspiracies in restraint of trade); Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 539, 544–46 (amending Interstate Commerce Act, ch. 104, § 1, 24 Stat. 379, 379 (1887), *repealed by* Communications Act of 1934, ch. 652, § 602(b), 48 Stat. 1064, 1102) (imposing regulations specific to the telecommunications industry).

rate Title.<sup>69</sup> Title I controls “information services” and gives the FCC limited powers to regulate such services.<sup>70</sup> Title II governs “common carriers” (wire telephony) with much more extensive regulatory mandates including interconnection and network “unbundling” requirements along with concomitant regulated rates.<sup>71</sup> Title III controls broadcast (television broadcast, mobile telephony, satellite broadcast, radio),<sup>72</sup> and Title VI governs aspects of the cable industry.<sup>73</sup> This Part describes more extensively the current framework of the FCC’s authority. Because regulatory jurisdiction is at the heart of the tradeoff with antitrust enforcement, it is significant to understand the public policy concerns that regulation was first instituted to address. In particular, this Part sets forth the interesting history of the regulation of Internet access provision.

The FCC has general subject matter jurisdiction over the interstate activities of the U.S. communications industry.<sup>74</sup> The scope of this authority, is highly correlated to the type of technology being regulated. Title I, for example, gives very limited powers to the FCC, but Title II grants extensive powers to regulate the communications industry.<sup>75</sup> The jurisdiction of antitrust authorities, by contrast, is plenary across industries but may be most limited when regulation is most extensive.<sup>76</sup>

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<sup>69</sup> See generally Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.) (separating types of communications media into titles).

<sup>70</sup> 47 U.S.C. §§ 151–62 (2006).

<sup>71</sup> *Id.* §§ 201–276.

<sup>72</sup> *Id.* §§ 301–399b.

<sup>73</sup> *Id.* §§ 521–573.

<sup>74</sup> *Id.* § 151.

<sup>75</sup> See *id.* §§ 203(b)(2), 204(a) (granting the FCC broad discretion to revise regulations under Title II); Implementation of Section 402(b)(1)(A) of the Telecomms. Act of 1996, Report & Order, 12 FCC Rcd. 2170, 2176, 2188, 2191–92, 2202–03 ¶¶ 9, 31, 40, 67 (Jan. 31, 1997) (using the broad discretion granted by Title II to issue a Tariff Streamlining Order); Access Charge Reform, Fifth Report & Order & Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14,221, 14,224–26, 14,241 ¶¶ 1–6, 40 (Aug. 5, 1999) (using the broad discretion granted by Title II to issue a Pricing Flexibility Order, allowing price cap LECs to file tariffs for new services on one day’s notice), *aff’d*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001); *5 Minutes with Harold Feld*, *supra* note 59 (explaining that the FCC’s authority to regulate under Title I is far more circumscribed than under Title II).

<sup>76</sup> The FTC, for example, is expressly limited by the “common carrier” exemption, 15 U.S.C. § 45(a)(2) (2006), which exempts from the FTC Act “common carriers subject to the Acts to regulate commerce.” Section 44 of 15 U.S.C. defines the “Acts to regulate commerce” as “subtitle IV of Title 49 (interstate transportation) and the Communications Act of 1934” and all amendments thereto. In addition, the Supreme Court has expressly found that the reach of antitrust law is not coextensive to that of the regulator. See *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 129 S. Ct. 1109, 1114–15 (2009) (finding no antitrust price squeeze complaint based on common carrier access and pricing regulations); *Veri-*

This is not a surprising trade off; as Alfred Kahn explained, “The essence of regulation is the explicit replacement of competition with government orders as the principle institutional device for assuring good performance.”<sup>77</sup>

Implicit in this trade-off is an underlying question of great import—who decides which silo (or Title) applies to Internet access? The answer will be dispositive of (1) the initial level of authorized, regulatory intervention and (2) the degree to which antitrust authorities may discipline the market.

The current classification of Internet access is as a Title I information service. This classification was made by the FCC in separate rulemakings for each Internet access source (wire telephony, wireless, cable, and satellite).<sup>78</sup> Under the Title I designation, the FCC may use its ancillary jurisdiction to regulate Internet access.<sup>79</sup> The ability to use such ancillary jurisdiction to execute net neutrality regulation, however, has now been cast in doubt by *Comcast Corp. v. FCC*, decided by the D.C. Circuit in 2010.<sup>80</sup>

In 2007 several subscribers to Comcast’s high-speed Internet service discovered that the company was interfering with their use of BitTorrent, a peer-to-peer networking application.<sup>81</sup> Comcast defended its interference noting that such programs consume significant amounts of bandwidth and that interference was necessary to manage scarce network capacity.<sup>82</sup> The FCC ruled that Comcast had “significantly impeded consumers’ ability to access the content and use the applications

zon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411–16 (2004) (finding no antitrust duty to deal based on common carrier access requirements).

<sup>77</sup> I ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 20 (1970).

<sup>78</sup> Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities, 17 FCC Rcd. 4798, 4802 ¶ 7 (Mar. 14, 2002) (deciding that cable broadband services are neither Title II “telecommunications services” nor Title VI “cable services”); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14,853, 14,855–57 ¶¶ 1–4 (Aug. 5, 2005) (classifying wired telephony broadband access as an information service); Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, Declaratory Ruling, 22 FCC Rcd. 5901, 5901 ¶ 1 (Mar. 22, 2007) (classifying wireless broadband access as an “information service”).

<sup>79</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642, 645–46 (D.C. Cir. 2010) (noting that the FCC claimed that it could regulate ISPs through its ancillary jurisdiction under Title I).

<sup>80</sup> See *id.* at 644 (noting that the FCC could not use its ancillary jurisdiction to prevent Comcast from interfering with its customer’s use of peer-to-peer networking applications).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 644–45.

of their choice” in a manner that “contravene[d] . . . federal policy.”<sup>83</sup> Comcast petitioned for review, claiming among other things, that the FCC has failed to justify exercising jurisdiction over Comcast’s network management practices.<sup>84</sup> Reaching only the jurisdictional challenge, the D.C. Circuit found the FCC had improperly used its ancillary jurisdiction to “pursue a stand-alone policy objective.”<sup>85</sup> The court forcefully explained that to properly exercise ancillary jurisdiction the agency must establish a clear relationship between its action and a specifically delegated power.<sup>86</sup> Simply stated, in order to establish the authority to enforce net neutrality, the FCC must first establish that the Communications Act contains a direct mandate (i.e., not an aspirational statement), and second, it must demonstrate that the net neutrality rules are related to, and necessary for, that mandate’s fulfillment.<sup>87</sup> In the court’s opinion, the FCC failed to do either.<sup>88</sup>

In the wake of *Comcast*, the FCC has proposed reclassifying Internet access from a Title I “information service” to a Title II “telecommunications service.”<sup>89</sup> The regulatory objective is to circumvent the *Comcast* standard for ancillary jurisdiction and to place Internet access within that section of its legacy-based regulation that gives the FCC the greatest degree of regulatory options. This decision does far more than augment the FCC’s power; it may simultaneously limit antitrust authority. Under Title II regulation, some commentators are concerned that the salutary application of antitrust authority will be curtailed.<sup>90</sup> In particular, commentators point to *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, decided by the U.S. Supreme Court in 2004,

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<sup>83</sup> *Id.* at 645 (quoting *In re Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13,028, 13,052–54 ¶¶ 43, 44 (2008)).

<sup>84</sup> *Id.*

<sup>85</sup> *Comcast*, 600 F.3d at 659.

<sup>86</sup> *See id.* at 661 (finding that the FCC “failed to tie its assertion of ancillary authority over Comcast’s Internet service to any ‘statutorily mandated responsibility’”) (citations omitted).

<sup>87</sup> *Id.* at 646.

<sup>88</sup> *Id.* at 661.

<sup>89</sup> Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, BROADBAND.GOV (May 6, 2010), <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html> (discussing proposals to mitigate the regulatory restrictions in *Comcast* by reclassifying Internet services to fall under Title II).

<sup>90</sup> *See FTC Comments, supra* note 52, at 9 n.25 (noting that consumers may benefit from the FTC’s competition and consumer protection expertise precisely because broadband Internet access is *not* a common carrier service and, therefore, the FTC shares concurrent jurisdiction in this arena with the FCC).

which spoke directly to the limited scope of antitrust in relation to a Title II, legacy-based regulation service.<sup>91</sup>

In *Trinko*, Verizon was required by statute to lease its network elements to competing firms at wholesale rates.<sup>92</sup> The plaintiff—a customer of one of Verizon’s rivals—asserted that Verizon denied its competitors access to interconnection support services, making it difficult for those competitors to fill their customers’ orders.<sup>93</sup> The complaint alleged that this conduct in the upstream market violated section 2 of the Sherman Act by impeding the ability of independent carriers to compete in the downstream market for local telephone service.<sup>94</sup> The Court held that while Verizon had a regulator duty to provide access to its rival, it had no antitrust duty to do so, and thus concluded that “Verizon’s alleged insufficient assistance in the provision of service to rivals” did not violate the Sherman Act.<sup>95</sup>

The Court proceeded to express a larger consideration of the proper role of antitrust law when faced with an industry-specific regulator.<sup>96</sup> The Court noted that of “particular importance is the existence of a regulatory structure designed to deter and remedy *anticompetitive* harm.”<sup>97</sup> The relevance of this elaborate structure, the Court stated, was that “the additional benefit to competition provided by antitrust enforcement will tend to be small.”<sup>98</sup> This assertion has been construed by some commentators as an implied limit to the reach of antitrust action against firms “in industries subject to extensive, competition-focused regulation.”<sup>99</sup>

Besides this implied judicial limit to antitrust authority in the communications arena, there is an express statutory limit known as the

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<sup>91</sup> *Trinko*, 540 U.S. at 412 (stating that in the presence of an industry-specific regulator “the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny”); see ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 714 (2d ed. 2008) (discussing *Trinko*’s implications for future antitrust cases).

<sup>92</sup> *Trinko*, 540 U.S. at 402–403.

<sup>93</sup> *Id.* at 404–405.

<sup>94</sup> See Amended Complaint ¶¶ 45–59, *Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp.*, 123 F. Supp. 2d 738 (S.D.N.Y. Jan. 19, 2001) (No. 00-1910) (outlining the allegations that Verizon violated section 2 of the Sherman Act).

<sup>95</sup> *Trinko*, 540 U.S. at 410.

<sup>96</sup> *Id.* at 411–15.

<sup>97</sup> *Id.* at 412 (emphasis added).

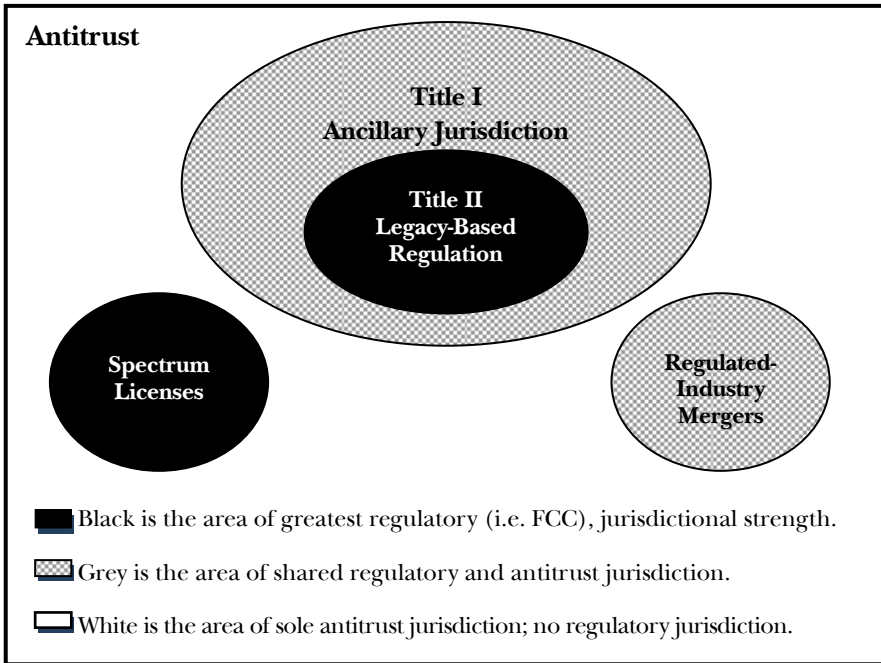
<sup>98</sup> *Id.*

<sup>99</sup> See e.g., Gavil et al., *supra* note 91, at 713–14.

“common carrier exception.”<sup>100</sup> This exception, first promulgated in the 1930s, the monopoly era of telephone, expressly limits the FTC in its oversight of Title II common carrier operators.<sup>101</sup>

In short, *Trinko* arguably defines the breadth of the FCC’s legacy-based regulation, whereas the *Comcast* standard limits the regulator’s ancillary jurisdiction. In other words, *Comcast* defines the reach of the regulator into the realm of antitrust and *Trinko* defines the limits of antitrust into the realm of the regulator.

### Current Regulatory & Antitrust Boundaries



<sup>100</sup> See 15 U.S.C. § 45(a)(2) (2006) (excluding “common carriers” from the FTC’s jurisdiction).

<sup>101</sup> There have been increasing cries that the exemption be repealed as it is inconsistent with the modern realities of the telecommunications market. See, e.g., Prepared Statement of the Federal Trade Commission Before the Senate Committee on Commerce, Science and Transportation, 16, 20–21 (Apr. 8, 2008), <http://www.ftc.gov/os/testimony/P03410Ireauth.pdf> (advocating for the passage of the FTC Reauthorization Act of 2008, which would repeal the common carrier exception). This bill “repeals [the common carrier] exemption, allowing the [FTC] to protect consumers from unfair and deceptive acts or practices by telecommunications common carriers, particularly in the areas of advertising, marketing, and billing,” according to a joint statement of the bill’s sponsors. Richard Martin, *Senate Considers Striking Down ‘Common Carrier’ Exception*, INFO.WEEK (Apr. 14, 2008, 1:42 PM), <http://www.informationweek.com/news/telecom/regulation/207200476?subSection=Hardware+Reviews>.

Historically, the FCC has extensive jurisdiction over industry participants regulated under Title II—much greater reach than that of antitrust authorities. In essence, antitrust authorities are limited to everything outside of the FCC’s Title II legacy-based jurisdiction.<sup>102</sup> In addition, the FCC may carve out greater obligations on industry than antitrust law would impose by use of its jurisdiction to regulate spectrum licenses and regulated-industry mergers. This Article refers to this carve out as the opportunistic use of satellite jurisdiction and refers to (1) the regulation of Title III industry participants (wireless operators) by inserting terms and conditions into spectrum licenses and (2) the regulation of all merging communications industry participants by inserting terms and conditions into the merger approval.<sup>103</sup> The FCC’s satellite jurisdiction opportunistically broadens its original jurisdiction by extending into areas of Title I ancillary jurisdiction.<sup>104</sup>

The decision to classify a service offering as part of the “inner circle” of Title II legacy-based regulation is a momentous one. There is no doubt that the FCC’s categorical, legacy-based regulation can lead to difficult jurisdictional challenges in the growing world of technological innovation and convergence. The result is that sometimes the FCC must force an elephant into a hole.<sup>105</sup> Some might argue that Internet access may be just such an elephant. However, given the historic development of each legacy-based regulatory regime and the impact a Title II designation has on antitrust supervision of the industry, it would appear that the market for Internet access is far larger than a mere “elephant”—it represents a new market offering of such distinction that cannot (and should not) be jammed into the current regulatory structure.

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<sup>102</sup> See, e.g., 15 U.S.C. § 45(a)(2) (2006) (granting the FTC power to prevent unfair methods of competition and restraints on trade in all areas except for “common carriers” and several other exceptions).

<sup>103</sup> See *id.* (excluding Title II “common carriers” from antitrust oversight); 15 U.S.C. §§ 18, 21(a) (2006) (granting the FCC the ability to regulate mergers of “common carriers”); 47 U.S.C. § 303(y) (2006) (granting the FCC exclusive authority over spectrum licenses).

<sup>104</sup> See *infra* notes 170–203 and accompanying text.

<sup>105</sup> See *Comcast*, 600 F.3d at 644 (finding that the FCC’s ancillary jurisdiction under Title I was not broad enough to justify its attempted regulation of the Internet). Consider the following: under technology-specific, silo regulation, where does Voice over Internet Protocol (“VoIP”) belong? VoIP services can be sent over any Internet transmission system—DSL (wire), cable, or wireless (broadcast). Arguably, the role of the FCC as arbiter of this difficult decision has met with judicial approval. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81 (2005) (suggesting that the FCC’s ancillary jurisdiction requires the agency to provide a *reasonable* interpretation of the statute, but that interpretation need not be the best).

This conclusion is supported by the regulatory structure itself. Re-classification of Internet access into the Title II legacy-based regulation would place certain technologies (cable, satellite, broadcast, and, to some extent, wireless) under the Title II umbrella for the first time. These technologies would ostensibly still be regulated under their own legacy-based regulation (Title III or Title VI) for that technology's traditional service offering and Title II for Internet transmission services. But this ignores the underlying reasons that led to each technology's distinct statutory regime in the first instance.

There is no doubt that Congress has expressly permitted, in fact encouraged, the FCC to forbear from regulating technologies or services that have matured into competitive markets.<sup>106</sup> As argued here, however, the decision to remove, or to never admit, a new service offering into the scope of the FCC's jurisdiction is quite distinct from the decision to designate new services for inclusion into the regulated state. In particular, when, as here, the FCC is expressly charged to encourage competition and deregulate the industry,<sup>107</sup> it cannot be the case that the agency is simultaneously charged with increasing regulation and re-regulating the industry in the face of legislative silence.

To elaborate further on this observation, a brief background on the history of FCC treatment of Internet transmission services is warranted. Internet access was first offered by landline common carriers—the Title II wire telephony providers. When providers offered new data services, this new offering was not a new technology per se but simply a new service provided on top of a regulated, wired telephony transmission network. In what was perhaps a reflexive move, regulators extended Title II obligations of wire telephony regardless of whether the network was used to transmit voice or data.<sup>108</sup> In other words, the wire telephony provider was already under certain Title II access and rate

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<sup>106</sup> See, e.g., 47 U.S.C. § 160 (granting the FCC permission to forbear from application of regulations or provisions of the chapter when certain pro-consumer conditions have been met).

<sup>107</sup> Specifically, Congress enacted the Telecommunications Act of 1996 ("1996 Act") for the express purposes of promoting competition, reducing regulation, and encouraging the "rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Preamble, Pub. L. No. 104-104, 110 Stat. 56, 56. In section 706 of the 1996 Act, Congress directed the Commission to "encourage," without regard to transmission media or technology, "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," through, among other things, "remov[ing] barriers to infrastructure investment." *Id.* § 706(a) (codified as 47 U.S.C. § 1302 (2006)).

<sup>108</sup> See JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 20, 150–55 (2005) (describing the FCC's early efforts to regulate wireline ISPs).



requirements for voice transmissions, so, when data over wire telephony became a separate service offering, the obligations of the underlying transmission system were merely continued.<sup>109</sup> It is imprecise to conclude, as many knowledgeable commentators have done carelessly, that ISPs ever carried a Title II designation at any juncture of commercial Internet development.<sup>110</sup>

In its decision to continue the underlying transmission obligations of wire telephony, the FCC emphasized its concern that the wire telephony company, AT&T, could leverage its market power into another industry.<sup>111</sup> Such concern and focus was in keeping with the regulatory history and legislative intent of Title II itself.<sup>112</sup> Due to concerns of AT&T monopoly control in the local loop,<sup>113</sup> Title II of the Act is dominated by various access rights and rate control provisions.<sup>114</sup> These regulatory interventions are aimed at alleviating concerns of bottlenecks, raising rivals' costs, and barriers to entry which might indirectly harm consumers by crippling potential competition in a highly concentrated market.<sup>115</sup>

But since the 1970s, when the FCC first visited the issue of data transmission over communication lines,<sup>116</sup> much has changed in the industry. Once the popularity of Internet access was established, it was not long before the telephone wire was not the only means of data transport. The other owner of the wire into most homes, the cable pro-

<sup>109</sup> See *id.* at 69–115 (describing the regulations for voice transmission under Title II).

<sup>110</sup> Harry Feld, *Sorry AT&T, Title II Would Not "Require" Paid Prioritization*, PUBLIC KNOWLEDGE (Oct. 8, 2010, 2:42 PM), <http://www.publicknowledge.org/blog/sorry-att-title-ii-would-not-require-paid-pri> (suggesting that the FCC may reclassify ISPs "back from Title I to Title II").

<sup>111</sup> See NUECHTERLEIN & WEISER, *supra* note 108, at 20, 150–55 (describing how the FCC's concerns about Internet access were driven by AT&T's prior monopolization of wireline telephone service).

<sup>112</sup> See generally Kenneth A. Cox & William J. Byrnes, *The Common Carrier Provisions—A Product of Evolutionary Development*, in LEGISLATIVE HISTORY, *supra* note 21, at 25 (discussing how the drafters of Title II were concerned about telephone companies obtaining monopolies and imposing discriminatory rates). The legislative history behind the 1996 Act also evidences the ongoing concern of market power over the local loop. For example, Representative Edward Markey declared that although "[t]he once monolithic giant, AT&T, is a shadow of its former vertically integrated self[,] [s]even powerful corporations now control the local networks, and thousands of fledgling competitors are lurking on the horizon." *Chairman's Opening Remarks Before the Subcomm. on Energy & Commerce*, 100th Cong. 1 (1987) (statement of Edward Markey, Subcommittee Chairman).

<sup>113</sup> See *supra* note 111 and accompanying text.

<sup>114</sup> See 47 U.S.C. §§ 201–231 (2006).

<sup>115</sup> See, e.g., *id.* § 201 (stating that FCC must assure that rates are "just and reasonable").

<sup>116</sup> See NUECHTERLEIN & WEISER, *supra* note 108, at 20, 150–55 (describing early efforts to regulate data transmission).

vider, began to provide data transmissions as well.<sup>117</sup> Cable, however, is regulated in a silo distinct from wire telephony products.<sup>118</sup> Cable works under a government-franchise model and is regulated under Title VI of the Communications Act.<sup>119</sup> The legislative history of the cable provisions of the Act, as opposed to that for wire telephony, reflects different motivating concerns.<sup>120</sup> By the time the FCC considered regulation of Internet access by cable, Internet access services had begun to develop and form as a distinct market from other communications offerings. Internet access by wireless and satellite providers, for example, was a reality. In reflection of this new market where many different types of technologies competed, the FCC made a deliberative determination that cable Internet access did not fit into the cable broadcast legacy regulation.<sup>121</sup>

Cable ISPs were instead regulated from the start as a Title I information service.<sup>122</sup> In light of the new competition from cable operators, and during a time of deregulatory pressure, the FCC reevaluated the justifications for treating data transmission by wire telephony differently from cable providers.<sup>123</sup> Also, because cable represented a second

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<sup>117</sup> See ROUZBEH YASSINI, PLANET BROADBAND 35–46 (2004) (discussing the emergence of Internet access through cable modems).

<sup>118</sup> See 47 U.S.C. §§ 521–573 (2006). The regulatory history of cable broadcast, as opposed to cable broadband, is of particular relevance to the current debate over Internet access regulation. Like Internet access, the innovation of cable television was a regulatory dilemma for the FCC. The technical means of content delivery used by cable did not fit naturally into the statutory “silos” established by Congress. Cable is the delivery of television broadcast signals by a coaxial cable, or “wire.” At first the FCC concluded that it lacked the jurisdiction to regulate this new technology. See NUECHTERLEIN & WEISER, *supra* note 108, at 23–24 (discussing early efforts to regulate cable television). Upon encouragement from the regulated television broadcasters of the day, the FCC reconsidered its position and concluded that it could indeed regulate cable, like Internet access today, under its Title I authority. *Id.* The claim was that regulation of cable television was ancillary to the FCC’s mandate to regulate over-the-air broadcasting. *Id.* A parallel argument for Title I jurisdiction of cable Internet access, has been asserted by the FCC—the agency briefly (without evidentiary support) claimed cable broadband access was ancillary to the FCC’s cable broadcast regulation. *Id.* at 163–65 & n.26.

<sup>119</sup> 47 U.S.C. §§ 521–573.

<sup>120</sup> See NUECHTERLEIN & WEISER, *supra* note 108, at 375–78 (discussing efforts to regulate cable television). Cable broadcast is of course characterized by a two-sided demand structure, content providers demand access to the cable network and consumers demand access to the network. Unlike the arena of cable broadband (Internet access), however, it is not relevant to a consumer of cable broadcast (television) that they be able to directly access consumers of other cable networks.

<sup>121</sup> NUECHTERLEIN & WEISER, *supra* note 108, at 163–65.

<sup>122</sup> See *Brand X*, 545 U.S. at 975–79, 1002–03 (upholding the FCC’s decision to regulate cable ISPs under Title I ancillary jurisdiction instead of Title II).

<sup>123</sup> *Id.* at 977–79 (noting that there was less potential for monopoly for cable ISPs).

wire to the home, the ISP market was less defined by monopoly than wire telephony's market for voice transmission.<sup>124</sup> In a reevaluation of Internet access based largely on market analysis, the FCC issued an order that removed wire telephony Internet access from its common carrier, Title II status, to the more lightly regulated status of an information service (Title I).<sup>125</sup>

### III. The FCC's AUTHORITY TO IMPOSE NET NEUTRALITY IN THE WAKE OF COMCAST CORP.

As a matter of administrative law, the FCC acting as an independent agency may enforce congressional mandates as expressed in statute, engage in rulemaking procedures, or use adjudicatory procedures to enforce the will of Congress.<sup>126</sup> However, a threshold issue exists—whether or not the agency has the jurisdiction to engage in the proposed regulatory arena in the first instance. Agencies such as the FCC have rulemaking authority by legislative delegation and, therefore, the scope of the agency's power is limited by the reach of its designated jurisdiction.

The access and distribution of applications and content on the Internet is provided by FCC-regulated industries (such as cable operators and both wire and wireless telecommunications networks), which by extension, establishes the FCC's general subject matter jurisdiction over some aspects of the Internet.<sup>127</sup> Even if general authority is estab-

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<sup>124</sup> See *id.* at 975–79 (describing the ISP market as more competitive).

<sup>125</sup> See, e.g., *id.* at 975–76 (“The Act regulates telecommunications carriers, but not [ISPs], as common carriers. . . . [ISPs], by contrast, are not subject to mandatory common-carrier regulation under Title II . . . .”). A note should be made also of the regulatory heritage of other Internet transmission providers—namely wireless and satellite. The regulatory history of these two technologies and all things broadcast over spectrum is distinct from that of wired telephony. The regulatory concern for broadcast was not born from monopolistic tendencies being expressed in the marketplace, but rather was based on the technological concern of defining spectrum broadcast rights in order to reduce “interference” between competing broadcast signals. See, e.g., Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 135–37 (1990) (discussing the “interference rationale” for allocating spectrum licenses).

<sup>126</sup> See *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 201–03 (1947) (holding that an agency has discretion to choose between adjudication and rulemaking but only where there are preexisting binding legal norms for agency to interpret and apply); see also *NLRB v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267, 294 (1974) (“[T]he choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”). See generally Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>127</sup> See, e.g., Communications Act § 1, 47 U.S.C. § 151 (2006) (establishing the FCC’s subject matter jurisdiction over “wire . . . communication”). Moreover, Congress has directly mandated that the FCC protect the citizenry from certain deleterious and illegal

lished, however, the FCC must further establish specific statutory jurisdiction related to the proposed rules to enact regulations or engage in adjudicatory procedures.<sup>128</sup> This is not only a matter of precedent, but also of logical restraint of powers born of constitutional delegation. If agency regulatory authority was coextensive with that agency's general subject matter jurisdiction, then Congress would only be able to prohibit or limit agency action rather than authorize it.<sup>129</sup> With respect to proposed net neutrality regulation, establishing a specific statutory anchor has proved problematic for the FCC as attested to in 2010 by the U.S. Court of Appeals for the D.C. Circuit in *Comcast Corp.*

In considering the type of regulations or adjudications proposed for net neutrality, the following jurisdictional sources have either been used or proposed: (1) reclassification of Internet access from a Title I to a Title II classification,<sup>130</sup> (2) Title I classification coupled with the use of ancillary jurisdiction,<sup>131</sup> (3) conditioning the approval of merger contracts on the inclusion of net neutral terms,<sup>132</sup> or (4) insertion of net neutrality limitations in spectrum license agreements for wireless broadband.<sup>133</sup> This Part discusses the types of FCC jurisdictional assertions and its prospective viability as legitimate exercises of administrative power.

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Internet content. See 47 U.S.C. § 230(b) (stating that the policy of the United States is to enforce laws against obscenity, harassment, and stalking by means of computer).

<sup>128</sup> See *Bell Aerospace*, 416 U.S. at 291–94 (stating that administrative agencies have broad discretion to either solve problems by adjudication or rulemaking when authorized by statute (citing *Chenery II*, 332 U.S. at 201–03)). In essence, it may be said that *Chenery II* and its progeny stand for the principle that new regulatory rules may be announced and applied by adjudication. However, these cases do not condone that new regulatory rules or principles be promulgated absent preexisting law. In *Chenery II* itself the Supreme Court explained that adjudications are the “place for the case-by-case evolution of statutory standards.” *Chenery II*, 332 U.S. at 203.

<sup>129</sup> See *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796, 805–06 (D.C. Cir. 2002) (discussing the dangers of allowing the FCC to assume authority in an area on which Congress was silent); *Ry. Labor Execs. Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (“Were courts to presume a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.”).

<sup>130</sup> See *infra* notes 140–148 and accompanying text. Some proponents of net neutrality call for a full application of Title II but the FCC Commissioner has proposed Title II reclassification combined with regulatory forbearance from enforcement of all but a select number of Title II provisions. Genachowski, *supra* note 89. As the first step of either scenario is reclassification to Title II, and due to the reversible nature of regulatory forbearance, the distinction of “full” or “limited” application of Title II is of limited relevance to the current discussion.

<sup>131</sup> See *infra* notes 170–193 and accompanying text.

<sup>132</sup> See *infra* notes 194–201 and accompanying text.

<sup>133</sup> See *infra* notes 202–203 and accompanying text.

The first proposal, reclassification to Title II, is a proposal for the FCC to assert classic, legacy-based regulatory jurisdiction over Internet access. The other three proposals this Article designates as “satellite” bases for FCC jurisdiction. In Section A of this Part, legacy-based regulatory jurisdiction options are considered.<sup>134</sup> In Section B, satellite jurisdiction is discussed in three parts: (1) the use of certain Title I classifications, (2) FCC merger approvals, and (3) spectrum licensing authority.<sup>135</sup> After the threshold issue of jurisdiction is established, an inquiry inevitably follows as to the contours of that jurisdictional authority. Therefore, the following discussion sets forward some reflections as to the limitations and concerns each jurisdictional theory creates with respect to net neutrality regulations. As will be shown, even under the highest degree of regulatory authority, Title II, net neutrality may not be directly regulated. If so, this is evidence that net neutrality does not reflect the intent of Congress as expressed in the Communications Act. If it is not a statutorily mandated responsibility, it is inconsequential whether Internet access transmission is classified as Title II or Title I—it simply falls outside the scope of the regulator’s authority.

#### A. *Legacy-Based Regulation: Procedural Opportunism*

Title II regulation is “common carrier” regulation that applies to “telecommunications [services].”<sup>136</sup> The landline phone system is the only communications technology that has been historically and is presently governed by the entirety of Title II.<sup>137</sup> Under Title II the FCC en-

<sup>134</sup> See *infra* notes 136–169 and accompanying text.

<sup>135</sup> See *infra* notes 170–203 and accompanying text.

<sup>136</sup> See 47 U.S.C. §§ 201–276 (2006) (regulating “common carriers”); see also NUECHTERLEIN & WEISER, *supra* note 108, at 76 (discussing the definition of “common carrier”). It is interesting to note, that the historic roots of the original telecommunications common carrier, wire telephony itself, are best described as lackadaisical rather than doctrinally robust. In a spur of the moment amendment, Congress placed wire telephony under the control of the Interstate Commerce Commission (“ICC”). See Mann-Elkins Act of 1910, § 7, ch. 309, 36 Stat. 539, 544–46 (amending Interstate Commerce Act, ch. 104, § 1, 24 Stat. 379, 379 (1887), *repealed by* Communications Act of 1934, ch. 652, § 602(b), 48 Stat. 1064, 1102). The ICC was the regulator of railroads, an industry historically characterized as a “common carrier.” It is not clear from the legislative history that there was any rationale for why the new wire telephony industry should be included in the same common carrier statute as railroads. In fact, the evidence indicates that inclusion of wire telephony in what was a bill to strengthen railroads was completely haphazard. See LEGISLATIVE HISTORY, *supra* note 21, at 6.

<sup>137</sup> Based on its broadcast technology, mobile telephony is governed by Title III, the offshoot of the 1927 Radio Act. However, mobile telephony is also classified as a common carrier for certain activities and is regulated under select sections of Title II. See 47 U.S.C. § 332(c) (defining mobile services and their treatment as common carriers).

joys its most plenary regulatory authority. Title II permits intervention in fundamental aspects of the private development, deployment, and maintenance of a landline telecommunications system.<sup>138</sup> Examples of Title II–based regulatory intervention include, but are not limited to, mandated interconnection to rivals, mandated leasing of regulatory-designated network elements to rivals, and oversight of the prices charged to consumers and rivals.<sup>139</sup> There is a strong push by certain FCC Commissioners, members of Congress, and net neutrality proponents to classify (or in the case of wire telephony Internet access to reclassify) all Internet access transmission services as Title II telecommunications services.<sup>140</sup> Advocates argue that such a classification would provide a more secure jurisdictional basis for promulgating net neutrality rulemaking.<sup>141</sup>

No doubt, a Title II classification of Internet transmission access bestows more power on the regulator to control the underlying transmission system. Conversely, such a determination removes some oversight jurisdiction from antitrust authorities. But as a matter of law, even under Title II, the FCC’s jurisdiction is limited by statute. This leads to the simple, but often overlooked, conclusion that to the extent net neutrality policy goes beyond the scope of the FCC’s Title II mandate, the policy cannot be enacted regardless of the technology’s classification.

As a general critique of adapting Title II to regulate Internet access, many net neutrality opponents argue, in essence, that Title II is the wrong hole for the net neutrality elephant.<sup>142</sup> Title II, they argue,

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<sup>138</sup> See *id.* §§ 201–276.

<sup>139</sup> See, e.g., *id.* §§ 201, 202, 251, 271.

<sup>140</sup> The FCC has argued for the “Third Way.” The Third Way suggested is that the FCC will reclassify Internet access as a Title II service but then simultaneously “forbear” from enforcing all but a select few of the Title II provisions. Genachowski, *supra* note 89 (suggesting reclassification of broadband Internet as Title II as one of three options). Important for this discussion is the FCC’s reclassification decision. Whether the FCC then decides to forbear or not is irrelevant. Moreover, some of the provisions which the FCC seeks to enforce under Title II are so broad that they may be interpreted to allow the same type of net neutrality regulations in spite of forbearance. Under the FCC’s Title II plus forbearance plan, only the following sections of 47 U.S.C. would be enforced: section 201 (carriers’ rates, terms, and conditions must be “just and reasonable”), section 202 (carriers must refrain from “unjust or unreasonable discrimination”), section 208 (parties may file complaints), section 222 (carriers must protect the privacy of information), section 254 (provides the framework for the Universal Service program), and section 255 (services must be made accessible to the handicapped). *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Nate Anderson, *Google Demands Neutrality (Just Don’t Apply It to Them)*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2010/04/google-demands-neutrality-just-dont-apply-it-to-them.ars> (last visited Sept. 27, 2011) (quoting Verizon’s concerns that reclassification of

was created specifically to control the monopolistic behavior of AT&T in the 1930s,<sup>143</sup> not the dynamic and more competitive Internet ecosystem.<sup>144</sup> Another way to describe this critique is that industry-specific economic regulation is necessitated in a monopolistic environment but not otherwise. The FCC and many proponents of net neutrality either implicitly or expressly accept this presumption by launching the net neutrality debate with a description of the lack of competition in the current Internet access market.<sup>145</sup> The FCC's current rhetoric, however, demonstrates concern with respect to the Internet access market, based not on empirical, antitrust-based market determinations, but on its own generalized "public interest, convenience, and necessity" standard.<sup>146</sup>

Reclassification is indeed a momentous decision and should ideally result from a direct congressional edict. If Congress cannot, or will not, speak, however, to limit procedural opportunism, the regulator should be given clear guidelines for making its determination. The FCC's public interest standard does not provide such clarity. The public interest standard is broad and notoriously susceptible to regulatory and congressional whim.<sup>147</sup> Even in the absence of congressional intervention, the judiciary has indicated that the public interest standard is best tempered by antitrust principles.<sup>148</sup> To apply antitrust analysis to the legacy-based

Internet service to Title II would be illegal and harm consumers); *see also* Genachowski, *supra* note 89 (noting potential drawbacks to a full reclassification of the Internet under Title II).

<sup>143</sup> *See* Robinson, *supra* note 21, at 5 ("Although sponsors of the [1934 Communications Act] complained that the Mann-Elkins had been simply 'an adaptation of railroad regulation to the communications field,' in fact that is essentially what title II of the Communications Act was as well." (quoting H.R. REP. NO. 73-1850 (1934))).

<sup>144</sup> It was thought that greater regulatory power was justified to strengthen control over AT&T, a company "more powerful and skilled than any State government with which it has to deal." Statement of Dr. Irvin Stewart, 73 H.R. REP. NO. 73-8301 (1934) (quoting a report by Dr. Walter M.W. Splawn), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 343, 357.

<sup>145</sup> *See supra* notes 45–49 and accompanying text. In turn, the assertion of monopoly or "de facto" duopoly is in and of itself based on a presumption of the relevant geographic and product markets, entry barriers, and other economic determinations common in antitrust evaluations. These economic concerns are not the concern of all proponents of net neutrality, however. *See supra* notes 45–49 and accompanying text.

<sup>146</sup> *See* Genachowski, *supra* note 89 (describing the public and administrative benefits of reclassification).

<sup>147</sup> As previously noted, in a last-minute amendment that rose from the House floor, Congress designated that the new technologies of telephone and telegraph be treated the same as railroads (i.e., given "common carrier" status). Beyond the common law traditions of public interest for railroads, there was little political consensus as to what was "the public interest" with respect to these new industries or to licensing of the "ether." *See supra* note 136.

<sup>148</sup> *See* *Town of Concord, Mass. v. Bos. Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (weighing the burdens and benefits of the court's antitrust "price squeeze" inquiry).

regulation determination is particularly attractive here where the regulation at issue (Title II) was motivated by anticompetitive concerns.

Let us now consider whether the FCC's Title II legacy-regulation can even support net neutrality regulation if applied to Internet access transmissions. Even if the legal hurdles to reclassification are overcome, the scope of the FCC's jurisdiction will be expanded, but still limited to the mandates within Title II. Arguably the most promising Title II statutory provisions by which to establish net neutrality rules are those sections that deal with competition issues.<sup>149</sup> In particular, the most promising statutory sections for net neutrality are those that relate to perceived bottleneck or access-foreclosure issues.<sup>150</sup> Three possible statutory groups are likely those which cover: (1) interconnection requirements, (2) "open access" or "unbundling" of facility elements, and (3) rate regulation. The following analysis discusses the direct enforcement of these statutory selections by virtue of reclassification of Internet access as a Title II telecommunications service.<sup>151</sup> It may be possible to use ancillary jurisdiction anchored by these statutes, but the validity of such application is arguably unlikely without the underlying Title II designation.<sup>152</sup>

## 1. Interconnection, "Unbundling," and Open Access

The statutory basis for net neutrality concepts are perhaps found within the statutory requirements for common carriage interconnection.<sup>153</sup> For example, the FCC is charged in the Communications Act "to promote *nondiscriminatory accessibility* by the broadest number of users and vendors of communications products and services" and "to ensure the ability of *users and information providers* to seamlessly and transparently transmit and receive information between and across telecommunications networks."<sup>154</sup> The importance of network intercon-

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<sup>149</sup> Again, as many commentators note, it is unclear what advocates of net neutrality seek to accomplish. See, e.g., Kahn, *supra* note 48, at 2-7 (questioning the benefits of network neutrality rules).

<sup>150</sup> Again, this Article contends that the policy outcomes of the legal literature are based primarily on economic rationales, often layered with normative conclusions.

<sup>151</sup> See *infra* notes 153-169 and accompanying text.

<sup>152</sup> See *infra* notes 170-203 and accompanying text.

<sup>153</sup> In the case of wireless, FCC jurisdiction is well established as to interconnection because wireless networks, and the wire networks to which they connect, are common carriers for purposes of voice transmission and, therefore, mandated interconnection rights attach accordingly. See 47 U.S.C. § 332(c) (2006) (stating that mobile voice transmission is a "common carrier" regulated by Title II).

<sup>154</sup> *Id.* § 256 (emphasis added); see also *id.* § 251 (requiring incumbent LECs to provide interconnection to any requesting telecommunications carrier).



nection—the interconnection of the “core” private networks that provide Internet transmission abilities—is one aspect of the Internet ecosystem that scholars on both sides of the net neutrality debate may agree upon.<sup>155</sup> The importance of interconnection is a central characteristic of network economies such as the Internet. The very size of a network creates benefits that attract more customers to the network, giving the largest network a natural advantage over its competitors.<sup>156</sup> Interconnection requirements stop incumbents from using network externalities to their strategic advantage.

Under the Communications Act, the FCC has overseen this aspect of the competitive development of the communications industry, and there is a great deal of consumer value in continuing such interconnection mandates for Internet access networks.<sup>157</sup> The net neutrality debate, however, is not limited to access among telecommunications networks, but also includes access by *applications* to the Internet infrastructure. Therefore, there is perhaps limited net neutrality gain, if any, from (re)application of this particular *transmission* interconnection requirement.<sup>158</sup>

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<sup>155</sup> See, e.g., Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, J. ECON. PERSPS., Spring 1994, at 93, 94, 96–97 (discussing benefits to consumers of having an interconnected communication network); Joseph Farrell & Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. ECONOMICS 70, 81–82 (1985) (explaining the disadvantage to producers of products incompatible with the industry standard). In order to enter a network economy, it is imperative that market entrants have access to the terminating points of other public network participants. In other words, the entrant’s subscribers must be able to reach the subscribers of other network participants.

<sup>156</sup> The Internet ecosystem is replete with examples of such network externalities. For example, consider the popularity of Facebook. In selecting a social network, say MySpace or Facebook, the consumer considers the number of friends on each system as well as the opportunity to contact with long-lost acquaintances. The rational consumer would determine that the larger system, Facebook, provides more such opportunities.

<sup>157</sup> 47 U.S.C. §§ 251, 256 (2006) (mandating the interconnection of telecommunications carriers). The current net neutrality debate also looks at various proposals of regulating private, closed networks as well. These proposals merit extensive discussion and are not addressed in this Article.

<sup>158</sup> See FTC, BROADBAND CONNECTIVITY COMPETITION POLICY 157–58 (2007), available at <http://www.ftc.gov/reports/broadband/v070000report.pdf> (questioning whether it would help or harm consumers to require the interconnection of content providers). The interconnection provisions appear to provide nondiscriminatory requirements for “users and information providers.” 47 U.S.C. § 256. Some may even interpret the “seamless[] and transparent[]” language as an endorsement of open source policies. The charge is for the FCC to “promote” nondiscriminatory accessibility, and to “ensure the ability” of information providers to connect seamlessly. *Id.* Arguably a charge to “promote” is an aspirational statement, not a legislative directive to the FCC. If so, the agency can no more employ direct Title II authority to mandate a policy statement than it can employ ancillary jurisdiction to do so.

Beyond mere interconnection, which is simply the linking of networks for mutual exchange of traffic, is the requirement that incumbents unbundle network elements or provide “open access” to their networks.<sup>159</sup> The unbundling of facilities is the practice of mandating access to rivals of network facilities at connection points determined by regulators. Interconnection, simply stated, mandates that each public network have access to one another’s end users, not necessarily to the rival’s transmission system. Unbundling, by contrast, is based not on concern for strategic use of network externalities, but rather upon a finding of competitive insufficiency. A facility must allow access by rivals to some (or, theoretically, all) of its network facility to encourage entry into the market. Such structural intervention has been deemed necessary at times due to the high levels of concentration in the marketplace and the high cost of entry.<sup>160</sup>

Although the FCC has not endorsed unbundling requirements for facilities-based ISPs, many proponents of net neutrality have.<sup>161</sup> These proponents claim that such access will indirectly insure net neutrality principles by increasing consumers’ ISP options.<sup>162</sup> If rivals may enter cheaply by “renting” facilities at wholesale, regulated rates, they may enter the market and provide a full array of product attributes and pricing programs for application providers and end users alike (free versus price-differentiated service, for example). In this way consumers and application providers are not so easily foreclosed from the market by the decisions of a limited number of network providers.

Whether mandated access to unbundled points will advance the net neutrality agenda is questionable. If previous history is an indicator, the results are hardly heartening.<sup>163</sup> To rely on mandated facility interconnection for net neutrality is, ultimately, to rely on competition. The theory is that these wholesale operators will add to the differentiation of the product market. If Comcast decides to charge application operators and wholesalers do not, the competition may pressure Comcast to do likewise or, at a minimum, give consumers an alternative. This is not only a far cry from the direct market intervention imagined by most net neutrality proponents, it is likely to fail on jurisdictional grounds.

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<sup>159</sup> 47 U.S.C. § 251(c)(3).

<sup>160</sup> See NUCHESTERLEIN & WEISER, *supra* note 108, at 179–89 (discussing the debate over unbundling).

<sup>161</sup> See *id.*

<sup>162</sup> See *id.*

<sup>163</sup> Boliek, *supra* note 45, at 47–48 (finding no evidence that regulation lowered consumer prices).

Although incumbent wire telephony operators have been subject to unbundling, no Title II–type unbundling requirements have been made with respect to the cable and satellite industries.<sup>164</sup> To successfully impose such requirements by regulatory fiat is as improbable as it is imprudent.

## 2. Discriminatory Access and Quality of Service Tiering

Net neutrality proponents consider it important to the development of innovation in the application markets that ISPs not be allowed to differentiate between *data packets* by status. For instance, net neutrality principles would not permit applications to pay an ISP for a higher quality of service even if such service is provided to all comers on a nondiscriminatory basis. The common carrier provisions of Title II do contain an antidiscrimination provision.<sup>165</sup> This mandate was based upon sections 2 and 3(1) of the Interstate Commerce Act of 1887.<sup>166</sup> The Commerce Act prohibited unequal charges for like and contemporaneous service and all forms of discrimination among persons.<sup>167</sup> The Act went further to forbid giving “undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic.”<sup>168</sup> Arguably, the antidiscrimination provision under Title II does not prevent different charges for different services—in other words, it would permit price differentiation for product differentiation.<sup>169</sup> If the goal of a Title II reclassification is to perpetuate undifferentiated ISP services (i.e., no pay-for-service enhancements), it will ultimately fail. In short, net neutrality is beyond the scope of even the regulator’s common carriage mandates.

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<sup>164</sup> See 47 U.S.C. §§ 521–573 (regulating cable and satellite providers).

<sup>165</sup> *Id.* § 202.

<sup>166</sup> S. REP. NO. 73-781, at 4 (1934), reprinted in 5 AMERICAN LANDMARK LEGISLATION: PRIMARY MATERIALS 495, 498 (Irving J. Sloan ed., 1977); H.R. REP. NO. 73-1850, at 5 (1934), reprinted in LEGISLATIVE HISTORY, *supra* note 21, at 723, 727; 78 CONG. REC. 10,313 (1934).

<sup>167</sup> Interstate Commerce Act, ch. 104, § 2, 24 Stat. 379, 379–80 (codified as amended in scattered sections of 49 U.S.C.).

<sup>168</sup> Interstate Commerce Act § 3, 24 Stat. at 380.

<sup>169</sup> See *infra* notes 259–262 and accompanying text (distinguishing price discrimination from price differentiation).

## B. *Satellite Jurisdiction—Substantive Opportunism*

### 1. Title I Classification and Ancillary Jurisdiction

In the regulatory world of the moment, the FCC has designated cable Internet access as a Title I information service.<sup>170</sup> The Title I classification has concerned many proponents of net neutrality as it is believed that Title I does not give the FCC sufficient jurisdiction to impose the net neutrality principles upon Internet access providers.<sup>171</sup> Undaunted by such concerns the FCC declared, in separate rulemakings, wireless and wire Internet access to be information services as well.<sup>172</sup> This inter-platform approach is consistent with the FCC's objective to minimize the divergent impact of classic silo regulation on similar service offerings. Hardly abandoning the articulated policies of net neutrality, the FCC moved forward confident in the belief that it could impose such policies on Title I service providers by virtue of its statutory ancillary jurisdiction.

In its first application of the ancillary authority doctrine to the FCC, the D.C. Circuit developed a two-prong test, further developed in its 2005 decision in *American Library Ass'n v. FCC*.<sup>173</sup> In the first prong, the FCC must establish general jurisdiction over the subject matter at issue.<sup>174</sup> In the second prong of the test, the FCC must show that the regulation at issue is "reasonably ancillary" to other statutory provisions.<sup>175</sup> As discussed above, the first prong, subject matter jurisdiction over Internet access and transmission, is widely viewed as within the subject matter jurisdiction of the FCC.<sup>176</sup>

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<sup>170</sup> This classification was challenged in *Brand X*, a case finally decided by the Supreme Court. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81 (2005). It was in this case that the Court most recently intimated the deference that would be afforded the agency in such designations. See *id.* (requiring that an administrative agency provide a reasonable interpretation of the statute—not necessarily the best).

<sup>171</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (holding that the FCC's ancillary jurisdiction did not extend to regulating Comcast's network management practices); Genachowski, *supra* note 89 (stating that the *Comcast* decision "cast[s] serious doubt on the particular legal theory the Commission used for the past few years to justify its backstop role with respect to broadband Internet communications").

<sup>172</sup> See *supra* note 78 and accompanying text.

<sup>173</sup> *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692–93 (D.C. Cir. 2005) (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 167, 178 (1968)).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See *supra* notes 74–79, 127–129 and accompanying text. Regulatory jurisdiction over applications and content providers on the Internet is highly limited. Briefly, it is highly debatable that the FCC's general subject matter jurisdiction (the first prong of the *American Library* test) reaches the application layer of the Internet. See 47 U.S.C. § 151 (2006)

The interpretation of the second prong was, previously, debatable.<sup>177</sup> The empowering statute of FCC ancillary jurisdiction permits the FCC to perform such “acts, make such rules and regulations, and issue such orders . . . as may be *necessary* in the execution of its *functions*.”<sup>178</sup> If this is the standard, to which FCC “functions” are net neutrality principles “reasonably ancillary”?<sup>179</sup> Several sections of the Communications Act have been proposed by the FCC as answers to that question.<sup>180</sup> The court established definitively, however, that “functions” is not an ambiguous term and could not be interpreted as legislative statements of general purpose, such as those set forth by the FCC.<sup>181</sup> In other words, to serve as a basis for ancillary jurisdiction, the “function” must be a “statutorily mandated responsibility,” and the court found that the FCC had failed to tie its action against Comcast to any such re-

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(granting the FCC authority over “wire and radio communication”). The content layer may perhaps be reached to the extent necessary for the FCC to fulfill its obligations under the 47 U.S.C. § 230(b) anti-pornography rules. *Cf.* Michael Kaneb, Note, *Neither Realistic nor Constitutionally Sound: The Problem of the FCC’s Community Standard for Broadcast Indecency Determinations*, 49 B.C. L. REV. 1081, 1082–85 (2008) (discussing the FCC’s power to regulate indecent broadcasts and the problems arising from such power).

<sup>177</sup> The court did not reach the alleged violation of the American Procedure Act claimed by Comcast. *See Comcast*, 600 F.3d at 645 (noting that this claim was raised). The net neutrality principles Comcast was fined for violating were “policy statements,” not official rules, and Comcast claimed they had no fair notice as to their prospective application. *Id.* at 645, 644–45. Arguably, by reaching the issue of jurisdiction, the D.C. Circuit eviscerated the Title I plus ancillary jurisdiction paradigm for net neutrality, regardless if such a policy is articulated by adjudication or a formal rulemaking procedure.

<sup>178</sup> 47 U.S.C. § 154(i) (emphasis added).

<sup>179</sup> Absent the application of ancillary jurisdiction, the FCC does not have sufficient statutory authority for regulation under a Title I service designation. Title I, in contrast to Title II, provides only a general jurisdictional grant that covers the subject of the regulation. To meet the second prong of the test for jurisdiction, the FCC must still identify specific statutorily mandated responsibilities to which proposed regulations are ancillary. *See Am. Library*, 406 F.3d at 700 (citing *Sw. Cable*, 392 U.S. at 177–78). As stated by the Supreme Court in the 1979 decision *FCC v. Midwest Video Corp. (Midwest Video II)*, 440 U.S. 689, 706 (1979), if interpreted otherwise, Title I would give the FCC “unbounded” authority and must be anchored by “reference to the provisions of the Act directly governing [the regulated service].”

<sup>180</sup> *E.g.*, 47 U.S.C. §§ 1, 151, 230(b), 251, 1302(a); *Comcast*, 600 F.3d at 655–58 (noting that the FCC argued that its ancillary jurisdiction was based on these sections).

<sup>181</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984) (discussing how courts and administrative agencies are to interpret ambiguities in statutes that grant authority to the latter, and noting that both must follow the unambiguous intent of Congress); *Comcast*, 600 F.3d at 644 (stating that an authorization to act as necessary in furtherance of its “functions” does not give the FCC authority to act outside of explicitly delineated areas).

sponsibility.<sup>182</sup> The current Open Internet Order bases FCC ancillary jurisdiction on section 706 of the Communications Act.<sup>183</sup> This basis was asserted by the FCC and rejected by the D.C. Circuit in *Comcast*.<sup>184</sup>

Does this mean that there is no jurisdictional support for the FCC to address the concerns it had with Comcast's interference with access to specific applications? Perhaps not. Consider one theory briefly raised by the FCC but never fully developed; namely, net neutrality was necessary to protect the cable rate system overseen by the FCC.<sup>185</sup> The economic argument is simple. Comcast provides OnDemand on its *cable broadcast* system while on the same infrastructure it provides access to the Internet by *cable broadband* connections. The rates of cable broadcast are regulated;<sup>186</sup> cable broadband connection rates are not. If online streaming video is a substitute for cable broadcast offerings, Comcast has an incentive to use its cable broadband connection (an input to online video applications) in an anticompetitive, strategic manner.

Comcast could either charge online content providers (such as BitTorrent) a fee for delivery of the application (raising rivals costs) or degrade the quality of the online movie experience—either tactic designed to lessen the degree to which consumers wish to substitute online streaming video (which, at the moment, is often free) for Comcast's fee-based, OnDemand offering. The theory is that rate regulation is implicated because either choice would decrease competition against Comcast, allowing Comcast to charge its cable *broadcast* customers

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<sup>182</sup> *Comcast*, 600 F.3d at 661 (quoting *Am. Library Ass'n*, 406 F.3d at 692). Under case law, a statutorily mandated responsibility is distinct from mere statements of policy conclusions or aspirations, which have no directive power. See *United States v. Lee*, 957 F.2d 770, 773 (10th Cir. 1992) (holding that policy statements are “advisory rather than mandatory in nature”). The D.C. Circuit noted that the FCC itself had characterized section 706 to be just such an advisory statute, in which Congress urged regulators to “encourage . . . distribution” of broadband services. *Comcast*, 600 F.3d at 658; Transcript of Oral Argument at 16, 19, 20, 21, 23, 35, *Comcast*, 600 F.3d 642 (No. 08-1291) (“[I]t goes on for page after page explaining why— . . . the statute you’re relying on doesn’t give the Commission any authority to do anything but encourage, it’s aspirational, it’s not— . . . operational.”). The FCC based its jurisdiction once again on section 706 for its current *Open Internet Order*, *supra* note 14, at 17,967 ¶ 116. Likewise, the FCC has described section 230(b) as expressing congressional authorization of its open Internet policy. *Comcast*, 600 F.3d at 651.

<sup>183</sup> *Open Internet Order*, *supra* note 14, at 17,967 ¶ 116.

<sup>184</sup> *Comcast*, 600 F.3d at 658–69.

<sup>185</sup> See *id.* at 660–61 (discussing this contention).

<sup>186</sup> The FCC has very limited power over cable rates, it may only oversee the rates charged for basic service tier. See 47 U.S.C. § 543 (2006).

higher rates, at least for certain services. In other words, it is trying to protect its unregulated rates for OnDemand against rivals.<sup>187</sup>

Although the theory is relatively straightforward, the FCC's assertion was largely theoretical as to what was (or is) only a *potential* threat to competition. As seen in the antitrust arena, anticompetitive practices are not always easily defined and need some theoretical support and an evidentiary showing before action may be taken. Indeed, the FCC's net neutrality principles leave room for countervailing consumer benefits by allowing for "reasonable network management."<sup>188</sup> Here, Comcast argued that slowing BitTorrent (i.e., not *blocking* access to BitTorrent, but prioritizing other Internet traffic before BitTorrent) was reasonable because this application used a large amount of a finite resource.<sup>189</sup> By *slowing* the application, Comcast argued that it protected the vast majority of its broadband users from a systemic slow down caused by the few BitTorrent users.<sup>190</sup> The FCC provided the court with scant record

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<sup>187</sup> A parallel issue was seen in both *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956) and *Use of the Carterfone Device in Message Toll Tel. Serv.*, 13 F.C.C.2d 420 (June 26, 1968) [hereinafter *Carterfone*]. In *Hush-A-Phone* the regulator incorrectly analyzed the competitive implications of the challenge, but it corrected its error in the later *Carterfone* decision. Compare *Hush-A-Phone*, 238 F.2d at 267–69 (noting that the FCC upheld the use of tariffs to prevent users from connecting unapproved phones to the common carrier's network), with *Carterfone*, *supra*, at 423–24 (forbidding the use of such a tariff). In that instance, AT&T was cross-subsidizing its unregulated affiliates' rates in equipment by passing through the affiliates' costs to AT&T's products. See *Carterfone*, *supra*, at 241 (describing the penalty rates charged to AT&T's customers who used this unapproved device to connect to AT&T's network). Since AT&T's products had regulated rates based on costs, the result was to raise the regulated rates. In general, regulated rates often result in unintended consequences in unregulated markets. When the rates in unregulated markets are affected by an attempt to avoid regulated rates, this Article argues that the regulator's ancillary jurisdiction is appropriately applied. Of course, antitrust might also serve a role, but given the intricacies and complexity of rate control, the expertise of the regulator is indispensable.

<sup>188</sup> See *Open Internet Order*, *supra* note 14, at 17,928 ¶ 39 (noting that the FCC's rules against blocking or unreasonable discrimination allow for "reasonable network management" and are therefore not overly burdensome).

<sup>189</sup> See Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13,028, 13,031–32, 13,053–54, ¶¶ 6, 44 (Aug. 20, 2008) (explaining Comcast's claims that it was attempting to reduce network congestion).

<sup>190</sup> See *id.* at 13,057–58, ¶ 49. It should be noted that Comcast failed to notify its consumers *ex ante* that *slowing* certain programs was a potential network management tool and was properly admonished for this failure. See *id.* at 13,058–59, ¶¶ 52–53 (noting that Comcast failed to notify its customers about this policy). Such failure to disclose is properly handled by various consumer protection laws across the country and does not automatically necessitate FCC intervention to assure correction. As to the targeting of BitTorrent specifically, Comcast and BitTorrent came to a private resolution before administrative action was taken. See Press Release, Comcast Corp., Comcast and BitTorrent Form Collabo-

to the contrary and no record to support its theory that (1) the online market is a competitor to Comcast's cable broadcasts, (2) that *slowing* BitTorrent had any effect on the online video market, and (3) that Comcast had an incentive to protect its cable revenues as opposed to its data transmission revenues.<sup>191</sup> Although the court appeared open to recognition of FCC jurisdiction if the claimed effect on the cable rate system was true, the court left no doubt that the FCC must establish by evidence that its ruling was indeed connected, "ancillary," to the cited statute to establish Title I jurisdiction.<sup>192</sup> Mere theory, speculation and potential threats would not satisfy the evidentiary burden necessary to establish such jurisdiction.<sup>193</sup>

## 2. Merger Approval

Merger approval is classified here as "opportunistic" not because it exploits statutory vagaries to establish jurisdiction—here, both the jurisdiction of the FCC and antitrust authorities are well established<sup>194</sup>—but rather because regulatory approval of mergers has been opportunistic in its application. Although there is statutory authority for the FCC to approve mergers, there are no statutory limitations as to the type of obligations that the FCC may impose on the merged entity. That means the FCC is relatively free to extract concessions from parties as it determines them to be consistent with "public interest, convenience, and necessity."<sup>195</sup> Antitrust authorities, by contrast, are limited to disapprove only those mergers the result of which "*may* be substantially to lessen competition, or to *tend* to create a monopoly."<sup>196</sup> For instance, long before a net neutrality rulemaking process was announced, the FCC imposed net neutrality type regulations on the merger of AT&T and Bell

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ration to Address Network Management, Network Architecture and Content Distribution (Mar. 27, 2008), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=740> (stating that Comcast and BitTorrent have resolved their differences and will work together to develop new network management policies).

<sup>191</sup> See generally Transcript of Oral Argument, *Comcast*, 600 F.3d 642 (No. 08-1291) (failing to address these issues).

<sup>192</sup> See *Comcast*, 600 F.3d at 659–61.

<sup>193</sup> See *id.* at 651–61 (rejecting all FCC's arguments that it had ancillary jurisdiction in this case).

<sup>194</sup> See Clayton Act, 15 U.S.C. §§ 18, 21(a) (2006) (granting the FCC the ability to regulate mergers of "common carriers").

<sup>195</sup> See 47 U.S.C. § 1302(a) (2006) (granting the FCC the authority to promote competition in the telecommunications industry using this standard). The NBC/Comcast merger is of particular interest and is discussed further. See *infra* note 198.

<sup>196</sup> 15 U.S.C. § 18 (emphasis added) (indicating that probabilistic findings of anticompetitive result are required to disallow a merger).



South.<sup>197</sup> The NBC/Comcast merger is a recent example of the FCC's assertive use of the merger approval process to execute FCC policies over and above the state of current regulation.<sup>198</sup> The result of the FCC requirements in the NBC/Comcast merger is an imposition of a heightened version of net neutrality rules on one firm and one firm only.

The question is not whether the FCC has the authority to require such obligations; it certainly does.<sup>199</sup> Rather, the question is, should the

<sup>197</sup> See, e.g., Press Release, FCC, FCC Approves Merger of AT&T Inc. and BellSouth Corporation (Dec. 29, 2006), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-269275A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269275A1.pdf) (stating that AT&T had to provide a "neutral network and neutral routing in its wireline broadband Internet access service," charge \$10 more a month to new broadband customers, and repatriate 3000 out-sourced jobs); AT&T Inc. & BellSouth Corp. Application for Transfer of Control, Memorandum Opinion & Order, 22 FCC Rcd. 5662, 5663 ¶ 2 (Dec. 29, 2006) (finding various conditions on the merger to be consistent with the FCC's policy goals); Verizon Commc'ns Inc. & MCI, Inc. Applications for Approval of Transfer of Control, Memorandum Opinion & Order, 20 FCC Rcd. 18,433, 18,537 ¶ 221 (Oct. 31, 2005) (same); SBC Commc'ns Inc. & AT&T Corp., Applications for Approval of Transfer of Control, Memorandum Opinion & Order, 20 FCC Rcd. 18,290, 18,392 ¶ 211 (Oct. 31, 2005) (same).

<sup>198</sup> The merger analysis of both the DOJ and the FCC are similar in their concern that the merger may threaten online video services that compete with Comcast's cable broadcast subscriber model. Compare, for example, each agent's treatment of Hulu, NBC's joint venture to provide its content online. According to the DOJ's release:

Comcast must relinquish its management rights in Hulu, an [online video distributor]. Without such a remedy, Comcast could, through its seats on Hulu's board of directors, interfere with the management of Hulu, and, in particular, the development of products that compete with Comcast's video service. Comcast also must continue to make NBCU content available to Hulu that is comparable to the programming Hulu obtains from Disney and News Corp. . . .

Press Release, DOJ, Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions (Jan. 18, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/266149.htm](http://www.justice.gov/atr/public/press_releases/2011/266149.htm). The FCC's release set forth three merger restrictions with regards to Hulu:

- Does not enter into agreements to unreasonably restrict online distribution of its own video programming or programming of other providers.
- Does not disadvantage rival online video distribution through its broadband Internet access services and/or set-top boxes.
- Does not exercise corporate control over or unreasonably withhold programming from Hulu.

Press Release, FCC, FCC Grants Approval of Comcast-NBCU Transaction (Jan. 18, 2011), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0118/DOC-304134A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0118/DOC-304134A1.pdf). The FCC also made various demands that Comcast subscriber programs have guaranteed access to "diversity" programming defined as Spanish-language programs, children's educational programming, and continued public access, education, and government access to cable transmissions. *Id.*

<sup>199</sup> See 15 U.S.C. §§ 18, 21(a) (granting the FCC the ability to regulate mergers of "common carriers").

FCC be limited in its consent of mergers to statutorily mandated requirements, much like it is in the ancillary jurisdiction jurisprudence? If not, then the FCC may continue to do an “end run” on Congress and the courts by using its legitimate merger power to apply stipulations it would not otherwise have authority to apply as rules or regulations. Such substantive opportunism, moreover, has the deleterious effect of creating a byzantine and haphazard application of broad policies. The FCC itself has stated a general goal of eliminating regulatory disparity whenever possible.<sup>200</sup> In fact, its treatment of Internet access classification, bringing all technologies under the same Title I umbrella, can be seen as just such an effort. The use of merger approvals is in direct opposition to the salutary goal of regulatory parity, as by its very nature it imposes different obligations on one firm than on other firms that operate in the same market.<sup>201</sup>

### 3. License Allocation and Assignment

As is the case with merger approvals, so it is with applying net neutrality policy by license allocation and assignment decisions. Like in merger approval, this area also has no jurisdictional issues for the FCC. The FCC has full authority to allocate and assign spectrum licenses under its Title III jurisdiction.<sup>202</sup> As with mergers, however, regulation by licensing obligations is particular to the firm that buys the license. Such opportunistic use of its licensing jurisdiction leads to a patchwork of obligations inter-network (e.g., AT&T Wireless versus T-Mobile) and intra-network (e.g., Verizon Wireless 700 MHz licenses with “open access” requirements and other Verizon Wireless licenses without such requirements).<sup>203</sup>

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<sup>200</sup> See Kathleen Q. Abernathy, FCC Comm’r, Remarks Before the Federal Communications Bar Association New York Chapter: The Nascent Services Doctrine (July 11, 2002), <http://transition.fcc.gov/Speeches/Abernathy/2002/spkqa217.html> (stating that “regulatory parity is an important *long-term* goal,” but some disparities may be tolerated for brief periods to foster the growth of nascent services).

<sup>201</sup> The disparities may be both inter-platform (cable versus wire Internet access) and intra-platform (Comcast cable versus Time Warner cable) depending on the definition of the relevant market.

<sup>202</sup> 47 U.S.C. § 303(y) (2006).

<sup>203</sup> Network neutrality principles were included in the form of “open platform” building requirements in the 700-MHz spectrum auction. Serv. Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report & Order, 22 FCC Rcd. 15,289, 15,361 ¶ 195 (Aug. 10, 2007) (imposing license restrictions on only one commercial spectrum block in the 700 MHz Band). The FCC stated that it looks to the marketplace to deliver the benefits of “choice, innovation and affordability” to consumers but will regulate if market forces “alone may not achieve *broader social goals*.” *Id.* at 15,362 ¶ 200 (emphasis added) (explain-

#### IV. ANTITRUST AUTHORITY TO IMPOSE NET NEUTRALITY IN THE WAKE of *Trinko*

Antitrust authorities are similarly limited in their jurisdiction in enforcing net neutrality principles. Section A of this Part briefly discusses the role of general antitrust law when a regulator, such as the FCC, exercises authority over competition and business practices in a specific industry.<sup>204</sup> Section B describes how antitrust principles may help promote the net neutrality ideals of interconnection, unbundling, and open access, as well as the elimination of discriminatory access and quality of service tiering.<sup>205</sup>

##### A. Antitrust Jurisdiction in General

Just as the discussion of the FCC's jurisdiction over the Internet ecosystem exposed regulatory limitations, so too will an investigation of the jurisdiction of the FTC and DOJ in this arena. In general, antitrust authority has the power to govern conduct that is "in restraint of trade or commerce among the several States, or with foreign nations."<sup>206</sup> Antitrust jurisdiction reaches all such anticompetitive conduct expressed "in" interstate commerce or that has a substantial "effect" on such commerce.<sup>207</sup> Express and implied limits on DOJ and FTC authority, however, have been created by both Congress and the courts.<sup>208</sup>

ing the agency's decision to introduce open access requirements to the mobile telephone market in spite of finding the market "effectively competitive").

<sup>204</sup> See *infra* notes 206–215 and accompanying text.

<sup>205</sup> See *infra* notes 216–273 and accompanying text.

<sup>206</sup> Sherman Act § 1, 15 U.S.C. § 1 (2006). For an illustration of the authority of the FTC and the DOJ to regulate conduct in the restraint of trade, see generally Sherman Act, 15 U.S.C. §§ 1–7; Clayton Act, 15 U.S.C. §§ 12–27, 29 U.S.C. § 53 (2006); Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 41–58.

<sup>207</sup> 15 U.S.C. § 45(a)(1). Sections 2 and 3 of the Clayton Act, in contrast, have more limited jurisdictional scope as they apply more narrowly to persons operating "in" interstate commerce. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195–99 (1974) (interpreting the phrase "in [interstate] commerce" to require a factual showing of actual movement of commerce across state lines and not just an "effect" on such commerce). Section 7 of the Clayton Act, dealing with merger approval, was specifically amended by Congress in 1980 to overcome these jurisdictional limitations, providing jurisdiction over persons "engaged in commerce or in any activity affecting commerce." An Act to Expedite and Reduce the Cost of Antitrust Litigation, and for Other Purposes, Pub. L. No. 96-639, § 6(a), 94 Stat. 1154, 1157–58 (1980) (codified as amended at 15 U.S.C. § 18 (2006)) (emphasis added).

<sup>208</sup> See *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 267–68 (2007) (holding that antitrust enforcement must yield to securities laws when the two conflict); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411–16 (2004) (finding no duty to deal, especially in an industry already regulated by an administrative agency).

This again brings focus to the importance of Title II legacy-based regulation, which may have the effect of shielding the industry from antitrust oversight. Perhaps even more sweepingly, the Supreme Court's skepticism with respect to the efficacy of (private) antitrust action in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* in 2004 might indicate the Court's revealed preference for regulation in general.<sup>209</sup> In 2007, the Supreme Court supported this theory in *Credit Suisse Securities (USA) LLC v. Billing*, which supports an implied antitrust immunity in an instance similar to *Trinko*.<sup>210</sup> The Court did not allow a private action in antitrust law to proceed against conduct that was under the regulatory authority of the Securities and Exchange Commission.<sup>211</sup>

These broad prognostications are not without their critics. *Trinko* may simply mean that antitrust principles cannot be expanded to include purely regulatory remedies, such as forced access. There is statutory support for this view in the Communications Act itself.<sup>212</sup> The Act expressly saves antitrust jurisdiction, but does not extend it, in the communications arena.<sup>213</sup> The savings clause in the Communications Act represents a policy shift by Congress and the reintroduction of antitrust principles into an industry that had previously been somewhat protected from antitrust oversight.<sup>214</sup> As the Supreme Court noted in *Trinko*, "[A] detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity. . . . Congress, however, precluded that interpretation."<sup>215</sup>

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<sup>209</sup> See *Trinko*, 540 U.S. at 411–16 (finding no duty to deal, especially in an industry already regulated by an administrative agency). It is unclear how the posture of the *Trinko* case as a private, treble damages civil case played into the Court's skepticism and apparent preference for regulatory solution.

<sup>210</sup> See *Credit Suisse*, 551 U.S. at 267–68 (holding that antitrust enforcement must yield to securities laws when the two conflict).

<sup>211</sup> *Id.*

<sup>212</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 56, 143 (codified as a note to 47 U.S.C. § 152 (2006)) ("Savings Clause") ("[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.").

<sup>213</sup> *Id.*

<sup>214</sup> For example, prior to the enactment of the 1996 Act, telecommunications companies were somewhat immunized from full application of the antitrust laws, regarding mergers and acquisitions, because of regulation by the FCC and the state public utility commissions. See Communications Act, ch. 652, § 221(a), 48 Stat. 1064, 1080 (1934) (codified at 47 U.S.C. § 221 (2006)) (making all contrary acts of Congress inapplicable when the FCC determines that a merger should be allowed).

<sup>215</sup> *Trinko*, 540 U.S. at 406.

Under Title I, the FTC has affirmed its position of shared jurisdiction with the FCC,<sup>216</sup> but the above discussion implicates an important consequence of the FCC's current reclassification initiatives. If Internet access is reclassified as a Title II service, the FTC is most assuredly limited in its authority to address anticompetitive behavior in the Internet market. On the other hand, the FTC has expressed confidence that a Title I designation falls outside the scope of the common carrier exception and permits the FTC to exercise its authority in the Internet arena.<sup>217</sup>

### B. *Antitrust Principles for the Enforcement of Net Neutrality*

Assuming that jurisdictional authority is established, whether antitrust law alone could accomplish the articulated goals of net neutrality is a separate question. Another way to pose the issue is to consider what antitrust laws and principles could be advanced to secure the net neutrality principles of (1) interconnection, unbundling, and open access, as well as (2) non-discriminatory access and pricing. In the antitrust context, unlike in the regulatory arena, if jurisdiction is not implicitly or expressly limited, it is triggered in each and every industry by certain types of firm conduct.<sup>218</sup> In the Internet ecosystem, the plenary nature of antitrust jurisdictional reach is of particular importance. Action may be taken by antitrust authorities without an *ex ante* "silo" classification to establish jurisdiction. Moreover, antitrust is not limited to oversight of the Internet transmission providers, but also includes jurisdiction of all other participants in the marketplace. This is of particular significance in overseeing a network economy defined by two-sided demand structures. The regulator is severely handicapped when, as here, it does not have direct authority to regulate both sides of the equation.<sup>219</sup> Ap-

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<sup>216</sup> *FTC Comments*, *supra* note 52, at 1, 9 n.25.

<sup>217</sup> *See id.*

<sup>218</sup> *See supra* notes 206–208 and accompanying text.

<sup>219</sup> For example, the FCC does not have the power to compel Google to provide the same prominence to MapQuest that it provides Google Maps. In contrast, however, the FTC has challenged some of Google's search engine prioritizations as possibly being in violation of section 2 of the Sherman Act or perhaps section 5 of the FTC Act. *See* Thomas Catan & Amir Efrati, *Feds to Launch Probe of Google*, WALL ST. J., June 24, 2011, at A1 (describing the FTC's investigation).

The tendency for technological convergence further complicates the bases for jurisdiction. As one industry insider has noted,

[B]y the very nature of the Internet Ecosystem, many are working together or competing in other company's turf. Computer companies sell phones, and quite successfully. Search engines sell open operating systems. Network providers create their own apps stores. That means that the value proposition to

plication providers, for example, represent the other side of the two-sided demand structure, and these firms are arguably just as capable of creating bottlenecks and violating net neutrality principles as are the transmission providers.<sup>220</sup>

Antitrust authority is indifferent as to the particular industry in which a violator operates. The only criterion for an antitrust action is firm conduct that falls within the purview and precedent of antitrust law. Even if *Trinko* stands for the principle that antitrust intervention is not limited, but is simply not expanded, by the Communications Act, it does not automatically follow that anti-net-neutral conduct would violate antitrust principles. Below is a discussion of the most likely antitrust theories that might support a degree of net neutrality policy and the associated limitations to each.

### 1. Interconnection, “Unbundling,” and Open Access

The Supreme Court in *Trinko* spoke to Verizon’s alleged failure to provide “interconnection services” to rivals.<sup>221</sup> More accurately, the allegation went to Verizon’s failure to provide “open access” or “unbundled network elements.”<sup>222</sup> The distinction represents a significant difference in fact but, arguably, the same antitrust theories are properly applied to either.<sup>223</sup> As discussed above “interconnection,” “unbundling,” and “open access” all imply that a firm is permitting use of its proprietary facilities by another.<sup>224</sup> Legal precedent demonstrates that under certain

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the consumer is really a package created by many companies acting together with little, if any, regard to their previous corporate histories. So no set of companies should be immune from scrutiny.

Tom Tauke, Verizon Exec. Vice-President, New Democrat Network Keynote Remarks (Mar. 24, 2010), <http://www.scribd.com/doc/28858099/Prepared-Remarks-of-Verizon-EVP-Tom-Tauke>.

<sup>220</sup> For instance, in accordance with the FCC’s limited jurisdiction, regulatory focus is on concerns that Internet transmitters may have sufficient market power to “control” the transmission of non-affiliated applications. In a two-sided demand structure, however, there is no economic theory that would predict that only the transmitter of applications would have the ability to limit the flow of content; the application provider itself may exert such power. For example, every ISP, if required, would pay to carry Facebook or Google just as they currently pay to carry ESPN.com.

<sup>221</sup> *Trinko*, 540 U.S. at 407.

<sup>222</sup> *Id.* at 402–05.

<sup>223</sup> The difference is significant to the *Trinko* decision. As the Court notes, the “unbundled elements offered pursuant to [the Act] exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act and offered not *to consumers* but *to rivals*, and at considerable expense and effort.” *Id.* at 410 (emphasis added).

<sup>224</sup> See *supra* notes 153–164 and accompanying text.

circumstances, such interconnection or shared network complaints can support an antitrust action.<sup>225</sup> To the extent the unilateral sharing practices of a single firm rise to an antitrust concern, it is likely to implicate section 2 of the Sherman Act, which prohibits a firm's "monopoliz[ing]" or "attempt[ing] to monopolize" a defined market.

The backdrop of section 2 jurisprudence is that it is not an antitrust violation to have a monopoly.<sup>226</sup> Rather, a firm that possesses monopoly power in the market is prohibited from private conduct that amounts to "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>227</sup> Any firm, including any lawful monopoly, has no affirmative antitrust duties to deal with rivals. In general, antitrust is focused on negative duties, prohibitions on interference with rivals.<sup>228</sup> The imperative of antitrust doctrine is to promote and protect competition, not cooperation. Therefore, to force a firm to share the very fruits of its business acumen with a rival is antithetical to the antitrust system.

The *Trinko* Court succinctly expressed the danger of forced sharing in noting that "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."<sup>229</sup> To hold otherwise—to recognize an antitrust duty to deal with rivals—would require a remedy far beyond the technical and administrative capacity of the judiciary. In practical terms, a court order to share access would require an in-depth understanding of the operation and economics of the market, the technical components of access, and a balancing of the

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<sup>225</sup> See, e.g., *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 135–47 (D.D.C. 1982), *aff'd mem. sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983) (describing interconnection issues in an antitrust case).

<sup>226</sup> See, e.g., *United States v. U.S. Steel Corp.*, 251 U.S. 417, 460 (1920) (stating that the Sherman Act "offers no objection to the mere size of a corporation"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

<sup>227</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

<sup>228</sup> See, e.g., *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375–76 (7th Cir. 1986) ("There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter.") (quoting *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 512–13 (7th Cir. 1982)); STEPHEN BREYER, *REGULATION AND ITS REFORM* 157 (1982) ("[Antitrust laws] act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in a specified ways; for the most part, they tell private firms what not to do.").

<sup>229</sup> *Trinko*, 540 U.S. at 407–08.

pro-competitive benefits and detriments to investment of each access decision.<sup>230</sup>

Moreover, the concomitant requirement to mandated wholesale access is mandated wholesale price. If access is mandated and price is not controlled, the firm can set the price sufficiently high to effectively nullify the competitive benefits of the access.<sup>231</sup> If it ordered such a remedy, the court would suddenly be engaged in a realm for which it is ill equipped. Beyond the extreme difficulty of determining a remedy, the initial judgment must be revisited and adapted as the market develops and changes. Such a detailed and constant scrutiny of a single firm's business development is not the strength of a court of generalized expertise. For good reason, these challenges have most often been the responsibility of the regulatory regime, not the antitrust system.

The default position of antitrust is that a private business is free to use its independent discretion in deciding with whom it will deal.<sup>232</sup> That right, however, is not unqualified. The Supreme Court has determined that under certain circumstances, a refusal to deal may qualify as anticompetitive behavior in violation of section 2 of the Sherman Act.<sup>233</sup> The qualified circumstances must demonstrate the unilateral termination of a voluntary course of dealing and a "willingness to forsake short-term profits to achieve an anticompetitive end."<sup>234</sup> Or more intuitively, anticompetitive conduct is evidenced by "the defendant's unwillingness to [deal] *even if compensated at retail price.*"<sup>235</sup> In other words, once a firm makes the multitude of calculations that lead it to voluntarily sell a product on such terms as it demands, refusal to deal

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<sup>230</sup> See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 430 (1999) (Breyer, J., concurring in part and dissenting in part) (explaining the difficulties of an incumbent being "forced to share virtually every aspect of its business" with its rivals, and concluding that it would lead to "a world in which competitors would have little, if anything, to compete about").

<sup>231</sup> *MetroNet Servs. Corp. v. U.S. W. Commc'ns*, 329 F.3d 986, 1012 (9th Cir. 2003), *vacated sub nom. Qwest Corp. v. MetroNet Servs. Corp.*, 540 U.S. 1147 (2004) (mem) (permitting plaintiff to establish a section 2 claim by showing access price was prohibitively high so as to "discourage" the plaintiff from "staying in the business"); see *Town of Concord, Mass. v. Bos. Edison Co.*, 915 F.2d 17, 25–26 (1st Cir. 1990) (stating that if a court were to impose an antitrust duty that a monopolist sell inputs to rivals at "fair prices," it would first require the court to determine that "the anticompetitive risks [of permitting the monopolist's conduct] outweigh the possible benefits and the adverse administrative considerations" of antitrust intervention).

<sup>232</sup> *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); cf. *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983) (recognizing a limited duty to deal by a monopolist in control of an "essential facility").

<sup>233</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600–05 (1985).

<sup>234</sup> *Trinko*, 540 U.S. at 409 (citing *Aspen Skiing*, 472 U.S. at 608, 610–11).

<sup>235</sup> *Id.* at 409.



with a rival (or a rivals' customers) on those terms *may* rise to a section 2 violation. This type of discrimination was present in the Supreme Court cases finding refusal to deal liability.<sup>236</sup>

This standard may have multiple implications for antitrust in the net neutrality arena. First, to the extent that "interconnection" is defined as linking telecommunications services networks, the underlying landline infrastructure already has regulatory safeguards to ensure interconnection.<sup>237</sup> Mandated interconnection, however, is not the only means by which to incentivize interconnection. After all, each network receives benefits from mutual, voluntary interconnection. As a case in point, operators that provide links to the Internet backbone used by all ISPs have no regulatory mandate for interconnection, but rather market forces are relied upon to determine interconnection rights and rates.<sup>238</sup>

A second theory of net neutrality "interconnection" relates to a more complex issue: interconnection of the application and content providers to the Internet transmission network. Perhaps denial of "in-

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<sup>236</sup> See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 459, 463 n.8 (1992) (describing that the defendant engaged in an unlawful "unilateral refusal to deal" when it would not sell parts to customers who bought service from rival service providers, but sold such parts to customers generally); *Aspen Skiing*, 472 U.S. at 593–94, 608, 610–11 (describing that the defendant refused to sell its rival ski-lift tickets at retail prices even though it made such sales to customers generally and had previously made such sales in collaboration with the same rival); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 371, 378 (1973) (describing that the defendant refused to wheel power for a subset of rivals at the local level even though it's business was to wheel power for other such customers); *Lorain Journal Co. v. United States*, 342 U.S. 143, 149–50 (1951) (describing that the defendant newspaper sold advertising to all comers but refused to sell advertising to any party that also advertised with the competing radio station).

<sup>237</sup> See, e.g., 47 U.S.C. § 251 (2006) (mandating that telecommunications carriers interconnect with each others' networks).

<sup>238</sup> Interestingly, the backbone is comprised of only a handful of companies. See NUCHESTERLEIN & WEISER, *supra* note 108, at 131–33 (describing the internet "backbone"). Of those few, Sprint and MCI for example have affiliates who provide ISP services. *Id.* at 132. The contracts for backbone services for affiliates, however, have not raised either antitrust concern or regulatory interest. *Id.* at 133. The analogy to this, of course, is that the market structure (few competitors, high market shares) is not necessarily dispositive to the level of market competition. It is a good reminder that the absence of regulation does not mean certain "disconnection" of networks nor does it signal chaos. In a competitive market where interconnection is of mutual value, market forces may drive competitors to enter into private service agreements. See Katz & Shapiro, *supra* note 155, at 96–97, 100–05 (describing market forces in communications networks). In a network economy, however, it is also possible that lopsided market share may thwart the competitive incentives for mutual agreement. See *id.* at 112–13 (describing inefficiencies in such markets). In those instances, interconnection regulation may well be required to increase competition and ensure that a dominant firm does not monopolize the market by virtue of the network effects from its own large network base.

terconnection,” or “blocking,”<sup>239</sup> could be categorized as a refusal to deal under antitrust precedent. It is an intriguing possibility. To begin, with the notable exception of wireless connections, applications and content already flow freely through wireline and cable Internet access markets.<sup>240</sup> Since the ISP has already provided access services voluntarily, the first evidentiary hurdle for finding an unlawful refusal to deal is satisfied.<sup>241</sup> A change in course, like a move to disconnect an application like BitTorrent, for example, *after* a connection had been established for some time may prompt the finding that such refusal was “prompted not by competitive zeal but by anticompetitive malice.”<sup>242</sup> In general, interconnection of applications to the transmission system is not interconnection of rivals *per se*<sup>243</sup> but more often to a complementary good or service—indeed, application and content providers are often customers—of the transmission network. This general market reality may strengthen the antitrust case in the more limited circumstance where an Internet access provider (e.g., Comcast) that drops or alters the quality of access for a perceived rival (e.g., BitTorrent). Un-

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<sup>239</sup> All sides of the debate agree that some forms of “blocking” are desirable for the continued viability of the Internet ecosystem. Examples of such healthy interventions are the ISP (or application) blocking of SPAM and malware. See *Open Internet Order*, *supra* note 14, at 17,983 ¶ 143 (distinguishing SPAM, virus, and adult-content blocking, which would be allowed, from blocking that would be disallowed).

<sup>240</sup> Wireless, by virtue of its limited capacity, has historically limited access to the Internet and created a “walled garden.” Neil Weinstock Netanel, *Temptations of the Walled Garden: Digital Rights Management and Mobile Phone Carriers*, 6 J. TELECOMM. & HIGH TECH. L. 78, 80 (2007). As recognized by the FCC, but not all proponents of net neutrality, these limitations are acceptable given the developmental stage of the wireless Internet access industry. See *Open Internet Order*, *supra* note 14, at 17,962 ¶¶ 104–105 (adopting a wait-and-see approach to regulation of wireless broadband, which was still in its nascent stages). To penalize wireless for such limitations may threaten investment and future development. See *id.*

<sup>241</sup> Under “the essential facilities doctrine” a limited duty to deal has been found in circumstances that a monopolist has control over a certain physical plant, access to which is necessary for any competition to develop in the industry. See *MCI Commc’ns Corp.*, 708 F.2d at 1132–33 (developing a four part test). The Supreme Court has never itself applied the doctrine, and in *Trinko* the Court expressed open skepticism as to the scope of the doctrine’s application. *Trinko*, 540 U.S. at 410–11.

<sup>242</sup> *Trinko*, 540 U.S. at 409.

<sup>243</sup> Are online streaming video aggregators, like Netflix or Hulu, “rivals” to cable broadcast services? To the extent these services are rivals, it does not follow as a matter of course that cable operators would maximize revenue by blocking the services offered by these online firms. The ultimate answer is empirical and necessitates focus on many key factual points such as the following: it would need to be established (1) that online streaming video affected the revenue stream of cable broadcast and, even if this effect is established, (2) that degrading the service of the online streaming video aggregator did not so diminish the demand and revenues from cable ISP services to nullify the expected raise in cable broadcast revenues.

like in *Trinko*, where the interconnection rate was set by regulators,<sup>244</sup> interconnection rates for Internet access customers are merely the unregulated, retail, or wholesale prices set by the Internet access firm. To turn down a retail customer or to change the quality of service to a subset of retail customers based on status (uploading an application, for example) is therefore more analogous to the fact pattern of the *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, decided by the Supreme Court in 1985, than to that of *Trinko*.<sup>245</sup>

## 2. Discriminatory Access and Quality of Service Tiering

Since long before *Aspen Skiing*, there has been antitrust concern that a firm in control of an important input may show anticompetitive preference to itself or its affiliates over all others.<sup>246</sup> Such affiliate preferences have been challenged in the antitrust arena under various theories, such as an illegal refusal to deal, the essential facilities doctrine, monopoly leveraging, and unlawful restraint of trade.<sup>247</sup> Such preferences may be express, such as exclusive dealing or joint venture arrangements, or implicit, such as by quality of service or price differences.<sup>248</sup>

The plaintiffs' charge in *Trinko* was not based squarely in the essential facilities doctrine, where the relief sought is access. Access in this

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<sup>244</sup> *Trinko*, 540 U.S. at 402–03 (describing the system by which regulators govern the interconnection of networks).

<sup>245</sup> *Id.* at 409 (citing *Aspen Skiing*, 472 U.S. at 608, 610–11) (stating that the defendant in *Aspen Skiing* turned down a proposal to sell at its own retail price, suggesting its future monopoly retail price would be higher).

<sup>246</sup> See *Otter Tail*, 410 U.S. 366, 377–78 (holding that a power company's refusal to deal violated the Sherman Act).

<sup>247</sup> See, e.g., *Aspen Skiing*, 472 U.S. at 600–08 (analyzing the conduct complained of under these theories).

<sup>248</sup> For example, Hulu is an aggregator of online, streaming video and is a joint venture of several content developers, NBC Universal, News Corp. and Walt Disney Co. Sam Schechner & Jessica E. Vascellaro, *Hulu Reworks Its Script as Digital Change Hits TV*, WALL ST. J., Jan. 27, 2011, at A1. Hulu was developed in response to the (sometimes illegal) video sharing on YouTube and is a direct competitor to online video aggregator, Netflix. *Id.* Even though Hulu has had privileged access to content, it is still small compared to Netflix. *Id.* The owners of Hulu have also placed shows in other venues. For example, NBC Universal voluntarily gave new episodes of "Saturday Night Live" to Netflix and may make substantially more of such deals as a condition of its merger with Comcast. *Id.* Disney voluntarily provided software for Apple's iPad by which it offers some ABC television shows for free. *Id.* ABC has also built a potential online subscription service of its own. *Id.* To prohibit or limit ex ante the joint venture that formed Hulu would prevent the type of competitive experimentation desirable in the development of new offerings and services.

instance was compulsory by statute and mandated by regulators.<sup>249</sup> The alleged anticompetitive behavior was characterized as the type of illegitimate refusal to deal described above.<sup>250</sup> The character of the refusal to deal was not foreclosure from the market but, rather, increased cost as a result of *discriminatory* access.<sup>251</sup> In a real sense, if all buyers are charged the same price, particularized and diminished quality of service is the economic equivalent of discriminatory prices—different prices charged to different market participants for the same quality of service.<sup>252</sup> Plaintiff explained that

[Verizon] has not afforded [rivals] access to the local loop on a par with its own access. Among other things, [Verizon] has filled orders of [rival] customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for [rival] customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform [rivals] of their customers' orders with [Verizon].<sup>253</sup>

The problem in *Trinko* was not that such discriminatory access fails to establish an antitrust claim. The problem was that the type of access to which plaintiff claimed a nondiscriminatory right, was not voluntarily offered in the first instance.<sup>254</sup>

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<sup>249</sup> See *Trinko*, 540 U.S. at 410–11 (noting that the essential facilities doctrine was inapplicable because the regulators already have mandated access to Verizon's network).

<sup>250</sup> See *id.* at 407–11 (discussing the contention that Verizon engaged in a refusal to deal).

<sup>251</sup> See *id.* at 409 (distinguishing the facts in *Trinko* from those in *Aspen Skiing*, as in the latter case the defendant refused to deal at a retail price, and in *Trinko* the defendant merely refused to allow its rivals to connect to its network at a discounted rate).

<sup>252</sup> Antitrust will not second guess whether a voluntarily offered price is fair. In fact, charging monopoly prices is not unlawful as such prices reflect a return to investment and "business acumen." See *id.* at 407 (describing the policy rationales of antitrust law). To hold otherwise would reduce "risk taking that produces innovation and economic growth," the cornerstones of antitrust doctrine. See *id.* The building of infrastructure that renders a firm "uniquely suited to serve their customers" is what allows firms to acquire monopoly power. See *id.*

<sup>253</sup> Amended Complaint ¶ 21, Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp., 123 F. Supp. 2d 738 (S.D.N.Y. 2001) (No. 00-1910).

<sup>254</sup> See *Trinko*, 540 U.S. at 410 ("[I]nsufficient assistance in the provision of service to rivals is not a recognized antitrust claim . . ."); *Cavalier Tel., LLC v. Verizon Va., Inc.*, 330 F.3d 176, 188 (4th Cir. 2003) (stating that "Congress enacted §§ 251 and 252 of the Telecommunications Act to impose *entirely* new duties, which were in addition to the duties imposed by § 2 of the Sherman Act," and that the sharing duties of the Telecommunications Act "exceed the duties imposed by the antitrust laws"); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000) ("A complaint like this one, which takes the form

Although “discrimination” has a negative popular association, in economic theory, price discrimination may actually serve to increase consumer welfare. Different customers typically have different preferences for a firm’s products and thus are willing to pay different prices. For instance, one ISP customer might be willing to pay fifteen dollars a month for high-speed access to streaming video, but another might be willing to pay only ten dollars. When a firm engages in price discrimination—that is, charging similar customers different prices, as opposed to charging all customers a uniform price—it is typically attempting to extract from each customer more of what he or she is willing to pay.<sup>255</sup>

Price discrimination typically has ambiguous effects on both customers and efficiency.<sup>256</sup> The ability to price discriminate often allows firms to increase output. More consumers can be served when firms charge higher prices for customers that value a product highly and lower prices for those that value the product less. In those cases, however, the price paid by some consumers—specifically, those that value the product the most—might be higher than the price they would have paid if the product were sold to every customer at the same price. Many forms of price discrimination (e.g., offering coupons or limited-time sales) are not illegal under the antitrust laws. Price discrimination of some kind is commonplace in most competitive industries.<sup>257</sup>

In the ISP market, net neutrality proponents are generally opposed to “tiered” services being offered at a premium to application providers.<sup>258</sup> Such premiums are often termed “price discrimination” and are characterized as an assault on application innovation.<sup>259</sup> Many net neutrality proponents go further to not only want to eliminate price

‘X is a monopolist; X didn’t help its competitors enter the market so that they could challenge its monopoly; the prices I must pay X are therefore still too high’ does not state a claim under Section 2.”).

<sup>255</sup> See DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 277, 284, 291 (3d ed. 2000) (noting that price discrimination is a method to maximize profits that depends upon the customers’ willingness to pay a certain price).

<sup>256</sup> See James C. Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 *ANTITRUST L.J.* 327, 369 (2005) (“[I]n certain cases price discrimination can cause firms to compete more intensely, leading to lower prices for all consumers and lower profits for all firms.”).

<sup>257</sup> See *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 44–45 (2006) (observing that, “while price discrimination may provide evidence of market power, . . . it is generally recognized that it also occurs in fully competitive markets”).

<sup>258</sup> See Hass, *supra* note 44, at 1581 (recounting net neutrality proponents’ objections to access tiering).

<sup>259</sup> See *id.* (recounting fears that this practice will reduce innovation); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 *J. TELECOMM. & HIGH TECH. L.* 141, 152–54 (2003) (describing “price discrimination” by ISPs)

discrimination, but also to prevent ISPs from providing premium “quality of service” offerings.<sup>260</sup> This, however, confuses nondiscrimination principles with price differences that result from product differentiation.<sup>261</sup> Price discrimination is a firm’s attempt to capture the consumer surplus of each individual purchaser—offering different consumers the same product at different prices.<sup>262</sup> Price differentiation, by contrast, is offering the same consumer different products at different prices.

The concern of net neutrality proponents is that application operators will no longer be on an “equal playing field,” but rather, advantages in service will accrue to those innovators with the best access to capital.<sup>263</sup> Those innovators who cannot raise capital, net neutrality proponents conclude, will be relegated to the Internet “slow lane” where ISPs, either by intent or neglect, will allow lapses in quality.<sup>264</sup> Moreover, the concern is that the rise in access costs will result in a commensurate rise of application costs that will exclude some innovators from the market and will diminish innovation incentives of others.<sup>265</sup>

Arguably, such theoretical conjecture is sufficient to establish regulatory policy *if* the subject matter is specifically related to a congressional mandate.<sup>266</sup> However, under antitrust law there must be a show-

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<sup>260</sup> See Feld, *supra* note 110 (objecting to quality of service pricing).

<sup>261</sup> For example, online streaming video aggregator Hulu offers its basic service for free and offers Hulu Plus, a premium service with additional content, for a fee. See Schechner & Vascellaro, *supra* note 248. Hulu seeks to increase revenues by *differentiating* the two offerings to attract paying customers; it is not price discriminating, as it is not charging two prices for the existing service.

<sup>262</sup> It is unclear why such price discrimination based on application status would be against common carrier principles. Airlines, for example, are “common carriers” in the tradition of railroads and trucks and have regulated rates. Even so, price discrimination based on status is permitted by statute. See 47 U.S.C. § 202(a) (2006) (forbidding only “unjust or unreasonable discrimination”); *Associated Press v. FCC*, 452 F.2d 1290, 1301 (D.C. Cir. 1971) (“Since rate classifications, no less than other classifications, may be justified by differences between the classes, the mere existence of a disparity between particular rates does not establish a statutory violation.”).

<sup>263</sup> See, e.g., Legaci Staff, *Net Neutrality: How Black Leaders Are Selling Out Minority Owned Websites*, OUR LEGACI (Jan. 2, 2011), <http://ourlegaci.com/2011/01/net-neutrality-how-black-leaders-are-selling-out-minority-owned-websites> (expressing concerns that minority-owned websites will be at a competitive disadvantage with those of large corporations if ISPs are able to slow service to websites who cannot pay a premium for better access).

<sup>264</sup> See *id.*

<sup>265</sup> See *id.*

<sup>266</sup> To disallow quality-of-service tiering has been argued to fall under the “non-discriminatory pricing” requirement of net neutrality. 47 U.S.C. § 202(a). Even if Internet access was a Title II offering, however, the FCC would not be able to impose this requirement. Title II prohibits common carriers from providing *discriminatory access* and charging “unreasonable” prices, not from providing, at a minimum, nondiscriminatory access at

ing of anticompetitive conduct. In this regard an overanxious regulator may act *ex ante* to any developments regardless if such developments be anticompetitive or procompetitive. Antitrust laws take a “wait and see” approach to new innovations and product development, and authorities will only intervene if such innovation is found to be anticompetitive *ex post* of deployment. This distinction between the regimes accentuates a policy decision, therefore, that should not be considered by the FCC in regulatory isolation, but seriously contemplated and directly addressed by the legislature if necessary.

To expand on this particular theme, antitrust authorities must establish empirical evidence that (1) links the access price of transmission to innovation (or lack of innovation) at the edge and (2) finds increases in prices as anticompetitive; no such evidence has been established. Indeed, the theoretical conclusion that loss of innovation at the edge is a certainty is easily reversed by theory based on countervailing assumptions.<sup>267</sup> For a simple example, one should consider what innovations might be possible if jitter and latency were minimized or eliminated by innovation at the core? What innovation or increased entry in the gaming marketplace might we see if gamers in the United States could enjoy the transmission protocols adapted for their particular use levels that European gamers enjoy? Consider what may happen if an application provider, such as BitTorrent, could guarantee to end users that they could enjoy online video without disruption. If end users are generally loathe to use online video, or are easily discouraged by low quality online viewing, such a guarantee could increase end-user use and raise the competitive strength of BitTorrent *vis-à-vis* other online video providers or other broadcast/cable content providers. If such is the case, if quality of service increases end-user use and decreases uncertainty of adoption, there is no reason why this would discourage rather than increase investment in applications.<sup>268</sup>

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*differential prices.* See *id.* Even under the strictest reading of the common carrier requirements, railroads were still able to charge different prices for different cargo types, weights and levels of service. See *Interstate Commerce Comm'n v. Balt. & Ohio R.R. Co.*, 145 U.S. 263, 281–84 (1892) (interpreting railroad price discrimination statutes to allow for “party rate” tickets which offer discounted tickets to large numbers of people traveling together). Under Title II, it might be argued that some price discrimination such as by promotional deals, coupons, or exclusive offerings might be prohibited or at least suspect.

<sup>267</sup> Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1853–55 (2006) (suggesting that net neutrality rules forbidding price discrimination may result in less innovation than if ISPs were able to charge the heaviest users of data transmission more than it charged small start-ups).

<sup>268</sup> See Barbara Van Shewick, *Towards an Economic Framework for Net Neutrality Regulation*, 5 J. TELECOMM. & HIGH TECH. L. 329, 378–82 (2007) (describing how fear of being

The irony in the net neutrality debate is that there is strong market evidence that quality of service guarantees are of great value to innovators on the edge and to the success of application adoption. In other words, there is evidence that such guarantees may enhance consumer welfare. For example, most large application operators seek out caching services provided by Akamai and other private companies to guarantee speed in retrieval rates.<sup>269</sup> The largest of firms, such as Microsoft and Google, have their own server farms to provide the speed and quality of service that is viewed as imperative for a competitive edge.<sup>270</sup> In essence, quality of service offered by ISPs would increase competition in the market for “Internet quality” and could therefore lead to an increase in the *quantity* of quality enhancements available in that market and put downward pressure on the *prices* charged for such enhancements.<sup>271</sup> If such is the future Internet reality, smaller and nascent innovators on the edge, currently foreclosed from such quality by high prices, may be able to afford such enhancements in the future. Low-cost quality enhancements may be the key for the innovators of tomorrow to compete on a more equal footing with larger, incumbent application providers.<sup>272</sup> Under this scenario, the ex post approach of antitrust law is surely more

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blocked could discourage investment and innovation by start-ups). This conclusion misses the point inherent in the author’s own evidence, namely that allowing a contractual means by which the application innovator can assure blocking or degradation will not occur is of value to investors. Quality of service guarantees will arguably reduce investor uncertainty and even increase investment opportunities for application providers.

<sup>269</sup> See *About Akamai*, AKAMAI, <http://www.akamai.com/html/about/index.html> (last visited Sept. 27, 2011) (noting that Akamai manages the performance of billions of web applications for many large corporations).

<sup>270</sup> See Marius Oiaga, *Microsoft and Google Server Farm Face-Off*, SOFTPEDIA (Jan. 22, 2007), <http://news.softpedia.com/news/Microsoft-and-Google-Server-Farm-Face-Off-45096.shtml> (describing the competition between Google and Microsoft to build large servers to serve their customers’ growing data needs).

<sup>271</sup> Competition in general will have the effect of increasing quantity and decreasing prices. The extent to which this occurs or does not occur depends on many variables including the ability of a single firm to dominate the market in such a way that it may control prices. This type of dominance is just the type that antitrust officials may scrutinize in the wake of anticompetitive conduct. This Article does not contend that the scenario described here will occur, but merely that it is as likely to occur (probably more so) as the doomsday scenarios set forth by net neutrality proponents. The question is whether to risk preemption of innovation on vague theories of potential threat (arguably, not even probable threat) rather than waiting to intervene only in the event of observed anticompetitive realities.

<sup>272</sup> This hypothetical scenario supports the oft-spouted adage that regulation tends to benefit the incumbents and entrench the status quo. Ironically this is exactly the opposite of the purported objective of net neutrality which is to increase nascent innovation.



procompetitive and enhancing of consumer welfare than the ex ante regulatory approach, which may stifle innovation.<sup>273</sup>

### CONCLUSION

This Article posits the question: In the face of an industry-specific regulator, what is the role of antitrust authorities? The net neutrality debate within the communications industry is an ideal arena to explore this issue. At the core of the net neutrality debate are concerns regarding the sufficiency of both industry competition and consumer protection safeguards. But for the dominance of the FCC in its role as regulator of telephone and cable providers, the natural overseer for such concerns in the arena of the Internet ecosystem would be the DOJ and the FTC.<sup>274</sup> The concepts of market power, market failures, market definition, investment and innovation, and the costs of government intervention are prevalent throughout the net neutrality policy development.<sup>275</sup> These are the types of concerns that either the FTC or DOJ have addressed in other industries since the inception of antitrust law.<sup>276</sup>

As with all types of government interaction, there are pros and cons to the use of antitrust versus regulation.<sup>277</sup> As the history of the

<sup>273</sup> The largely ex post nature of antitrust intervention is a product of the governing laws of antitrust authority. See, e.g., Sherman Act § 1, 15 U.S.C. § 1 (2006) (“Every contract . . . in restraint of trade . . . is declared to be illegal.”). There are, however, instances when antitrust authority may be categorized as more proactive and capable of being utilized with respect to probable or incipient anticompetitive behavior. Most notably, this ex ante authority is exercised in the merger approval process. Clayton Act § 7, 15 U.S.C. § 18 (2006) (no merger allowed where effect “*may* be substantially to lessen competition, or *to tend* to create a monopoly”) (emphasis added).

<sup>274</sup> The DOJ Antitrust division and FTC share responsibilities under various U.S. Statutes that provide antitrust, or competition law enforcement. See *supra*, note 1. In contrast to the DOJ, the FTC has additional authority to enact and enforce various consumer protection regulations. See *About the Federal Trade Commission*, FTC (last modified June 17, 2010), <http://www.ftc.gov/ftc/about.shtm> (“It is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy.”).

<sup>275</sup> See, e.g., Nuechterlein, *supra* note 60, at 34–45 (discussing these concepts in the context of net neutrality); Tim Wu, *Wireless Carterfone*, 1 INT’L J. COMM. 389, 393–94 (2007) (discussing market power, innovation, and competition in the wireless industry).

<sup>276</sup> See, e.g., *Standard Oil of N.J. v. United States*, 221 U.S. 1, 30–43 (1911) (describing Standard Oil’s violations of the Sherman Act in a case brought by the U.S. Attorney General).

<sup>277</sup> The most common complaint of net neutrality enforcement by antitrust enforcement is that such actions are too slow and the remedies are insufficient to cope with anticompetitive effects once entrenched in a network economy. Jonathan B. Baker, *Can Antitrust Keep Up?: Competition Policy in High-Tech Markets*, BROOKINGS INST. (Winter 2001), [http://www.brookings.edu/articles/2001/winter\\_regulation\\_baker.aspx](http://www.brookings.edu/articles/2001/winter_regulation_baker.aspx). To be sure, antitrust action is by definition an ex post rather than prophylactic solution. It is not immediately evident, how-

communications industries demonstrates, at times the regulator and antitrust authorities have simply played out their roles in tandem. But what the judiciary has made clear through *Trinko*<sup>278</sup> and *Comcast Corp.*<sup>279</sup> is that limits exist to curtail the scope of each regime's authority. Net neutrality exposes the jurisdictional gaps of each regime and presents policymakers with a significant opportunity to establish a path for the development of the Internet marketplace.

Before the policy advantages of regulation versus antitrust can be properly measured, however, two crucial threshold jurisdictional issues call for congressional intervention: the prevention and limitation of both regulatory procedural and regulatory substantive opportunism. The opportunistic regulator may manipulate the classification *process* to extend the agency's own power to new (non-legacy based) services—indeed, the FCC has asserted its belief that the Supreme Court has blessed such determinative agency discretion.<sup>280</sup> To counteract such procedural opportunism, Congress should intervene to establish a two-step remedy.

The first step is for Congress to expressly eliminate what is termed here as *procedural opportunism*. There are of course degrees by which such a limitation on agency action may be expressed: a limited prohibition (e.g., a prohibition on ISPs' being classified as common carriers subject to Title II of the Communications Act); a more general prohibition (e.g., a prohibition on *any* new service being classified as Title II); or an absolute prohibition (e.g., a prohibition on *any* new service being classified under *any* legacy-service title other than Title I). Given the pernicious regulatory overreach implicit in procedural opportunism, the greatest curtailment of agency authority over the classification process is supportable, if not desirable. Any such prohibition will of course limit regulatory agility in the face of new services, but it will also limit regulatory harm in stunting the development of nascent or fast-paced innovative markets such as the Internet. Moreover, any such new services would be far from "unregulated" in any economic sense of that word. There is a multitude of agencies that watch over environmental

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ever, that waiting for evidence of anticompetitive effect is more harmful to consumers than is a prescriptive solution to a problem that may never materialize. Prescriptive measures are especially problematic in an industry, such as wireless broadband access, that is highly dynamic and faces both intra- and inter-platform competition.

<sup>278</sup> 540 U.S. 398 (2004).

<sup>279</sup> 600 F.3d 642 (D.C. Cir. 2010).

<sup>280</sup> See *Comcast*, 600 F.3d. at 649 (noting that the FCC interpreted Nat'l Cable & Telecomms. Ass'n, v. Brand X Internet Servs., 545 U.S. 967 (2005) to grant ancillary jurisdiction in this situation).

protection issues, labor relations, securities law, and of course antitrust matters, just to name a few. Congress itself will also have the power to classify any service as it should see fit if more industry-specific regulation is required.

The second step of the remedy to prevent procedural opportunism is for Congress to define how the FCC may determine what is or is not a “new” service. If the FCC is prohibited from classifying a “new” service as a legacy-based regulated service, it is feasible that the agency would regard a “new” service as anything but. That is, the agency could say that a “new” offering by the telephone company is simply part of the old, Title II services. This is similar to what occurred under the long, tedious regulatory classification of data transmitted by the landline, telephone system.<sup>281</sup> To prevent such gamesmanship, Congress can clarify that services not previously offered, that are of a reasonably distinct consumer, marketing, or technological nature to the legacy-based regulatory services, shall be presumptively unregulated, or regulated under Title I. It may be prudent to permit the agency to rebut this presumption, but only after it shows by rigorous market analysis of the new service that the “new” service is the functional equivalent of the legacy-based service.<sup>282</sup> This two-step remedy to prevent procedural opportunism ((1) prohibition of inclusion of new services into legacy-based regulatory regimes and (2) a presumption that those services that are reasonably distinct from legacy-based services are “new”) is not a call for a redrafting of the Communications Act, but is rather a modest plea for clarification of administrative jurisdiction in arenas not previously considered by Congress.

The second jurisdictional point to address—congressional limitation of substantive opportunism (i.e., using ancillary, merger, and license authority that is not tethered by statutory mandate)—is related but distinct. The court in *Comcast* provided a viable framework for protecting against undesirable “opportunistic” use of ancillary jurisdiction provisions. To the extent that general legislative statements are not equated to a congressional mandate, ancillary jurisdiction would be properly limited to the scope contemplated by Congress. Ancillary jurisdiction would, however, still have a role when expressly shown to be related to a specific mandate. As the *Comcast* court implied, this means

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<sup>281</sup> See NUCHECHTERLEIN & WEISER, *supra* note 108, at 151–55 (discussing the *Computer Inquiries* released by the FCC in the 1970s and 1980s).

<sup>282</sup> The market analysis requirement should be similar to the empirically rooted market analysis conducted by antitrust authorities.

the regulator has the evidentiary burden to prove the relationship of the proposed regulation to the expressed will of Congress.

The *Comcast* standard for ancillary jurisdiction is an example of the judicial restraint needed to rein in an overreaching administrative agency. This standard should not only be memorialized by Congress but extended to limit the type of concessions that may be extracted under other forms of satellite jurisdiction, such as merger or license agreements. Given the disproportionate bargaining power held by the FCC in matters of mergers and licenses, there is arguably no viable judicial oversight of administrative determinations.

In these two areas, Congress should act decisively to remove the exploitive nature of the FCC's demands and place statutory restrictions on such examples of substantive opportunism. Indeed, there is much to be said of the complete removal of the FCC's statutory power to approve any merger. The subject matter of mergers is an area well suited to the expertise of antitrust authorities. Licensing, however, is another matter. The FCC has sole jurisdiction over licenses,<sup>283</sup> and the regulatory oversight of such issues as interference among license holders is an imperative. That said, what cannot be done by rulemaking should not be done by contract. At a minimum, Congress should expressly prohibit the FCC from inserting terms in merger consent decrees or spectrum license agreements that the FCC would not have the jurisdiction to apply to a company by an adjudicatory or informal rulemaking procedure. To permit otherwise—to maintain the status quo—leaves the agency all the power it needs to circumvent the limitations of delegated authority and the will of the legislature.

This proposal will limit regulatory overreach but will not leave the marketplace unsupervised. The backdrop of private, state, and federal antitrust and consumer protection laws remains.<sup>284</sup> There are many reasons to prefer either regulation or antitrust law to monitor the development of the Internet ecosystem. At its core, however, the choice to

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<sup>283</sup> See 47 U.S.C. § 303(y) (2006) (granting this authority to the FCC).

<sup>284</sup> On another note, under Title I jurisdiction based on Section 706 of the Communications Act raises the possibility of state level regulation. 47 U.S.C. § 1302(a). Section 706 of the Communications Act states, "The Commission . . . shall encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity," certain "regulating methods that remove barriers to infrastructure investment." *Id.* Section 706, however, applies equally to "each State Commission with regulatory jurisdiction over telecommunications services." *Id.* By relying on this basis for jurisdiction, the FCC has introduced significant questions of federalism that need to be considered. See *Open Internet Order*, *supra* note 14, at 17,967 ¶ 116 (invoking this provision as a grant of ancillary jurisdiction).

rely on one regime as opposed to the other is a policy decision. If the regulator is permitted to use its status to opportunistically manipulate the scope of the agency's authority, this important policy decision is short circuited. With focused attention on limiting the procedural and substantive opportunism in the application of regulatory jurisdiction, Congress can temper regulatory overreach, prevent the circumvention of congressional intent, and resurrect the important role of the anti-trust authority in the communications industry.