

The FCC Whence and Whither; How to Protect the Internet's Golden Age¹

James Heller

University of New South Wales (UNSW) Law School

This article is intended to engage in the current debate surrounding the May 15, 2014 release of the FCC's "Protecting and Promoting the Open Internet" proposal concerning the future of the Internet. This article is also intended to provide a thorough background to the ongoing debate, which seems to be missing from much of the current commentary. While the current debate continues to be led by specialists, its consequences will be felt far and wide, which is why understanding the background to the debate is so important.

In order to engage in the current debate, it is necessary to elaborate on just how the FCC and its categories of regulations have developed over time. It is my intent to answer the following questions in this article:

1. What is the importance of the sort of communication that the Internet enables?
2. How and why has the FCC regulated communications including the Internet?
3. Was there ever an era in the early history of radio or television similar to the current "golden age" of the Internet²? If so, what, if anything, changed that era?
4. Are we entering a Milton Friedman era of the Internet, in which a deregulated Internet is operated by utility companies?
5. Is the best possible solution for the FCC to use its Title II authority to regulate common carriers, in order to protect the Internet's golden age?

The Four Main Camps in the Battle for the Future of the Internet

The battle for the future of the Internet is entering its fourth round.³ The central battle line is drawn between those who want "net neutrality" and those who

¹ The author, James M. Heller, is a research candidate at the University of New South Wales (UNSW) Law School and lawyer. A special thanks is owed to the following individuals who assisted my efforts: Dr. Isabel Karpin of the University of Technology, Sydney; Dr. Rebekah L. Fox of Texas State University; Dr. Susan Giroux of McMaster University; Dr. Cedrick May of University of Texas - Arlington; Dr. Paul Youngquist of University of Colorado - Boulder; Dr. Alana Maurushat of UNSW Law School; Laurie Donahue; Louise Hardy; Christina Weaver; David Claypool; Andrew Rowe; Richard Hanlon; and Nick Smyth. All errors are mine.

² Alan Norton, *10 threats to The Golden Age of the Internet*, TECHREPUBLIC (Feb. 2, 2012), <http://www.techrepublic.com/blog/10-things/10-threats-to-the-golden-age-of-the-internet/>.

want deregulation. Net neutrality seeks to ensure that Internet communications are not discriminated against or treated with preference. Deregulation seeks to ensure that cable companies get to self-regulate, while also deciding for themselves whether Internet communications can be discriminated against or treated with preference.

There are four main schools of thought on the issue:

- a. Those who want to treat the underlying cause of the FCC's continued inability to implement its own net neutrality policies. This camp encourages the FCC to use its Title II authority to regulate common carriers.
- b. Those who want to treat the symptom of the FCC's recent string of ineffective Internet regulations, while ignoring the underlying cause (namely, the FCC's continuing refusal to use its authority under Title II of the Communications Act of 1934⁴ to regulate any aspect of cable). FCC Chairman Tom Wheeler is in this camp.
- c. Cable companies and deregulation advocates who want cable companies to be able to regulate themselves and who are vehemently opposed to the use of the FCC's Title II authority to regulate any aspect of cable.
- d. Those such as Congressman Henry Waxman who propose that the FCC use a hybrid solution, like "tough rules under [Section] 706 [of the Telecommunications Act of 1996]," complemented by Title II authority as a backup plan, should courts deem that the FCC lacks the capacity to regulate the Internet under Section 706.⁵

Brand X Flashback: The FCC's Initial Refusal to Use its Title II Authority

It may be unexpected to deem Justice Scalia a technological visionary, but the leading statement on our current predicament is from Supreme Court Justice Antonin

³ The first three rounds were *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), *Comcast Corp. v. FCC*, 600 F.3d 642 (2010) and *Verizon Communications Inc. v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁴ 47 U.S.C. § 201, et seq. Hereinafter, also referred to as "Title II."

⁵ This has been referred to as "backstop" authority. Tim Wu, *The Solution to the FCC's Net-Neutrality Problems*, THE NEW YORKER, May 9, 2014, available at <http://www.newyorker.com/online/blogs/elements/2014/05/tom-wheeler-fcc-net-neutrality-problems.html>: "Wheeler is in a bind. But here's a solution. The chairman should, as just suggested, toughen up his proposal to presumptively outlaw fast lanes and degradation schemes. Then he should specify, as a legal matter, that his rules rely on 706 authority primarily, but are also backed up by the full force of the Commission's authority, should 706 authority fail."

Scalia.⁶ His dissent in 2005's *National Cable & Telecommunications Ass'n v. Brand X Internet Services* is nothing short of brilliant.⁷ To try to understand my proposition about the brilliance of Justice Scalia's reasoning in *Brand X*, let us take a step back to 2005, when Justice Scalia dissented with the majorities' judgment in *Brand X*:

The main source of the Commission's regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance by concluding that the definition of "telecommunications service" is ambiguous and does not (in its current view) apply to cable-modem service.

After all is said and done, after all the regulatory cant has been translated, and the smoke of agency expertise blown away, it remains perfectly clear that someone who sells cable-modem service is "offering" telecommunications. For that simple reason set forth in the statute, I would affirm the Court of Appeals.⁸

Here, Justice Scalia is saying, by failing to use Title II authority to regulate aspects of cable, the FCC creates layers of regulatory complexity, which seems to undermine the FCC's regulatory credibility.⁹ Had the FCC adopted his reasoning following 2005's *Brand X* ruling, the Internet would still look much the same, though we would not be embroiled in this never-ending, increasingly hostile battle for the future of the Internet. Former FCC Chairman Michael Powell has issued threats of "World War III," should the FCC choose to use its Title II authority to regulate aspects of cable Internet.¹⁰ Since *Brand X*, the FCC has walked an increasingly precarious tightrope by continuously and unsuccessfully trying to apply Title II-like regulations to aspects of cable, which it chooses to regulate under a non-Title II category. If one took the time to read Justice Scalia's dissent in *Brand X*, which

⁶ Joined by Justices Ginsburg and Souter.

⁷ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting) (hereinafter referred to as "*Brand X*").

⁸ *Nat'l Cable*, 545 U.S. at 1013-1014 (Scalia, J., dissenting).

⁹ Notably, the majority in *Brand X* also had no issue with the FCC regulating aspects of cable using its Title II authority.

¹⁰ Jeff Baumgartner, *Powell On NCTA's 2014 Priorities: 'Broadband, Broadband and Broadband'*, MULTICHANNEL NEWS, Oct. 22, 2013, <http://multichannel.com/news/content/powell-ncta-s-2014-priorities-broadband-broadband-and-broadband/357180>.

specifically admonished this approach, the decisions in *Comcast Corp. v. FCC* and *Verizon v FCC* would have come as no surprise.

In *Verizon v FCC*, the court noted:

We are unable to sustain the Commission’s action on a ground upon which the agency itself never relied. [] “argument[s]... raised for the first time at oral argument [are] forfeited” []. Nor may we defer to a reading of a statutory term that the Commission never offered.

... the agency’s decision is so deficient as to raise serious doubts whether the agency can adequately justify its decision at all...¹¹

Again in *Verizon v FCC*, the Court indicated that there would be no issue with the FCC regulating aspects of cable as a Title II common carrier, so long as it chooses to expressly rely upon its Title II regulatory authority.

Will the FCC Finally Use its Title II Authority?

Regarding the FCC’s consistent failure to use Title II authority, Congressman Waxman poignantly said, in a recent letter to the FCC:

I believe the time has come for the FCC to stop putting vitally important open Internet rules in jeopardy through legal gymnastics.

The Internet service providers have been litigating the open Internet rules for too long. They lobby the FCC to avoid using its strongest legal authority for the open Internet rules. Then when the FCC agrees with them, they sue the agency on the basis that the FCC lacks the power to protect an open Internet.¹²

With the May 15, 2014, release of the FCC’s “Protecting and Promoting the Open Internet” proposal, we have entered round four of the debate about the Internet’s future. At the very least, Chairman Wheeler is discussing the potential for re-categorizing aspects of cable under Title II:

¹¹ *Verizon Commc’ns Inc. v. FCC*, 740 F.3d 623, 658-659 (D.C. Cir. 2014).

¹² Letter from Rep. Henry Waxman, Ranking Member, Committee on Energy and Commerce, to Thomas Wheeler, Chairman, FCC (May 14, 2014), <http://democrats.energycommerce.house.gov/sites/default/files/documents/Wheeler-Title-II-Backup-Option-2014-5-14.pdf>.

There is ONE Internet. Not a fast Internet, not a slow Internet; ONE Internet. The consideration we are beginning today is not about whether the Internet must be open, but about how and when we will have rules in place to assure an Open Internet. My preference has been to follow the [Section 706 of the Telecommunications Act of 1996] roadmap laid out by the D.C. Circuit in the belief that it was the fastest and best way to get protections in place. I have also indicated repeatedly that I am open to using Title II.¹³

Nonetheless, actions speak louder than words. If the FCC fails to change the way which cable Internet is regulated, cable companies may soon allow speeding it up for certain users, which – in turn – means discriminating against other users. If yet another order is put forth by the FCC, trying to apply Title II-like regulations to a category, which it chooses to regulate under a non-Title II category, the result will be another round of unsuccessful litigation for the FCC.

Cable companies have deep enough pockets to indefinitely fight any substantive regulation of cable that the FCC puts forth, as deregulation is the goal of most cable companies. If litigation is inevitable, then why not put forth regulations that will hold up to court scrutiny? Cable companies also have enough money to hire the best lobbying firms and public relations agencies to advocate that they should be able to offer preferential Internet speeds for those who can afford to pay for them. It doesn't require Einstein's theory of relativity to calculate that the net effect of speeding the Internet up for some users will slow it down for everyone else, relatively speaking.¹⁴ Parties on all sides of the debate are predicting doom and gloom scenarios for the future of the Internet, should resolution to the debate not go the "right way". Regardless of one's stance, it is unlikely that the Internet will resemble its current form, if a significant response by the FCC does not take place.

¹³ Statement of Chairman Tom Wheeler Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28.

What is the Importance of the Sort of Communication that the Internet Enables?¹⁵

Thomas Jefferson said of communication, that the “force of public opinion cannot be resisted, when permitted freely to be expressed.”¹⁶ Speaking of the importance of communication, Justice Oliver Wendell Holmes Jr. said, “the ultimate good desired is better reached by free trade in ideas... that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹⁷ Jefferson and Holmes’ statements underscore a golden truth: communication is the lifeblood of democracy. As the greatest enabler of a free trade in ideas and information that the world has ever known, the Internet demands special protection as a particularly valuable enabler of democracy.

In the last two decades, our world has become dramatically smaller thanks to the rampant advancements afforded us by technological gains in nearly every industry. As in previous eras, when disruptive technologies in the field of communications have changed ways we communicate, communications regulations have been put in place to provide some basic safeguards.

The earliest instance of this in US history came in 1860, when the telegraph revolutionized communications. Initially, there was only one telegraph line connecting the East Coast, through Omaha, Nebraska, to the West Coast via Carson City, Nevada. The drafters of the Pacific Telegraph Act foresaw that the technological capacity to fairly handle all messages would be difficult to ensure; thus, “bandwidth” would be a limited resource. The Act included a provision that read, “messages received from any individual, company, or corporation, or from any telegraph lines connecting with this line at either of its termini, shall be impartially transmitted in the

¹⁵ Thomas Jefferson valued communication so much that he helped persuade its safeguards in the Bill of Rights: “There are rights which it is useless to surrender to the government, and which governments have yet always been fond to invade. These are the rights of thinking, and publishing our thoughts by speaking or writing; the right of free commerce; the right of personal freedom. There are instruments for administering the government, so peculiarly trust-worthy, that we should never leave the legislature at liberty to change them.” Thomas Jefferson, Letter to David Humphreys, Mar. 18, 1789 in *THE PAPERS OF THOMAS JEFFERSON* 676–679 (1958).

¹⁶ Thomas Jefferson, Letter to Marquis de Lafayette, Nov. 4, 1823, *available at* <http://founders.archives.gov/documents/Jefferson/98-01-02-3843>, ver. 2014-05-09.

¹⁷ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Wendell, J., dissenting).

order of their reception, excepting that the dispatches of the government shall have priority.”¹⁸ The Act also noted that communication should be open to all citizens for a maximum of three dollars per ten telegraphic words.

This was not the first time that “common carrier” rules were put in place by a government agency, mandating that services be provided impartially and in the order of their reception. In 1670, Lord Hale brought “common carriage” into English common law in relation to regulating the scarce capacity of cranes on wharfs:

If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, [etc.], neither can they be enhanced to an immoderate rate.¹⁹

The origins of “common carriage” have been traced all the way back to 6th Century Roman law.²⁰ Common carriage is inherently similar to net neutrality.

The FCC Whence and Whither: The History of the FCC’s Use of its Title II Authority

Interstate Telephone²¹F History

In 1887, the Interstate Commerce Act²² established the Interstate Commerce Commission (ICC)²³ to regulate – among other things – railroads, another set of interstate lines with limited capacity. In fact, railroads became the first federally

¹⁸ Pacific Telegraph Act of 1860, 12 Stat. 41, 42 (1860) (emphasis added).

¹⁹ LORD CHIEF JUSTICE HALE, *DE PORTIBUS MARIS* (1787), 1 HARG. LAW TRACTS 78. Common carriage was accepted into American common law in *Interstate Commerce Commission v. Baltimore & Ohio Railroad Co.*, 145 U.S. 263, 275 (1892).

²⁰ The etymology of “common carriage” is traced by Justice Story all the way back to Roman law, where it applied to innkeepers, shipmasters and stable-keepers. Justice Story adeptly spells out common carriage as it relates to the carriage of goods in JOSEPH STORY, *COMMENTARIES ON THE LAW OF BAILMENT* (1832).

²¹ This and all further references of “telephone” include telegraph.

²² Interstate Commerce Act of 1887, 24 Stat. 379 (repealed 1995).

²³ Hereinafter also referred to as the “ICC.”

regulated industry.²⁴ Notably, Congress' source of power to enact such a regulation came from Article 1, Section 8 of the Constitution; Congress was given the power to "regulate commerce [] among the several states...."²⁵ In 1910, the ICC's jurisdiction expanded from railroads to the interstate telephone and telegraph industry, which shared the same lines. This marked the first time in US history that communications were regulated by a commission. The ICC was empowered to decide logistical issues surrounding private ownership of communications capacity (or "bandwidth").

The ICC enforced a mandate that rates be published and that notice be given about pending rate changes.²⁶ Similar to the Pacific Telegraph Act of 1860, the ICC enforced price ceilings and prohibited discrimination and preference. The ICC also began to regulate telephone companies as "common carriers." This meant that the companies were "bound to take all [communications] offered, if [they had] the requisite convenience to carry; and a refusal, without some just ground, subject[ed] [them] to an action."²⁷ The common carrier designation restated a prohibition of discrimination and preference from the Pacific Telegraph Act of 1860, this time, for both telegraph and telephone.

Radio History

The Wireless Ship Act of 1910²⁸ mandated that certain seafaring vessels carry radios, in an effort to improve the safety of passenger ships. Though the act was short-lived, it was significant in that it marked the beginning of the regulation of radio transmissions. The Radio Act of 1912²⁹ was ushered in to remedy an increasing problem of radio interference. It provided for licensing to enhance safety and to suppress interference by "pirate radio," which were unregulated radio broadcasts and chatter causing interference with the utility of radio for Navy communications. The

²⁴ Public Broadcasting Service, *American Experience, People & Events: Interstate Commerce Commission*, http://www.pbs.org/wgbh/amex/streamliners/peopleevents/e_ica.html (last visited June 23, 2014).

²⁵ U.S. CONST. art. I, § 8 (emphasis added).

²⁶ *See also* Elkins Act of 1903, 32 Stat. 847 (1903).

²⁷ *Shelden v. Robinson*, 7 N.H. 157, 163 (N.H. 1834).

²⁸ 36 Stat. 629, et seq.

²⁹ 37 Stat. 302, et seq.

Act gave the Department of Commerce the ability to determine use of frequencies, powers and time periods of broadcasts.³⁰ The Radio Act required amateur radio operators to obtain a license. Though the Act only allocated a couple of frequencies³¹, it marked the beginnings of a category of communications regulated in a non-common carriage fashion.

The Golden Age of Radio

As the Roaring Twenties began, the cost of broadcasting radio signals was low. Amateurs were so excited to engage in the new form of communication, they were purchasing or constructing their own radios, which could both send and receive signals.³² If there were ever an era in communications that parallels today, this was it.

Professor Tim Wu notes of the era,

The arrival of mass broadcasting inspired, in the United States and around the world, an extraordinary faith in its potential as the benefactor, perhaps even a savior, of mankind. And while the reason may not be readily apparent, such belief is crucial to understanding the long cycles in the development of information media. For it is not just the profit motive that drives the opening up of a medium – there’s typically a potent mix of both entrepreneurial and humanitarian motives.³³

As with the Internet, colleges and universities were early pioneers of radio, on airwaves with very few rules. Hundreds of non-profit broadcasters were operating by the mid-1920s, many university-affiliated.³⁴ Though there remained some issues of interference, the Radio Act of 1912 ensured a level of comity in the airwaves. Nonetheless, in 1926, Federal Judge Wilkerson struck down the way in which the ICC had been regulating existing radio allocations via the Radio Act of 1912.³⁵ In a case not very dissimilar to the recent *Verizon v FCC*, the focal point of *United States v. Zenith*

³⁰ HERNAN GALPERIN, NEW TELEVISION, OLD POLITICS 50 (2004).

³¹ Notably frequencies were reserved for weather forecasters and for crop reporters.

³² RAFAEL OEI, RIDING THE BANDWIDTH: PRODUCING FOR DIGITAL RADIO 13 (2005).

³³ TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 36 (2010)

³⁴ ROBERT W. MCCHESENEY, THE POLITICAL ECONOMY OF MEDIA: ENDURING ISSUES, EMERGING DILEMMAS 158 (2008).

³⁵ *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926).

Radio Corp. surrounded whether the regulatory commission was acting outside of its statutory authority:

Congress cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of facts upon which the law makes or intends to make its own action depend.

If there is a conflict between a provision in the license and the regulations established by Congress, the latter must control.³⁶

The striking down of the ICC's regulations led to massive radio interference resulting from mutual disrespect of frequencies and broadcasting power between broadcasters. Soon after Judge Wilkerson's ruling, almost 700 radio stations were broadcasting in an atmosphere of chaos. In the wake of an unregulated radio environment, several proposals were put forth to reduce radio interference. AT&T proposed that radio be subject to telephone-style regulations, via leasing and regulating radio air time with common carrier rules.³⁷ A competing proposal from the National Association of Broadcasters (an association of for-profit broadcasters) lobbied for licensing channels of the radio spectrum in the "public interest."³⁸

After mounting pressure and a growing public perception of broadcasting chaos, the Radio Act of 1927³⁹ was swiftly passed, without extensive discussion or foresight. It authorized allocations of frequencies and broadcasting power in the "public convenience, interest, or necessity."⁴⁰ Additionally, the Act empowered a panel, known as the Federal Radio Commission⁴¹, to decide ongoing issues related to licensing, frequency allocation, geographic area, time allotments, and broadcasting power allowed for each licensee.⁴² The Radio Act of 1927 did not create any long-term proprietary interest in the airwaves for channel licensees. Yet, after its passage,

³⁶ *Id.* at 617.

³⁷ Galperin, *supra* note 30, at 58.

³⁸ *Id.* at 57.

³⁹ 44 Stat. 1162 (1927).

⁴⁰ *Id.*

⁴¹ Galperin, *supra* note 30, at 59.

⁴² Galperin, *supra* note 30, at 59.

licensees began trading their licenses, thus creating de facto proprietary interests in radio licenses.⁴³

The Radio Act of 1927 mandated that paid programming be identified as paid programming, including relevant information about who paid for the programming. The Act also mandated that political candidates were to be given equal programming time. Furthermore, the Act allowed the FRC to refuse future licenses based upon “obscene, indecent, or profane content.”⁴⁴ Though, some argued that the Radio Act of 1927’s channel licensing regime had the potential to violate the First Amendment, a very technologically-based explanation was accepted as justifying any such violation; namely, legislators and jurists accepted that there was simply not enough “spectrum” available to allow everyone, who so desired, to express themselves on the airwaves. For this reason, “journalistic freedom” of broadcast license holders was given preference to other proposals, some of which would have allowed “right of access” to individuals, to be given air time to speak about public issues.⁴⁵

Federal Radio Commission v. Nelson Brothers Bond, was an early Supreme Court case in which the authority of the FRC was accepted.⁴⁶ Chief Justice Hughes, speaking for the court, emphasized and legitimized the broad nature of FRC’s powers:

In view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses. The Commission has been set up as the licensing authority and invested with broad powers of

⁴³ Galperin, *supra* note 30, at 59.

⁴⁴ 18 U.S.C. § 1464 (1976).

⁴⁵ “Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues....’ The Court took note of a bill reported to the Senate by the Committee on Interstate Commerce providing in part that any licensee who permits “a broadcasting station to be used . . . for the discussion of any question affecting the public. . . shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce: Provided, that such licensee shall have no power to censor the material broadcast.” *FCC v. Midwest Video Corp.*, 440 U.S. 689, 704 (1979) (quoting 67 Cong. Rec. 12503 (1926)). Chief Justice William Howard Taft said, “[I]nterpreting the law on [radio] is something like trying to interpret the law of the occult. It seems like dealing with something supernatural. I want to put it off as long as possible in the hope that it becomes more understandable before the court passes on the questions involved.” C.C. DILL, *RADIO LAW* 1-2 (1938) (quoting Taft). *See also* *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 105 (1973); Galperin, *supra* note 30, at 59; U.S. CONST. amend. I.

⁴⁶ *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortg. Co. (Station WIBO)*, 289 U.S. 266, 279 (1933).

distribution in order to secure a reasonable equality of opportunity in radio transmission and reception.

In granting licenses the Commission is required to act "as public convenience, interest or necessity requires." This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power.⁴⁷

If anything changed the frontier spirit of radio, it was the Radio Act of 1927.

Professor Tim Wu notes:

Every few decades a new communications technology appears, bright with promise and possibility. It inspires a generation to dream of a better society, new forms of expression, alternative types of journalism. Yet each new technology eventually reveals its flaws, kinks, and limitations.

From industry's perspective, the invention may inspire other dissatisfactions: a threat to the revenues of existing information channels that the new technology makes essential, if not obsolete.⁴⁸

A side effect of the Radio Act of 1927 was increased costs for contributing to information. Rather than any enthusiast being able to purchase or construct his own radios, from which could both send and receive signals, now broadcasters had to compete to acquire a license from the FRC to broadcast. Many of the early pioneers of radio, including universities and non-profit broadcasters suffered under the new regime; unable to compete for licenses, they lost broadcasting time and power.⁴⁹

The Federal Communications Commission History; The Beginning of the FCC's Split Regulatory Mind

Via the Communications Act of 1934,⁵⁰ the FCC⁵¹ succeeded the FRC. As an expanded version of the FRC, the FCC oversaw the allocation of a new scarce resource, the television spectrum, which it regulated in the same manner as the radio spectrum. The FCC also began supervision of telephone and telegraph

⁴⁷ *Id.* at 279 (1933). Quoting 47 U.S. Code § 303.

⁴⁸ Wu, *supra* note 33, at 10.

⁴⁹ McChesney, *supra* note 34, at 162.

⁵⁰ 48 Stat. 1064 (1934).

⁵¹ Also referred to as the "FCC."

communications, formerly supervised by the ICC. As such, the FCC adopted the ICC's preexisting common carrier telephone regulations.

From the beginning, the FCC dealt with its different children differently. Initially, the FCC regulated AT&T's telephone monopoly and analog airwaves, which included radio and early television broadcasts. In one hand, the FCC carried a proverbial carrot, providing incentives for equal treatment of communications by telephone line owners. In the other hand, the FCC waved a stick to show broadcasters it was in control of "scarce" airwaves.

From 1934 to 1950, a precedent was set, allowing the regulation of different communications differently. During this time period, the FCC's reasons for regulation were:

1. Radio & Television: Licensing a public asset due to scarce spectrum; and
2. Telephones & Telegraphs: Enforcing common-carrier regulations to prohibit discrimination or preference.

As the FCC's reasons for regulating became more established, few people questioned whether different communications needed to be regulated differently. Just as the radio and television spectrum could be divided and its pieces licensed out, so could telephone bandwidth. And, just as telephone bandwidth was subject to common carrier regulation, so too could have the radio and television spectrum. The fact that the FCC's jurisdiction was accepted by legislators, the industry, and by the courts can be explained by first-to-market and path dependence theories. Paul A. David suggests that inferior regulations – once widely adopted – can become entrenched and difficult to change.⁵²

But, if communication is the lifeblood of democracy, constant thought should be given to not only technological capacity and administrative law when deciding the sufficiency of regulations surrounding communications; but the underlying importance of communication to democracy should also be a factor considered in

⁵² Paul A. David & Julie Ann Bunn, *The Economics of Gateway Technologies and Network Evolution: Lessons From Electricity Supply History*, 3 INFO. ECON. & POL'Y 165, 169 (1988). See also Paul A. David, *At last, a remedy for chronic QWERTY-skepticism!* 10 (All Souls College, Oxford, Working Paper, Sept. 31, 1999), www.siepr.stanford.edu/workp/swp99025.pdf ("But why set up a ... system that at each point accepts the status quo as having been unavoidable?"); McChesney, *supra* note 34, at 174.

determining whether communications regulations are sufficient. To its credit, in its recent Notice of Proposed Rulemaking, the FCC has sought comments on the constitutionality of its proposed rules: “[W]e seek comment on other legal limitations and barriers to adoption of the rules we propose today, including First Amendment and Due Process considerations.”⁵³

Cable Television History and Relevance to Debate Surrounding Net Neutrality

Between 1946-1954, the number of television stations expanded from six to 354.⁵⁴ As technologies developed, the FCC became responsible for supervision of cable television networks. In 1948, cable television line ownership started in a pioneering way. Generally, local operators would set up a community antenna, which would receive signals and broadcast them via coaxial cables to houses with poorer reception.⁵⁵ Nevertheless, many local broadcasters objected because cable allowed for the reception of out-of-town signals, which meant greater competition for local broadcasters and advertising revenue. Local broadcasters lobbied for new cable regulations on “economic injury” grounds.⁵⁶

Ironically, some of cable’s first proponents countered by advocating for common carriage regulations of cable – opposite to cable companies’ stance in the current debate. Professor Tim Wu describes,

Above all, its champions pressed for some form of common carriage regulation. What this meant exactly wasn’t clear, but there was a general concern that cable should carry content without discrimination, and should be impressed with duties of public service. [Fred] Friendly, of all the cable evangelists, the most cynical about what might go wrong, wrote, rather presciently, “If not regulated, the current Monopoly could give way to a new Tower of Babel, in which a half-

⁵³ Federal Communications Commission, Notice of Proposed Rulemaking 14-61, 5 (May 15, 2014).

⁵⁴ SUSAN J. DOUGLAS, LISTENING IN: RADIO AND THE AMERICAN IMAGINATION 219 (2004).

⁵⁵ Galperin, *supra* note 30, at 63.

⁵⁶ Ironically, some cable broadcasters are now objecting to regulating the Internet as a common carrier on similar economic injury grounds.

hundred voices screaming in a cacophonous attempt to attract the largest audience.”⁵⁷

Important to our current debate is the fact that in 1959, the FCC reasoned that cable was neither purely a common carrier, like telephones, nor a broadcaster like the radio. In 1962, it issued preliminary regulations for a new category of cable, as it relied on both broadcast technologies (in receiving out-of-town television broadcast signals) and telephone-like technologies (in broadcasting television signals via coaxial cables). The FCC issued what became known as a “must carry” rule, requiring cable operators to carry all local television signals when signals of other, out-of-town broadcasters were imported by cable operators.⁵⁸ The “must carry” rule ensured local independent stations had the same programming advantages as local network affiliates.

The 1968 case *United States v. Southwestern Cable* was the first to decide a challenge to the FCC’s regulation of cable broadcasters.⁵⁹ In the case, the Court found the FCC did have the authority to compel cable operators to carry all local television signals; though later courts have sought to clarify that the FCC’s must-carry rule was narrowly tailored to ensure that cable operators carry specific “private” local signals, rather than what could have been a more broad rule mandating that cable operators “hold their facilities open to the public generally.”⁶⁰ *Southwestern Cable* also marked the beginnings of court challenges on whether the FCC could regulate cable operators as common carriers under Title II of its authority. *Southwestern Cable* tried to argue that the FCC had no authority to regulate cable operators, since cable did not fit neatly within either Title II or Title III of the Communications Act of 1934.⁶¹

⁵⁷ Wu, *supra* note 33, at 184.

⁵⁸ Federal Communications Commission, Second Report and Order, 2 F. C. C.2d 725 (1966).

⁵⁹ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

⁶⁰ *Verizon Commc’ns Inc. v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁶¹ *Southwestern Cable*, 392 U.S. at 172 (“Respondents emphasize that the Commission does not contend either that CATV systems are common carriers, and thus within Title II of the Act, or that they are broadcasters, and thus within Title III. They conclude that CATV, with certain of

Building off of its success in *Southwestern Cable*, the FCC put forth new rules in 1969 reinforcing its must-carry regulations, which were also accepted in 1972's Supreme Court Decision, *United States v Midwest Video Corp.*⁶² Nevertheless, in 1976, the FCC overreached its statutory authority by adding a new "right of access" requirement.⁶³ The FCC put forth rules requiring cable operators with 3,500 or more subscribers to develop the minimum of a "20-channel capacity" and to furnish equipment, facilities, and certain channels to enable third parties to broadcast.

These "right of access" regulations were struck down by the Supreme Court in 1979 in *FCC v. Midwest Video Corp.* The Court ruled that the FCC's "right of access" regulations exceeded the FCC's statutory authority. The court noted, "Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a non-selective basis to all persons wishing to talk about public issues."⁶⁴ Between 1979-1984, cable television influenced a wave of independent content production, by enabling local stations to reach larger audiences; during this five-year period, the total number of independent cable stations increased 108% to 193 from 93.

Brief FCC Satellite History

Satellites altered cable broadcasting, notably improving broadcasting capabilities of cable television. Due to the new technology's ability to broadcast with clear signals over greater distances, viewers could watch programs, with clearer images and better sound.⁶⁵ Satellite technology also enabled programmers like HBO to deliver new programming to cable operators, who benefited from increased programming and new subscribers.⁶⁶

the characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither, eludes altogether the Act's grasp.").

⁶² 406 U.S. 649 (1972).

⁶³ *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*).

⁶⁴ *Id.* at 703, quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U. S. 94, 105 (1973).

⁶⁵ PATRICIA A. AUFDERHEIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996 10 (1999).

⁶⁶ Galperin, *supra* note 30, at 69.

Initially, satellites broadcasters were regulated like radio broadcasters: The FCC made orders granting use of certain portions of the spectrum to satellite broadcasters.

Eventually, to promote “dissemination of information from a multiplicity of sources,”⁶⁷ Congress passed the Satellite Home Viewer Improvement Act,⁶⁸ which established a “carry one, carry all” rule, which is a variation of the long-standing must carry regulation for cable. Under this rule, satellite broadcasters could carry programming from local television stations without express permission. In order to qualify for this privilege, satellite broadcasters had to agree to carry programming from other local stations in the same market, upon request.⁶⁹

The Breakup of AT&T

In the early 1980s, deregulation of the telephone industry altered the way the FCC presided over the telephone industry. AT&T was broken up – transformed from a single, near-national monopoly into a number of near-regional monopolies. The impetus of this break up was the antitrust case, *United States of America v. AT&T*.⁷⁰ The case is of colossal importance from an antitrust standpoint, though for the current debate its only major relevance is to note that industries with high costs of infrastructure trend toward “natural” monopolies⁷¹. Just like the telephone industry, the cable industry has high costs of the infrastructure.⁷² After the breakup of AT&T’s monopoly, the FCC adopted and enforced a pro-competition policy to enhance long-distance competition. Thereafter, “deregulated” regional line-owners were forced to permit equal access of long-distance companies to regional customers. Nevertheless, the telephone industry remained regulated via common carrier regulations.

⁶⁷ H.R. Rep. No. 106-464, at 101 (1999) (Conf. Rep.).

⁶⁸ Satellite Home Viewer Improvement Act of 1999, 113 Stat. 1501, 17 U.S.C. 101 (1999).

⁶⁹ *Satellite Broad. & Commc’ns Ass’n v. FCC*, 275 F.3d 337, 349 (4th Cir. 2001).

⁷⁰ *United States v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982).

⁷¹ JOHN SUTTON, *SUNK COSTS AND MARKET STRUCTURE* (1991).

⁷² There is also a compelling argument to be made about “regulatory capture,” which is outside of the scope of this article, beyond the observation that it was antitrust law and not the FCC that ended AT&T’s monopolistic reign: “...as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefits.” George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

Birth of the Internet and the FCC Reasons for Regulating

In 1981, the FCC issued its *Computer II* regulations. These regulations recognized the birth of the early Internet across telephone lines and sought to decouple the regulatory approach of the Internet from the regulatory approach of basic phone transmission services. Basic Services were defined as “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information;”⁷³ An example of pure transmission is a telephone call. Basic services continued to be regulated as common carriers. On the other hand, Enhanced Services were defined as “basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.”⁷⁴ Enhanced Services were not subjected to common-carrier regulations.

The FCC’s reason for regulating enhanced services differently was to promote “competition in communications and data processing.”⁷⁵ In 1982, Judge Tamm permitted the FCC’s two category regulatory approach of transmissions over phone lines in *Computer & Communications Industry Association. v. FCC*.⁷⁶ Soon after, the FCC issued its *Computer III* regulations, which mandated that telephone companies allow competing Internet service providers access to telephone lines.⁷⁷ For the purposes of the current debate, it is important to note that the *Computer II* regulations were able to operate on their own, prior to the implementation to the *Computer III* regulations.

⁷³ Computer II Final Decision, 77 F.C.C.2d (1979).

⁷⁴ *Id.* at 419-20.

⁷⁵ *Id.* at 387.

⁷⁶ *Computer and Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 213 (D.C.Cir.1982).

⁷⁷ Report and Order, In re Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry) (Docket No. 85-229), 104 FCC.2d 958 (1986).

The FCC & Mobile Telephones

The explosion in popularity of mobile telephones occurred in the 1990s. Mobile phones initially operated on the “scarce” radio spectrum, and the FCC simply licensed portions of the radio spectrum to mobile telephone service providers in the public interest.⁷⁸ This regulatory response was almost analogous to the way the FCC has long regulated radio.

Congress enacted the Omnibus Budget Reconciliation Act of 1993,⁷⁹ which allowed regulation of mobile telephones under Title II of the Communications Act of 1934. The Act also allowed the FCC to forbear mobile phone providers from some of the provisions that govern Title II common carriers in the traditional telephone industry. This cemented the FCC’s clear statutory authority upon which to base its regulations of the mobile phone industry, while also allowing the flexibility to deal with technological differences between the mobile telephone industry and the traditional telephone industry. This also established a precedent that communications via radio waves can be regulated under Title II of the Communications Act of 1934.

Telecommunications Act of 1996

Soon thereafter, the Telecommunications Act of 1996 usurped the Basic Services and Enhanced Services categories of *Computer II*, while maintaining the spirit of these categories.⁸⁰ The *Computer II* category of Basic Services became the “Telecommunications Carriers” category, continuing to be regulated via common carrier regulations. The *Computer II* category of Enhanced Services became the “Information-service Providers” category, under the 1996 Act, continuing to not be subjected to common-carrier regulations.⁸¹

⁷⁸ California Metro Mobile Commc’ns v. FCC, 365 F.3d 38 (D.C. Cir. 2004).

⁷⁹ Pub.L. No. 103-66, 107 Stat. 312, 469 (1993).

⁸⁰ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 47 U.S. Code §1, et seq.

⁸¹ See Austin Schlick, Gen. Counsel, FCC, A Third- Way Legal Framework for Addressing the Comcast Dilemma 5 (May 6, 2010), https://apps.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf (“Although it would be new for broadband, this third way is a proven success for wireless communications. In 1993, Congress addressed the minimum safeguards necessary for then-emerging commercial mobile radio services (CMRS), such as cell phone service. Congress specified in a new section 332(c) of the Communications Act that Title II applies to CMRS, but

Post-2002 Reasons for Regulating

*National Cable & Telecommunications Association v. Brand X Internet*⁸² brings my analysis of the history of communications regulations full circle. In 2002, the FCC issued its Cable Modem Order; which stated that cable Internet was neither a “cable service” nor a “telecommunications service.”⁸³ *Brand X* also ruled that the FCC did not have to regulate cable operators in a way that forced unfettered right of access to their lines for competing Internet service providers. This was unlike the FCC’s regulation of telephone companies, which until just after the *Brand X* ruling had to allow unfettered access to local lines for competing dial-up Internet service providers.⁸⁴ Despite thorough discussion of the FCC’s reasons for regulating cable companies differently than its regulated telephone companies, the majority in the Supreme Court decided the case on *Chevron U. S. A. v. Natural Resources Defense Council* grounds⁸⁵; The *Chevron* doctrine gives deference to regulatory bodies in which the regulatory body’s authorizing statute is ambiguous. There is nothing in *Brand X* which prohibits the FCC from regulating cable operators under Title II, should it choose to use its Chevron discretion to do so.

After *Brand X* and the FCC’s August 2005 Order, the FCC had seven reasons for regulating:

1. Local Telephone Services: Enforcing common-carrier regulations to prohibit discrimination or preference
2. Telephone Long-Distance Services: Allowing all long-distance carriers unfettered access to local lines to enhance competition

the Commission may forbear from enforcing any provision other than the core requirements of sections 201, 202, and 208”).

⁸² 545 U.S. 967 (2005); Hereinafter also referred to as “*Brand X*.”

⁸³ In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802-4803, ¶ 9 (2002).

⁸⁴ The majority also stated that telephone line owners had to allow unfettered access to local lines for competing DSL providers. Nevertheless, on August 5, 2005, the FCC deemed DSL to be an information service, thus, freeing telephone line owners from having to allow unfettered access to local lines for competing DSL providers. This decision also brought DSL’s regulation in line with cable Internet. See Federal Communications Commission, Report and Order and Notice of Proposed Rulemaking No. 05-150, 20 FCC Rcd. 14853 (adopted Aug. 5, 2005), hereinafter also referred to as the “August 2005 Order”.

⁸⁵ *Chevron U. S. A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U. S. 837 (1984).

3. Mobile Phone Services: Enforcing common-carrier regulations to ensure that the charges, practices, classifications, and regulations are just, reasonable and non-discriminatory
4. Radio and Television: Licensing a public asset due to “scarce” spectrum
5. Cable Television: Enforcing must-carry regulations in order to increase outlets and augment choice
6. Information Services, Including Internet: Unfettering from common-carrier regulations to promote investment and innovation in a competitive market
7. Satellite Broadcasts: Enforcing carry one, carry all regulations to promote a widespread dissemination of a multiplicity of sources.

Starting in 2005, the FCC issued policy statements, which emphasized its goal to “promote the open and interconnected nature of the public Internet”⁸⁶ and nondiscrimination⁸⁷ of Internet communications. This can be seen as beginnings of the FCC’s net neutrality policy, originally formulated by Columbia University professor Tim Wu.⁸⁸ As mentioned, the net neutrality policy is a close cousin of common carrier policy and seeks protections from preference or discrimination of Internet communications— regardless of whether the Internet operates via telephone, cable, mobile phones, or by any other medium.

Following its own net neutrality policy, in 2008, the FCC issued an order prohibiting Comcast – a cable company – from discriminating against Internet communications. The order followed instances where Comcast was discriminating against peer-to-peer Internet communications. Notably, in issuing its order, the FCC failed to claim its authority to do so under Title II, which allows it to regulate common carriers. Instead, it claimed to rely upon its very general ancillary authority to “make such rules and regulations, and issue such orders... as may be necessary in the execution of its functions.”⁸⁹ In ruling against the FCC, the Court found that while the FCC can rely on its ancillary authority, it must tie its use of ancillary

⁸⁶ Federal Communications Commission, Report and Order and Notice of Proposed Rulemaking No. 05-150, 20 FCC Rcd. 14853 (adopted Aug. 5, 2005).

⁸⁷ Nate Anderson, *FCC Chairman wants network neutrality, wired and wireless*, ARSTECHNICA (Sept. 22, 2009), <http://arstechnica.com/tech-policy/2009/09/fcc-chairman-wants-network-neutrality-wired-and-wireless/>.

⁸⁸ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=388863.

⁸⁹ Communications Act of 1934, 47 U.S.C. § 154(i).

authority to a more specific “statutorily mandated responsibility,” which it “failed to” do.⁹⁰

The Third Way

In response to *Comcast Corp. v. FCC*, FCC Chairman Julius Genachowski issued a proposal known as the “The Third Way” to solve its unsuccessful regulation of cable operators via general ancillary authority.⁹¹ Notably, Chairman Genachowski’s proposal recommended using Title II authority to regulate pure transmission aspects of cable in a narrowly-tailored way. Supporting the Third Way, FCC General Counsel Austin Schlick reasoned that Title II, coupled with the FCC’s ability to grant forbearance, would be a solid foundation upon which to regulate cable Internet, while protecting from discrimination or preference. This reasoning was in line with the dissent in *Brand X*. Similar to the precedent of *Computer II*, Schlick proposed distinguishing between Telecommunications Carriers (name that replaced Basic Services under the Telecommunications Act of 1996) and Information Services:

If broadband access service is found to contain a separate telecommunications service, as Justices Scalia, Souter, and Ginsburg believed [in *Brand X*] was the only plausible view, then the Commission may protect broadband consumers by grounding its authority in Title II directly as well as in Title I as ancillary authority. This belt-and-suspenders approach—relying on direct statutory authority in addition to ancillary authority—puts the Commission in an inherently more secure position than the Title I approach, which allows only assertions of ancillary authority.⁹²

⁹⁰ *Comcast*, 600 F. 3d at 644 (quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C.Cir. 2005)). *See also Comcast*, 600 F. 3d at 655 (quoting *Computer & Commc'ns v. FCC*, F.2d 198, 213 (1982)): “Southwestern Cable ‘limited the Commission’s jurisdiction to that which is reasonably ancillary to the effective performance of the Commission’s various responsibilities,’ we explained that ‘[o]ne of those responsibilities is to assure a nationwide system of wire communications services at reasonable prices.’”

⁹¹ *In re Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd. 7866 (June 17, 2010).

⁹² Relevant to mobile broadband, Schlick also mentioned, “telecommunications classification of a distinct transmission component within wireless broadband service might be essential to supporting deployment and wider adoption of wireless broadband under section.” Schlick, *supra* note 81, at 5.

Rather than adopt its own Third Way proposal, the FCC tried again to apply Title II-like regulations to a category which it chose to regulate under a non-Title II category – the same strategy that proved unsuccessful in *Comcast* and the same strategy that the *Brand X* dissent admonished.⁹³ Unsurprisingly, in *Verizon v. FCC*, the Court once again ruled against the FCC, indicating: “We are unable to sustain the Commission’s action on a ground upon which the agency itself never relied. [] Nor may we defer to a reading of a statutory term that the Commission never offered.”⁹⁴ Yet again, the Court indicated that there would be no issue with the FCC regulating aspects of cable as a Title II common carrier, so long it chose to rely upon its Title II regulatory authority.

After two unsuccessful cases in a row, which resulted from the FCC’s failure to rely on its Title II authority, it would stand to reason that the FCC would choose to abandon its approach of “doing the same thing over and over again but expecting different results.”⁹⁵ Yet, despite tokenism about being open to using Title II, FCC Chairman Wheeler appears primed for another round of regulatory madness, basing his new proposal Section 706 of the Telecommunications Act of 1996, without any concrete proposal to regulate any aspect of cable as a Title II common carrier. Unless someone lights a fire under Chairman Wheeler, we can expect no real solid plans to end the Catch-22 logic that has dominated the FCC for the past decade and a half. Its failure to regulate any aspect of cable as a Title II common carrier means that the FCC lacks the ability to implement its own policies. And, failing to implement its own policies means that the FCC continues to undermine its own regulatory credibility, making it appear to lack the ability to meaningfully regulate cable providers.

⁹³ *In re Preserving the Open Internet*, 25 FCC Rcd. 17905 (2010).

⁹⁴ “Likewise, because the Commission has classified mobile broadband service as a ‘private’ mobile service, and not a ‘commercial’ mobile service, treatment of mobile broadband providers as common carriers would violate section 332.” *Verizon Commc’ns*, 740 F.3d at 650.

⁹⁵ Commonly cited as a definition of insanity; origination of quote has been attributed to Albert Einstein, though its most definitive source is RITA MAE BROWN, *SUDDEN DEATH* 68 (1983).

Are We Entering a Milton Friedman Era of the Internet?

Deregulation advocate Milton Friedman suggests that no government commission is suited to regulate communications: The FCC's jurisdiction "cannot, so far as I can see, validly be justified."⁹⁶ This is because, in Friedman's opinion, regulation of communications inherently violates First Amendment protections of free speech.⁹⁷ It is too broad of a topic to explore exactly what a completely deregulated Internet might look like, other than to acknowledge it would be a world where discrimination and preference of Internet communications would be perfectly legal.

In a completely deregulated Internet, cable providers could arguably use "private property" rights to not only discriminate and establish preference for Internet communications, but also filter anything they like. But, even Friedman says, the "role of government [] is to do something that the market cannot do for itself, namely, to determine, arbitrate, and enforce the rules of the game."⁹⁸ So, the question remains, what – if anything – will the FCC do to protect the future of the Internet?

The FCC's Recent Proposal

Chairman Wheeler's recent proposal for protecting the future of the Internet is rhetorically strong, but weak from a regulatory standpoint:

Personally, I don't like the idea that the Internet could become divided into "haves" and "have nots." I will work to see that does not happen.

The D.C. Circuit's ruling in January of this year upheld our determination that we need rules to protect Internet openness, and upheld our authority under Section 706 to adopt such rules[]. I promptly stated that we would reinstate rules that achieve the goals of the 2010 Order using the Section 706-based roadmap laid out by the court. That is what we are proposing today.⁹⁹

⁹⁶ MILTON FRIEDMAN, CAPITALISM AND FREEDOM 35 (40th anniv. ed. 2002).

⁹⁷ "... one [example] which deserves special mention because of its implicit censorship and violation of free speech, is the control of radio and television by the Federal Communications Commission." *Id.*

⁹⁸ *Id.* at 27.

⁹⁹ Statement of Chairman Tom Wheeler, Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28.

Although the Court in *Verizon* suggested that Section 706 of the Telecommunications Act of 1996 may be one acceptable way to protect from preference or discrimination of Internet communications, such an approach also has numerous shortcomings. First, Section 706 allows for individualized bargaining arrangements, allowing Internet providers to prefer and discriminate against Internet communications.¹⁰⁰ Second, the Section 706 approach adds a layer of complexity to the FCC's regulation of the Internet – veering away from the much simpler, well-established *Computer II* approach.

Professors Tim Wu and Tejas N. Narechania reason about the *Computer II* approach:

The *Computer II* approach was the governing regulatory regime during the period of the exponential growth during the 1980s and 1990s in the computer networking and Internet industries. Notably, the explosion in network services during this time casts serious doubt on the claims that any regulation under Title II is necessarily inconsistent with economic growth. To the contrary, the clever design of *Computer II*, which avoided overregulation of application-layer industries while simultaneously protecting them from carrier threats of blocking or discrimination, actually fueled growth in application-layer services.¹⁰¹

So, why is the FCC trying to reinvent the wheel, attempting to test a Section 706 theory, rather than applying the brilliant *Computer II* precedent of distinguishing pure transmission from information services? Simplifying the FCC's regulation of the Internet using the *Computer II* approach will not only reverse the trend of unsuccessful FCC litigation, but doing so will also help ensure Jefferson's "force of public opinion" and Holmes' "free trade in ideas,"¹⁰² as the lifeblood of democracy.¹⁰³

¹⁰⁰ Even the FCC admits that Section 706 "would allow for individualized bargaining where providers would not be required 'to hold themselves out to serve all comers indiscriminately on the same or standardized terms.' If the Commission's no-blocking rule allowed individualized bargaining above the minimum level of service necessary, then the rule might not create per se common carriage obligations." Federal Communications Commission, Notice of Proposed Rulemaking 14-61, 5 (May 15, 2014) (quoting *Verizon Commc'ns Inc. v. FCC*, 740 F.3d 623, 658 (D.C. Cir. 2014).

¹⁰¹ Tejas N. Narechania & Tim Wu, *Sender-Side Transmission Rules for the Internet*, FED. COMM. L.J., forthcoming 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447107.

¹⁰² Thomas Jefferson, Letter to Marquis de Lafayette, Nov. 4, 1823, available at <http://founders.archives.gov/documents/Jefferson/98-01-02-3843>, ver. 2014-05-09.

¹⁰³ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Wendell, J., dissenting).

As stated previously, after *Brand X*, the FCC maintains seven categories of regulation. The complexity of the FCC regulations leads to an inherent disadvantage in the way the FCC protects communication. Communications regulated by the FCC are crossing technological boundaries at an increasing rate.¹⁰⁴ It is now common for people to watch television programs online and make telephone calls using cable Internet lines. Supporting consolidation of the FCC's complex categories, Hernan Galperin of the Annenberg School for Communication says, "regardless of whether the bits flow[] over copper wires, fiber optic lines, or radio waves, the underlying technologies and the equipment utilized [a]re increasingly similar."¹⁰⁵

While the FCC has put forth various proposals to change the way it regulates cable Internet over the past several years, few have simplified its increasingly complex regulation categories. If anything, the FCC's proposals often reflect an attempt to solve one complexity by creating more. Elegant solutions tend to work better than unnecessarily complex ones.

The closest proposal to an elegant solution that the FCC has come across is the Third Way, which itself may have been complicated by overthinking. First and foremost, the FCC must find a head of statutory authority to attach its regulations – not as an ends; instead, as a means. Until or unless the FCC is willing to rethink the convulsion it set in motion in 2002¹⁰⁶ by refusing to apply Title II to any aspect of cable providers, the FCC will continue to add layers of complexity to itself. This complexity ultimately serves to undermine the FCC's own credibility as an effective regulatory commission.

The growing complexity of the FCC's regulations caused Justices Scalia, Souter, and Ginsburg to write a multi-page dissent in *Brand X*.¹⁰⁷ But, things need not

¹⁰⁴ Aufderheide, *supra* note 65, at 10.

¹⁰⁵ Galperin, *supra* note 30, at 80.

¹⁰⁶ In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802-4803, ¶ 9 (2002).

¹⁰⁷ See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1008, 1010 (2005) (Scalia, J., dissenting): "Despite the Court's mighty labors to prove otherwise, ante, at 989-1000, the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer—especially when seen from the perspective of the consumer or the end user, which the Court purports to find determinative,

be so complex. A common carrier “shall be treated as a common carrier [] only to the extent that it is engaged in providing telecommunications services,” as defined by the Telecommunications Act of 1996.¹⁰⁸ Once the FCC has begun attaching its regulatory authority to Title II of the Communications Act of 1934, it has a very broad discretion to use its ancillary authority and substantial forbearance power to follow its own policy of net neutrality; this will help ensure that cable is not designated as a common carrier to a greater extent than it needs to be, in order for the FCC to enforce its net neutrality policy.¹⁰⁹

Conclusion: Computer II Solution Recognizing DNS Services as Part of Pure Transmission is Necessary to Protect Golden Age of the Internet

The *Computer II* solution is exactly what is needed to protect the golden age of the Internet. To preserve the future of the Internet, the FCC must create the equivalent of a Basic Services category of cable, which is defined in a similar way to Basic Services in its *Computer II* rules: “Pure transmission capability over a

ante, at 990, 993, 998, 1000. The Commission's ruling began by noting that cable-modem service provides both "high-speed access to the Internet" and other "applications and functions," Declaratory Ruling 4799, ¶ 1, because that is exactly how any reasonable consumer would perceive it: as consisting of two separate things.” *** “Since the delivery service provided by cable (the broadband connection between the customer's computer and the cable company's computer-processing facilities) is downstream from the computer-processing facilities, there is no question that it merely serves as a conduit for the information services that have already been "assembled" by the cable company in its capacity as ISP. This is relevant because of the statutory distinction between an "information service" and "telecommunications." The former involves the capability of getting, processing, and manipulating information. § 153(20). The latter, by contrast, involves no "change in the form or content of the information as sent and received." § 153(43). When cable-company-assembled information enters the cable for delivery to the subscriber, the information service is already complete. The information has been (as the statute requires) generated, acquired, stored, transformed, processed, retrieved, utilized, or made available. All that remains is for the information in its final, unaltered form, to be delivered (via telecommunications) to the subscriber.”

¹⁰⁸ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 47 U.S.C. §1, et seq.

¹⁰⁹ Using its *Chevron* discretion. See also *Nat'l Cable*, 545 U.S. at 1012 (Scalia, J., dissenting): “That same result can be achieved today under the Commission's statutory authority to forbear from imposing most Title II regulations. § 160. In fact, the statutory criteria for forbearance—which include what is ‘just and reasonable,’ ‘necessary for the protection of consumers,’ and ‘consistent with the public interest,’ §§ 160(a)(1), (2), (3)—correspond well with the kinds of policy reasons the Commission has invoked to justify its peculiar construction of ‘telecommunications service’ to exclude cable-modem service.”

communications path that is virtually transparent in terms of its interaction with customer supplied information.”¹¹⁰

A *Computer II*-like regulation would allow the FCC to apply Title II regulations to the pure transmission services of cable and in doing so, would protect the Internet from discrimination or preference, the same outcome net neutrality is trying to achieve. An important element to the FCC adopting a *Computer II*-like regulation will be for the FCC to recognize that DNS servers are part of the “pure transmission” infrastructure of cable Internet. This would be in line with Justices Scalia, Souter and Ginsburg’s dissent in *Brand X*, where they reasoned, “DNS, in particular, is scarcely more than routing information, which is expressly excluded from the definition of “information service.”¹¹¹

Failure to recognize DNS servers as part of the “pure transmission” infrastructure of cable Internet would open a large loophole through which cable providers could continue to evade substantive regulations. As Professor Tim Wu indicates, “You pay your provider to deliver the information you seek, unchanged; Verizon’s job is to get you Wikipedia entries, not to edit them. And net-neutrality rules, just like Title II, ban unjust and unreasonable discrimination.”¹¹²

In order to carry this out, the FCC must also, of course, create the equivalent of an Enhanced Service category of cable, which it defines in a similar way to its definition of Enhanced Services in its *Computer II* rules: “basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information, or provide the subscriber

¹¹⁰ *Computer II* Final Decision, 77 F.C.C.2d (1979).

¹¹¹ *Nat’l Cable*, 545 U.S. at 1012-1013 (Scalia, J., dissenting).

¹¹² Regarding doom and gloom scenarios being spun by deregulation advocates overstating the negative potential of Title II regulations, “This reveals the insubstantiality of the fear invoked by both the Commission and the Court: the fear of what will happen to ISPs that do not provide the physical pathway to Internet access, yet still use telecommunications to acquire the pieces necessary to assemble the information that they pass back to their customers. ... The ISPs’ use of telecommunications in their processing of information is not offered directly to the public.” *Id.* at 1010-1011 (Scalia, J., dissenting).

additional, different, or restructured information, or involve subscriber interaction with stored information.”¹¹³

If the underlying infrastructure of the cable is not allowed to discriminate or prefer pure transmission of communications, then Enhanced Services¹¹⁴ would not be affected by discrimination or preference, thereby safeguarding against discrimination or preference of Internet communications. Enhanced Service providers could simply send and receive their pure information over Basic Service¹¹⁵ cable communications paths, for a reasonable fee and without the threat of preference or discrimination.¹¹⁶ Part of safeguarding against discrimination or preference depends on the FCC clarifying its net neutrality policy to explicitly include both protection from unreasonable discrimination and unreasonable preference.

In order to achieve the goals of net neutrality, namely the lack of discrimination or preference of pure transmission of Internet communications, a third category of cable regulations would need to survive. That category would need to allow for the sustenance of cable operators’ livelihood, since its inception, which is namely its television broadcast capabilities, as separate from television streaming over the Internet; television streaming over the Internet would fall under the equivalent of Enhanced Services, which cable operators could protect using exclusive licensing arrangements and copyright laws. A third category of Cable Television Broadcasts would need to continue to be regulated in the same way it has since *Midwest II*, namely allowing cable operators to broadcast and to use their journalistic freedom, while enforcing the must carry rules, for local broadcasts. Such an approach has long been accepted by courts.

¹¹³ Computer II Final Decision, 77 F.C.C.2d (1979).

¹¹⁴ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 47 U.S. Code §1, et seq.

¹¹⁵ Hereinafter “Basic Services” includes the equivalent thereof.

¹¹⁶ It is also important to note that “reasonable fees” enforced via common carrier regulations have never meant fixed fees, minimum fees or that common carriers cannot make a profit or offer volume-based discounts or usage-based fees.

It is certain that some deregulation advocates will attack the above three-category proposal, trying to lump all transmissions over cable together as “broadcasts,” but transmissions over cable are clearly no longer purely broadcasts.

Furthermore, it is important to note that my proposal for the adoption of *Computer II*-like regulations for aspects of cable does not necessarily require that cable operators offer access to cable lines to competing Internet service providers. As mentioned above, *Computer II* regulations predated the *Computer III* requirements that mandated the allowance of competing Internet service providers. As such, the FCC could adopt *Computer II*-like regulations without choosing to also force cable operators to allow access to competing Internet service providers.

The outcome of the current debate will be felt far and wide. It is unlikely that the Internet will resemble its current form, if a drastic response by the FCC does not take place. It is obvious from the history of communications regulations that excitement and altruism related to new technologies can give way to resistance, entrenchment, and eventual path dependence of rules promoted primarily by well-heeled utility companies. Nevertheless, the sort of communication that the Internet enables is inherently valuable to democracy. If there is an interruption in almost any good or service, the democratic process should be able to come up with a solution, so long as democratic citizens have the right to information without preference or discrimination. But the inverse argument does not hold true: if there is an interruption or preference of information to democratic citizens, the democratic process is disabled from coming up with a solution; such an interruption or preference interferes with a “free trade in ideas,” and thus democracy, itself.¹¹⁷ As the greatest enabler of a free trade in ideas that the world has ever known, the Internet demands special protection as a particularly valuable enabler of democracy.

If the Internet is to survive and thrive for future generations of democratic citizens, now is the time for an intelligent solution. A deregulated Internet is not really deregulated at all, but instead an Internet re-regulated by utility companies—which could arguably use “private property” rights to not only discriminate and prefer

¹¹⁷ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Wendell, J., dissenting).

Internet communications, but also filter anything they like. The solution need not be complicated. A *Computer II*-like regulation would allow the FCC to apply Title II regulations to the pure transmission services of cable and in doing so, would protect the Internet from discrimination or preference, the same outcome net neutrality is trying to achieve. First and foremost, FCC needs to use its Title II statutory authority - not as an ends; instead, as a means. Once the FCC has begun attaching its regulatory authority to Title II of the Communications Act of 1934, it has a very broad discretion to use its ancillary authority and substantial forbearance power to ensure that cable is not designated as a common carrier to a greater extent than cable needs to be designated as a common carrier, in order for the FCC to enforce its net neutrality policy.¹¹⁸

Chairman Wheeler must end the Catch-22 logic that has dominated the FCC for the past decade and a half. This includes the need for Computer II-like regulations to distinguish the pure transmission of information that flows across the cable Internet lines, an FCC clarification of its net neutrality policy to include safeguards against both discrimination and preference of Internet communications and regulating DNS servers as part of the “pure transmission” infrastructure of the Internet.¹¹⁹

Epilogue: FCC’s Eventual Need to Clarify its Broadband Classification Order

¹¹⁸ Using its *Chevron* discretion. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1012 (2005) (Scalia, J., dissenting): “That same result can be achieved today under the Commission’s statutory authority to forbear from imposing most Title II regulations. § 160. In fact, the statutory criteria for forbearance—which include what is ‘just and reasonable,’ ‘necessary for the protection of consumers,’ and ‘consistent with the public interest,’ §§ 160(a)(1), (2), (3)—correspond well with the kinds of policy reasons the Commission has invoked to justify its peculiar construction of ‘telecommunications service’ to exclude cable-modem service.” See also *Cellco Partnership v. FCC*, 700 F. 3d 534, 547 (2012) (“[C]ommon carriage is not all or nothing—there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage per se.... In this space between per se common carriage and per se private carriage... the Commission’s determination that a regulation does or does not confer common carrier status warrants deference.”).

¹¹⁹ If a backstop approach is used by the FCC, I propose to invert Congressman Waxman’s approach and use Section 706 as a backstop to Title II authority, rather than the other way around.

As Internet usage via mobile devices is almost at parity with Internet usage via traditional computers, to fully protect the future of the Internet, the FCC will have to eventually clarify in its Wireless Broadband Classification Order¹²⁰ that pure transmission of Internet communications via mobile devices is indeed subject to Title II. Therefore, while the equivalent of Enhanced Services is not subject to common carrier regulations, the FCC will need to clarify that pure transmission of Internet communications on mobile devices is subject to common carrier regulations.¹²¹ To support this clarification, the FCC needs to classify pure transmission of the Internet via mobile devices as a “commercial mobile service.” Finally, to fully safeguard against discrimination or preference of Internet communications on mobile devices, the FCC will also need to regulate DNS servers as part of the “pure transmission” infrastructure of mobile Internet.¹²²

There are bound to be debates about whether such an approach would undercut the mobile telephone industry’s historical core business model, as the Internet has the capacity to be used as a substitute for mobile telephone calls (via voice over Internet technologies like Skype and Viber). In fact, the use of voice over Internet technologies is already widespread and already cuts into the historical core business model for the mobile telephone industry. Therefore, it is likely that such an approach could help strengthen the historical core business model of the mobile telephone industry; mobile telephone providers could seek to have voice over Internet services like Skype and Viber also regulated as the equivalent of Basic Services, as they arguably offer competing “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.”¹²³

¹²⁰ Wireless Broadband Classification Order, 22 FCC Rcd at 5915-21 ¶¶ 37-56.

¹²¹ This approach is supported in *Cellco*, 700 F. 3d at 547: “[C]ommon carriage is not all or nothing—there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage per se.... In this space between per se common carriage and per se private carriage... the Commission’s determination that a regulation does or does not confer common carrier status warrants deference.”

¹²² If the underlying infrastructure of mobile devices is protected from preference or discrimination, then pure transmission of information from Enhanced Services, such as Internet communications will not be affected by discrimination or preference. Enhanced Service users and providers could simply send and receive their pure transmissions of Internet communications for a reasonable fee and without the threat of preference or discrimination.

¹²³ See Schlick, *supra* note 81, at 5: “On the other hand, telecommunications classification of a distinct transmission component within wireless broadband service might be essential to supporting deployment and wider adoption of wireless broadband under section.”