EDITOR'S NOTE

Welcome to the first Issue of Volume 67 of the *Federal Communications Law Journal*, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association.

In our first article, George S. Ford and Lawrence J. Spiwak take a detailed look at the implications of classifying broadband as a Title II service. Ford and Spiwak conclude that reclassification creates a new termination market in which edge providers are the customers of Broadband Service Providers ("BSPs"). Under Section 203 of the Communications Act, BSPs would be required to tariff their termination service at a nonzero rate. Because the Commission has determined that BSPs are "terminating monopolists," it would be unable to forebear from enforcing the tariffing requirement.

In our second article, Christopher J. Wright discusses the FCC's ancillary jurisdiction after the D.C. Circuit's decision in *Verizon v. FCC*. Wright reviews the evolution of the ancillary jurisdiction doctrine over the years, culminating in D.C. Circuit Judge David Tatel's test in *Comcast v. FCC*, which stipulated that the FCC must both identify an express delegation of ancillary authority" beyond a mere "policy statement," and show that its regulation is not inconsistent with the principles embodied in the Communications Act. Wright argues that, as applied in *Verizon*, the *Comcast* test may require the FCC to specify a provision reflecting a congressional anticipation of new technology, which could prove to be a substantial limitation on ancillary jurisdiction.

In our third article, Steven Tepp reviews the Supreme Court's decision in *American Broadcasting Companies v. Aereo*. In his piece, Tepp analyzes the legal background leading up to the *Aereo* decision, and explains Aereo's technology and business model. Tepp walks the reader through the Court's reasoning, and explains the long term implications of the Court's holding.

Next, Max Hsu provides a critique of the Supreme Court's reasoning in Aereo. He suggests that the Court may have boxed itself in for future decisions on the copyright implications of modern cloud computing services.

Audra Healey identifies an innovative role for the FCC to play in reviewing the NSA's surveillance activities as they relate to the viability of U.S. network infrastructure and its resilience against malicious attackers. She proposes a regime under which the FCC could bring its institutional expertise to bear in seeking to ensure that NSA operations do not undermine our long-term network security.

Finally, John Gasparini closes out the issue with a detailed analysis of the Communications Act in light of the IP transition. Concluding that only a Communications Act rewrite can realistically facilitate a twenty-first century FCC, Gasparini proposes some guiding principles on which a prudent and durable Communications Act rewrite might be based.

The *Journal* remains committed to providing its readership with substantive coverage of relevant topics in communications law, and we appreciate the continued support of contributors and readers alike. We welcome your feedback and submissions—any questions or comments about this Issue or future issues may be directed to fclj@law.gwu.edu, and any submissions for publication consideration may be directed to fcljarticles@law.gwu.edu. This Issue and our archive are available at http://www.fclj.org.

Anthony Glosson
Editor-in-Chief

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Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and the George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, privacy, communications and information policymaking, and other related fields.

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ARTICLES

The Federal Communications Commission is coming under intense political pressure to reclassify broadband Internet access as a common carrier telecommunications service under Title II of the Communications Act. Yet, almost no attention has been directed at the fine details of how reclassification will be implemented. Relying on the plain terms of the FCC's governing statute, current case law, and the Commission's own precedent, we examine such details in this Article and conclude the following: First, reclassification would turn edge providers into "customers" of Broadband Service Providers ("BSPs"), and this new "carrier-to-customer" relationship (as opposed to a "carrier-to-carrier" relationship) would require all BSPs to create, and then tariff, a termination service for Internet content under Section 203 of the Communications Act. Because a tariffed rate cannot be set arbitrarily, and since a service cannot be generally tariffed at a price of zero, reclassification would require all edge providers (not their carriers)—as customers of the BSP—to make direct payments to the BSPs for termination services. Second, as competition is the basis for Section 10 forbearance, the Commission is precluded from setting aside tariffing because it has labeled all Broadband Service Providers as "terminating monopolists." As such, the agency has boxed itself in for mandatory tariffing under Title II.

Whether the Federal Communications Commission can and should reenact net neutrality rules similar to those invalidated by the U.S. Court of Appeals for the D.C. Circuit in Verizon v. FCC has been the focus of most commentary on the case. But the decision in Verizon is also noteworthy for its effect on the scope of the FCC's "ancillary jurisdiction"—that is, the FCC's authority to adopt regulations based largely on the provisions in Title I of the Communications Act of 1934 that grant the agency general, rather than specific, authority. This Article thus focuses on the scope of the FCC's

ancillary authority after Verizon, rather than on how the FCC should respond to the opinion with respect to net neutrality.

This Article first reviews the statutory framework and the Supreme Court decisions governing the scope of the FCC's ancillary authority. The Article then analyzes how Judge Tatel's decisions in Comcast v. FCC and Verizon v. FCC, have reshaped the scope of the FCC's ancillary jurisdiction. Although Judge Tatel's synthesis of the relevant cases has produced a test that is largely true to D.C. Circuit precedent, this test is unlikely to shift judicial results away from complex issues having little to do with real-world matters and toward the merits of the FCC's actions as a matter of economic policy and engineering realities.

COMMENT

American Broadcasting Cos. v. Aereo, Inc.

Few things are as central to Americans' lives as their television. But the medium that has for decades been defined by the device on which it has traditionally been viewed is now undergoing a transformation to computers, tablets, and smartphones. In American Broadcasting Cos. v. Aereo, Inc., the U.S. Supreme Court addressed a service that sought to deliver television programming over the Internet to these devices without obtaining permission from either the broadcaster or the copyright owner.

This comment briefly summarizes the legal background against which the Aereo service was engineered. It then describes the pertinent design and functions of the Aereo service. Next, it reviews and analyzes the Supreme Court's majority opinion in American Broadcasting Cos. v. Aereo, Inc., as well as the dissent.

The issues presented in this litigation have implications beyond the specific facts of the case, and those issues remain controversial. This comment is intended to provide an even-handed account of the Court's opinions and, while it will note unanswered questions, it does not seek to offer answers to them.

NOTES

Private Performances for the Public Good: Aereo and the Battle for Broadcast's Soul

Every so often, a new technology comes along with the potential to revolutionize an entire industry. These "disruptive innovations" are what continue to move society forward—upending antiquated regimes and providing a prototype for future innovation. Enter Aereo: a New York-based

reconcile decades-old law with cutting-edge technology, however, the IP Transition moves implacably forward. Legislative action is needed, to be sure, but that will take time; in the interim, the FCC should use the tools it already has to move toward a more horizontal regulatory model, eliminating regulatory absurdities while facilitating the IP transition and enabling effective regulation of modern services and connectivity. While other commenters recognize the need for reform, their proposals focus on the end result, resigning regulators and consumers to indefinite uncertainty until Congress acts.

The FCC need not wait, however. Its preemption and forbearance powers allow it to take the first steps toward a regulatory framework based on the layers which define modern networks, rather than the means by which any given service is provided. These actions would respect the interests of the states and the federalism analysis which produced the joint-jurisdiction model, while allowing the FCC to regulate competing services equally. Most importantly, however, would be the guidance that FCC action can provide to Congress, as legislators have a history of looking to the actions of their expert agencies for inspiration when rewriting the law.

Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service

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Lawrence J. Spiwak, Esq.[**]

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** President, Phoenix Center for Advanced Legal & Economic Public Policy Studies. The views expressed in this paper are the authors' alone and do not represent the views of the Phoenix Center or its staff. We are indebted to Professor Randy Beard, Phoenix Center Senior Fellow, for his assistance with this paper.

I. INTRODUCTION

Since the early days of the Internet, the Federal Communications Commission (the "FCC") has taken a largely "hands off" regulatory approach to broadband Internet services—a light touch widely-held to be a key contributor to the rapid innovation, diffusion and adoption of Internet services in the United States.[1] Facilitating this deregulatory approach was the agency's classification of broadband Internet access as an "information service" under Title I of the Communications Act.[2] Despite the success of this approach, and in response to the agency's struggles to construct legally sustainable "Open Internet" rules,[3] the FCC is coming under intense political pressure to reverse course and classify broadband Internet connectivity as a common carrier telecommunications service under Title II.[4] Doing so, it is argued, is the only way to provide the agency with sufficient legal authority to prevent Broadband Service Providers ("BSPs") from engaging in anticompetitive conduct.[5]

This reclassification debate begs the question: How does classifying broadband as a common carrier telecommunications service help protect the

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1. *See, e.g.*, J. Oxman, *The FCC and the Unregulation of the Internet* (FCC, OSP Working Paper No. 31, 1999), *available at* http://www.fcc.gov/working-papers/fcc-and-unregulation-internet; K. High, *Digital Pioneers Remember Past, Forecast Future of the Internet*, POLITIC365 (December 6, 2013, 3:09 PM), http://politic365.com/2013/12/06/digital-pioneers-remember-past-forecast-future-of-the-internet.

2. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (cable modem); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order*, FCC 05-150, 20 FCC Rcd. 14853, 14862 (2005), *aff'd* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007) (wireline broadband); Appropriate Reg. Treatment for Broadband Access to the Internet over Wireless Networks, *Declaratory Ruling*, FCC 07-30, 22 FCC Rcd. 5901 (2007) (wireless broadband); United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Serv. as an Information Serv., *Memorandum Opinion and Order*, FCC 06-165, 21 FCC Rcd. 13281, 13281 (2006) (broadband over powerline).

3. Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, FCC 14-61, 29 FCC Rcd. 5561 (2014) [hereinafter *2014 Open Internet NPRM*], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1.pdf.

4. *See, e.g.*, Lawrence J. Spiwak, *The "Clicktivist" In Chief,* THE HILL (November 12, 2014) (http://thehill.com/blogs/pundits-blog/technology/223744-the-clicktivist-in-chief); Brendan Sasso, *In Net-Neutrality Push, Democrats Aim to Make the Internet a Utility*, NAT'L J. (July 14, 2014), http://www.nationaljournal.com/tech/in-net-neutrality-push-democrats-aim-to-make-the-internet-a-utility-20140714?ref=the_edge; Kate Tummarello, *Senate Dems: Regulate Internet Like Telephones*, THE HILL (July 15, 2014, 11:30 AM), http://thehill.com/policy/technology/212270-senate-dems-want-to-regulate-the-internet-like-phones. The full text of the letter is available on Senator Markey's webpage at: http://www.markey.senate.gov/news/press-releases/to-protect-net-neutrality-markey-leads-senate-dems-in-call-to-reclassify-broadband-as-a-utility.

5. This argument is inaccurate. *See* Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law*, 18 J. INTERNET L. 1 (Jan. 2015).

"Open Internet"? According to proponents of reclassification, the answer lies in the direct application of Sections 201 and 202 of the Communications Act.[6] As stated by the advocacy group Public Knowledge, "Sections 201 and 202 provide strong statutory grounding for creating strong rules to protect an open internet."[7] Section 201 requires rates to be "just and reasonable"[8] while Section 202 prohibits "unreasonable discrimination."[9] These two sections, it is argued, can be used to prevent Broadband Service Providers from establishing slow and fast lanes for the delivery of edge-provider traffic to consumers, since such differential treatment of edge providers could be labeled by the FCC as "unreasonable discrimination."[10] Network Neutrality advocate and law professor Marvin Ammori, pointing to Section 201 and 202, claims "under Title II, the FCC can eliminate certain classes of fees and discrimination, including banning paid prioritization (a.k.a. fast lanes) on the Internet altogether."[11]

Thus far, the advocates for reclassification have put forth mostly superficial arguments, suited more for political markets than for policymakers (and consumers) trying to grasp the full implications of such a

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6. *See, e.g.*, Comments of Pub. Knowledge & Common Cause at 12, Open Internet Remand, FCC GN Docket 14-28 (rel. March 21, 2014) [hereinafter *Public Knowledge Comments*], *available at* http://apps.fcc.gov/ecfs/document/view?id=7521094713; Comments of Mozilla at 6, 13, Protecting and Promoting the Open Internet, FCC GN Docket 14-28 (rel. July 15, 2014) [hereinafter *Mozilla Comments*], *available at* http://apps.fcc.gov/ecfs/document/view?id=7521479935; Comments of AARP at 41-42, Protecting and Promoting the Open Internet, FCC GN Docket 14-28 (rel. July 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521705861.

7. Public Knowledge Comments, *supra* note 6, at 12.

8. Section 201 of the Communications Act, 47 U.S.C. § 201(b), provides in relevant part that "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . ."

9. Section 202 of the Communications Act, 47 U.S.C. § 202(a), states:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage

10. Public Knowledge Comments, *supra* note 6, at 12. ("Violating any nondiscrimination rule will necessarily involve violating Sections 201 and 202 by engaging in practices that unjustly or unreasonably give preference to or disadvantage a particular class of persons: namely, the users of particular lawful applications, services, or content.")

11. Marvin Ammori, *Title II and Paid Prioritization*, AMMORI.ORG (May 12, 2014), http://ammori.org/2014/05/12/title-ii-and-paid-prioritization. Despite such cursory claims, Sections 201 and 202 do not prohibit the establishment of slow and fast lanes; decades of rate regulation plainly show that establishing slow and fast lanes is entirely consistent with Sections 201 and 202 of the Act, if not, as some argue, mandated by them. Differential quality and pricing under Title II is commonplace, so it will be very difficult for the FCC to prohibit paid prioritization under Title II regulation, despite the *ad hoc* arguments to the contrary.

significant regulatory change.[12] Almost no attention has been directed at the fine details of how reclassification would be implemented. To wit, what service is to be reclassified and regulated? Who are the buyers and sellers impacted by reclassification? What enforcement mechanisms are available? In this ARTICLE, we address these specific issues. Our legal and economic review forces us to conclude that reclassification is likely to cause a radical change in the economic fabric of the Internet ecosystem.

Relying on the plain terms of the FCC's governing statute, current case law, and the FCC's own precedent, we show that reclassification turns edge providers into "customers" of Broadband Service Providers. This new "carrier-to-customer" relationship (as opposed to a "carrier-to-carrier" relationship) would then require all BSPs (i.e., telephone, cable, and wireless broadband providers) to create, and then tariff, a *termination service* for Internet content under Section 203 of the Communications Act. Critically, this termination service would be separate and apart from any carrier-to-carrier agreements to deliver traffic.[13] Because a tariffed rate cannot be set arbitrarily, and since a service cannot be generally tariffed at a price of zero, reclassification would require all edge providers (not their carriers)—as customers of the BSP—to make direct payments to the BSPs for termination services. That is, *all content providers*, whether Netflix or a church website (or its host company), would be on the hook to pay every broadband service provider a positive termination fee.[14] Most importantly, the agency would

12. Indeed, press reports indicate that some 60 percent of initial comments to the FCC's *2014 Open Internet NPRM* came in the form of letters pre-written by advocacy campaigns. According to the Washington Post, this "suggests a heavy role for 'clicktivists,' or members of the public who weighed in by doing nothing more than clicking a button in an e-mail or on a Web site." *See* Brian Fung, *Sunlight: 99 Percent of Net Neutrality Comments Wanted Stronger FCC Rules*, WASH. POST, Sept. 2, 2014, http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/02/sunlight-99-percent-of-net-neutrality-comments-wanted-stronger-fcc-rules; *see also Clictivist in Chief*, *supra* note 4.

13. The discrimination feared by net neutrality advocates regards specific forms of content, not specific carriers. Carriers deliver all types of content. Thus, the issue is not about degrading or enhancing the delivery of the entirely of a carrier's traffic, but the picking-and-choosing of some of the content of a carrier's (or multiple carriers') total traffic. As discussed *infra*, the carrier-to-carrier relationships are very different than those contemplated in the network neutrality debate.

14. Today, much carrier-to-carrier termination, also subject to Section 201 and 202, is arguably priced at "zero" under the FCC's Bill-and-Keep regulatory approach. Carrier-to-carrier relationships, governed by Section 252 of the Communications Act, are not "customer" relationships, and edge providers are not, today, considered carriers (the companies carrying their traffic are carriers). *See* Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-161, 26 FCC Rcd. 17663 (2011) [hereinafter *USF/ICC Transformation Order*]. The difference between carriers and customers is substantial. As observed by the Tenth Circuit Court of Appeals in In re FCC 11-161, 753 F.3d 1015 (10th Cir. 2014), when ruling on the FCC's *USF/ICC Transformation Order*, carrier-to-carrier relationships involve the "recovery of costs through the offsetting of reciprocal obligations," and that to the extent costs are not recovered, "[s]tates are free to set end-user rates, and the Order does not prevent states from raising end-user rates to allow a fair recovery of termination costs" and "the FCC reforms include funds for carriers that would otherwise lose

likely be prohibited from using its authority under Section 10 of the Communications Act to forbear from such tariffing requirements because the FCC has labeled all BSPs as "terminating monopolists." In the presence of a terminating monopoly in the relevant market (i.e., each BSP is "dominant" for terminating access to their customers), competition—a key prerequisite for invoking section 10—cannot be used as a basis for forbearance for "terminating services." Accordingly, the agency has boxed itself in for mandatory tariffing under Title II. In light of the above, we can find no clear, legally supported path to a "Title II Lite" that avoids a tariffed termination service.[15]

To explore this complex issue in detail, this ARTICLE is organized as follows: In Section II we delineate the relevant market and show how reclassification turns edge providers into customers of BSPs, thereby creating a formal, regulated termination market. In Section III, we demonstrate that BSPs must set tariffs for this termination service, and the established rates would most likely have a positive price. In Section IV, we show that the FCC's own precedent likely prohibits forbearance of the tariffing requirements of Section 203 of the Communications Act. Conclusions and policy recommendations are provided in the final section.

II. RECLASSIFICATION AND THE CREATION OF A TERMINATION MARKET

If the FCC is to impose regulations to protect the "Open Internet," then it is essential to define exactly what transaction will be regulated, along with identifying the buyers and sellers involved in this transaction. That is, the relevant market must be established. Using the FCC's *2010 Open Internet Order*,[16] the D.C. Circuit's remand of the agency's Network Neutrality

revenues." *Id.* at 1128-30; *see also* Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 880 (8th Cir. 2005) (stating that a reciprocal compensation rate of zero did not violate the "reasonably approximation of the additional costs" requirement). If the carrier-to-carrier Bill-and-Keep type regime is created for edge provider termination service to BSPs, then edge providers must become telecommunications carriers, a point at which they are likewise subject to Title II regulation. The implications of classifying edge providers as Title II common carriers is beyond the scope of this ARTICLE, but certainly an interesting issue worthy of investigation.

15. It should be noted that former FCC Chairman Julius Genachowski attempted to float such an idea for a "Title II Lite" but ultimately rejected it. *See* George S. Ford, Lawrence J. Spiwak, & Michael L. Stern, *The Broadband Credibility Gap*, 19 COMMLAW CONSPECTUS 75 (2010), *available at* http://www.phoenix-center.org/papers/CommlawConspectusBroadbandCredibilityGap.pdf [hereinafter *Broadband Credibility Gap*].

16. Preserving the Open Internet, *Report and Order*, FCC 10-201, 25 FCC Rcd. 17905 (2010) [hereinafter *2010 Open Internet Order*], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.

efforts in *Verizon v. FCC*,[17] and the agency's *2014 Open Internet NPRM*,[18] it is possible to sharply delineate the relevant transaction.

We first turn to the FCC's *2014 Open Internet NPRM* for a clear depiction of the relevant market. There, the agency defines the "Open Internet" as a broadband ecosystem that "allows innovators and consumers at the edges of the network to create and determine the success or failure of content, applications, services and devices, without requiring permission from the broadband provider to reach end users."[19] In this statement, "permission" is the key word. According to both the FCC and the D.C. Circuit in *Verizon*, the BSP's ability to grant or deny "permission" to particular edge providers arises from the belief that BSPs are "terminating monopolies" (or "gatekeepers") and thus may exert control over the flow of Internet traffic over the last mile connection.[20] A BSP's interference with the flow of content from the edge to the customer is argued to disrupt the "virtuous circle of innovation" in the broadband ecosystem.[21]

The *2014 Open Internet NPRM* lays out three concerns arising from the "terminating monopolist's" control over traffic flow over the last mile: (a) broadband providers may have economic incentives to block or disadvantage a particular *edge provider* or class of *edge providers*; (b) broadband providers may have incentives to increase revenues by charging *edge providers* for access or prioritized access to broadband providers' end users; and (c) broadband providers, if charging positive prices for prioritized service, would have an incentive to degrade or decline the quality of service they provide to non-prioritized traffic.[22] The FCC and proponents of reclassification point to offerings such as Verizon's "expressed interest in pursuing commercial agreements with edge providers" and AT&T's "new sponsored data service, in which an edge provider enters an agreement with AT&T to sponsor and pay for data charges resulting from eligible uses of the sponsor's content by an AT&T mobile subscriber" as examples.[23] From these statements, it is clear that *the relevant transaction which the FCC would have*

17. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

18. *2014 Open Internet NPRM*, *supra* note 3.

19. *Id.* at para. 1 (internal quotation marks omitted).

20. *2010 Open Internet Order*, *supra* note 16, at para. 24; *Verizon*, 740 F.3d at 646; *2014 Open Internet NPRM*, *supra* note 3, at para. 42. Indeed, the D.C. Circuit went out of its way to find that this "terminating monopoly" was reinforced by the fact that not only do consumers have "limited" competitive options because "only one or two wireline or fixed wireless firms" provide service in most markets, but also that consumers face high switching costs for such services, including "early termination fees; the inconvenience of ordering, installation, and set-up, and associated deposits or fees; possible difficulty returning the earlier broadband provider's equipment and the cost of replacing incompatible customer-owned equipment; the risk of temporarily losing service; the risk of problems learning how to use the new service; and the possible loss of a provider-specific email address or website." *Verizon* 740 F.3d at 646-47.

21. *Verizon*, 740 F.3d at 649; *2010 Open Internet Order*, *supra* note 16, at para. 14.

22. *2014 Open Internet NPRM*, *supra* note 3, at para. 6.

23. *Id.* at para. 37.

to regulate under Title II is the one between BSPs and edge providers.[24] As observed by the FCC, the relevant transaction for "Open Internet" regulations is the "second side of the market—between broadband providers and edge providers or other third parties."[25] The service provided in this "second side of the market" is *termination*, a fact made clear by the use of the term "terminating monopolies." Thus, according to the FCC's logic, to protect the "Open Internet," any rules must target the transactions between edge providers on the demand side and BSPs on the supply side of the market in which a termination service is traded.

Historically, edge providers have not been considered "customers" of the BSPs.[26] Upon reclassification, however, edge providers would formally and legally become *customers* of BSPs.[27] In *Verizon v. FCC*, the creation of this new termination market is made plain:

> It is true, generally speaking, that the "customers" of broadband providers are end users. But that hardly means that broadband providers could not also be carriers with respect to edge providers . . . . [b]ecause broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge

24. Mozilla, in its filing before the FCC, makes the same argument, calling for the creation of "a new type of service" that is "the offering of delivery of traffic, upstream and downstream, to a remote edge provider . . . . [This] remote delivery service connects each of the Internet's edge providers to all of the local network's subscribers." Mozilla Comments, *supra* note 6, at 9-10. Mozilla uses the analogy of an apartment building doorman:

> It works a little bit like a doorman in a high-end condominium or apartment building. The doorman offers a service to the building's residents, in holding their mail (whether it has arrived or is waiting to be sent out). But the doorman is also, at the same time, effectively offering a service to Amazon, Best Buy, Netflix (for its DVD shipments), and any other company that the resident purchased a good from. In this metaphor, the doorman (who functions as the gatekeeper for millions of individual residents) is considering asking some shippers to pay more to make sure the subscriber gets their goods right away, while packages from non-preferred shippers might be left in the mailroom for a day or two. Mozilla is asking for the relationship between the doorman and the shipper to be codified, separate from the relationship between the doorman and the resident, even though the act of holding onto the packages is the same for both relationships. *Id.* at 10.

25. *2014 Open Internet NPRM*, *supra* note 3, at para. 37.

26. Of course, a termination service is provided, but to date transactions directly between BSPs and edge providers have not been commonplace, but not entirely absent either. *See, e.g.*, Eliot Van Buskirk, *ESPN to ISPs: Pay for Your Customers to Play Video*, WIRED (Feb. 5, 2009, 5:18 PM), http://www.wired.com/2009/02/espn-stands-fir; S. Nassauer, *ESPN Charges Net Providers for Right to Offer Broadband Web Site*, WALL ST. J. (Aug. 1, 2006), http://online.wsj.com/article/SB115439535367922979.html.

27. Under 47 U.S.C. § 201(a), every common carrier engaged in interstate or foreign communication by wire or radio has a "duty . . . to furnish such communication service upon reasonable request therefor." It may be that some edge providers could be classified as carriers, either on their own motion or as a result of FCC action. As carriers, the exchange of traffic would be governed by rules related to carrier-to-carrier traffic exchange.

> providers' "carriers" . . . regardless of whether edge providers are broadband providers' principal customers. This is true whatever the nature of the preexisting commercial relationship between broadband providers and edge providers . . . . No one disputes that a broadband provider's transmission of edge-provider traffic to its end-user subscribers represents a valuable service: an edge provider like Amazon wants and needs a broadband provider like Comcast to permit its subscribers to use Amazon.com.[28]

By reclassifying broadband as a telecommunications service, this termination service becomes a common carrier telecommunications service, thereby formalizing this "customer" relationship between edge providers (e.g., Amazon) and BSPs. Recalling that the D.C. Circuit in *Verizon* remanded the agency's *2010 Open Internet Order* because the agency effectively turned BSPs into common carriers, consider the court's statement:

> [G]iven the Open Internet Order's anti-blocking and anti-discrimination requirements, if Amazon were now to make a request for service, Comcast must comply. That is, Comcast must now "furnish . . . communication service upon reasonable request therefor."[29]

This "furnish[ed] communications service" is termination. Thus, with reclassification, the FCC creates a *termination* market—*an entirely new service involving edge providers and BSPs*.[30] This termination market is separate and apart from the carrier-to-carrier delivery of Internet traffic. We turn now to how creating this new "termination market" might be regulated to protect the "Open Internet."

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28. Verizon v. FCC, 740 F.3d 623, 653 (D.C. Cir. 2014).

29. *Id.* at 653-54 (emphasis in original).

30. Significantly, in the FCC's *2014 Open Internet NPRM*, the agency highlights its own concerns about the possibility that edge providers will formally become "customers" of BSPs. *See 2014 Open Internet NPRM*, *supra* note 3, at para. 151.

> Separate from the reclassification of "broadband Internet access service," we seek comment on how the Commission should consider broadband providers' service to edge providers and whether that service (or some portion of it) is subject to Title II regulation. As mentioned above, in *Verizon*, the D.C. Circuit stated that "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers.'" We understand such service to include the flow of Internet traffic on the broadband providers' own network, and not how it gets to the broadband providers' networks . . . . We seek comment on whether and, if so how, the Commission should separately identify and classify a broadband service that is furnished by broadband providers' to edge providers in order to protect and promote Internet openness. *Id.*

III. A NEW TERMINATION MARKET

As we have detailed above, the FCC and the courts conclude that Network Neutrality addresses the terminating market in which edge providers are the buyers and BSPs are the sellers. It follows that *it is this terminating market, formalized by reclassification, which must be regulated to protect the Open Internet*. Legal precedent suggests that in order for the FCC to effectively regulate this terminating market under the auspices of Sections 201 and 202, BSPs would be required to file (positive-price) tariffs under Section 203 for this new termination service. Such a regulated transaction does not occur today, but the D.C. Circuit in *Verizon* recognized that this absence places no limitation on the consequences of reclassification. Under this plausible scenario, therefore, edge providers would be required to pay a tariffed rate to BSPs for the termination of their traffic to end users. After all, a "telecommunications service," which is what broadband becomes upon reclassification, is defined as "the offering of telecommunications *for a fee*."[31]

While a thorough discussion of the tariffing process is beyond the scope of this ARTICLE, a brief background may prove fruitful in what we expect to be a healthy debate over the potential rate regulation of the "termination market." First, we have Section 201, which requires, *inter alia*, that a common carrier's rates must be "just and reasonable."[32] We also have Section 202, which prohibits a carrier from engaging in "unreasonable discrimination" or providing for "undue" preferences.[33] Section 201 and 202 are, in turn, enforced by Section 203, which requires a common carrier to

31. 47 U.S.C. § 153(53) (2012). Mozilla claims that the "fee" need not be monetary compensation, but there is no precedent for that in end-user markets (though the FCC views the exchange of traffic in carrier-to-carrier relationships as a form of compensation, thus justifying a bill-and-keep regime). Interconnection is not treated as a telecommunications service. Mozilla also contends that the termination fee may be set to zero in light of a positive price for broadband access paid by the end user. Mozilla Comments, *supra* note 6, at 11-12. However, termination and end-user services are entirely different markets and, we suspect, will be classified differently for regulatory purposes (*i.e.*, termination is a telecommunications service, end-user broadband is an information service). If end-user services are not regulated, ensuring they are fully compensatory, then using positive end-user prices as a basis for a zero termination charge is legally suspect, and some might argue such a scheme is a subsidy from consumers to edge providers.

32. 47 U.S.C. § 201(b) (2012).

33. 47 U.S.C. § 202(a) (2012). Section 202 of the Communications Act states:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage. *Id.*

file a tariff with the FCC.[34] If, after an opportunity for a hearing, the FCC finds that the filed rate is not "just and reasonable" or is "unreasonably discriminatory," then the FCC can adjust the rate under Section 205.[35] Moreover, as a backstop, there is Section 208, which allows interested parties to file a complaint with the FCC.[36]

Rate setting is not as simple as it seems.[37] Regarding the first prong of the test ("just and reasonable"), it is well established that a rate must fall into what is referred to as the "zone of reasonableness"—*i.e.*, it cannot be "confiscatory" (*i.e.*, "below cost") on the bottom end and "excessive" on the high end. As a result, while rates cannot allow a monopoly return, a rate generally must have a "positive" price (*i.e.*, it cannot be set at "zero"). Given the multiple methodologies used to set rates, (*e.g.*, price cap, rate of return, LRIC, TELRIC, etc.) and the formidable complexity of measuring cost and demand, both courts and the FCC have consistently recognized that ratemaking is "far from an exact science."[38]

Given the lack of historical termination fees for Internet traffic, how termination rates will be formulated is a complex matter. Evaluating a filed rate, especially if it is rejected, will require some sort of cost study for termination services. Unquestionably, the cost is not zero—there are no free lunches. In fact, it could be argued that most of the costs of the broadband network are related to termination, since the bulk of traffic is downstream rather than upstream (a ratio of about 6:1).[39] Under a fully-distributed cost formula, after reclassification, it is feasible that much of the BSPs revenue could be collected on the termination side of the two-sided market.[40] As such, the tariffed termination fee to be paid by edge providers will not only be

34. 47 U.S.C. § 203 (2012).

35. 47 U.S.C. § 205 (2012).

36. 47 U.S.C. § 208 (2012).

37. Indeed, the phrase "just and reasonable" is not "a mere vessel into which meaning must be poured." *See* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1504 (D.C. Cir.), *cert denied sub nom.*, Williams Pipe Line Co. v. Farmers Union Cent. Exch., 469 U.S. 1034 (1984).

38. *See, e.g.*, Fed. Power Comm'n. v. Conway Corp., 426 U.S. 271, 278 (1976*);* WorldCom v. FCC, 238 F.3d 449, 457 (D.C. Cir. 2001); Sw. Bell Telephone Co. v. FCC, 168 F.3d 1344, 1352 (D.C. Cir. 1999); United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983); *see also* Access Charge Reform, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, FCC 99-206, 14 FCC Rcd. 14221, at paras. 96, 144 (1999) (the FCC justified its deregulatory triggers by noting that "regulation is not an exact science"); George S. Ford & Lawrence J. Spiwak, *The Need for Better Analysis of High Capacity Services*, 28 JOHN MARSHALL J. COMPUTER & INFORMATION L. 343 (2011).

39. SANDVINE, GLOBAL INTERNET PHENOMENA REPORT 1H 2014 at 5 (2014, *available at* https://www.sandvine.com/downloads/general/global-internet-phenomena/2014/1h-2014-global-internet-phenomena-report.pdf.

40. STEPHEN J. BROWN & DAVID S. SIBLEY, THE THEORY OF PUBLIC UTILITY PRICING 44-49 (1986). Rate setting also has a strong dose of politics. *See, e.g.*, T. Randolph. Beard & George S. Ford, *Splitting the Baby: An Empirical Test of Rules of Thumb in Regulatory Price Setting*, 58 KYKLOS 331-51 (2005); T. Randolph. Beard & Henry Thompson, *Efficient Versus "Popular" Tariffs for Regulated Monopolies*, 69 J. BUS. 75-87 (1996).

positive, but, in the end, it may turn out that the revenues from termination make up the lion's share of BSP revenue from the sale of broadband service.[41]

Regarding the second prong of the standard (that any rate must also not be "unreasonably" discriminatory), note that the operative word here is "unreasonable"—*i.e.*, *reasonable* discrimination in service offerings is perfectly acceptable. Thus, according to well-established case law, any charge that a carrier has unreasonably discriminated must satisfy a three-step inquiry (in sequence): (1) whether the services offered are "like"; (2) if they are "like," whether there is a price difference among the offered services; and (3) if there is a price difference, whether it is reasonable.[42] If the services are not "like," or not "functionally equivalent" in the legal parlance, then discrimination is not an issue and the investigation ends. There is no valid discrimination claim for *different* prices or price-cost ratios for *different* goods.

Notably, a determination of whether services are "like" is based upon neither cost differences nor competitive necessity. Cost differentials are excluded from the likeness determination and introduced only to determine "whether the discrimination is unreasonable or unjust." Likeness is based solely on functional equivalence.[43] If the services are determined to be "like" or "functionally equivalent," then the carrier offering them has the burden of justifying any price disparity as reasonable, such as a difference in cost.[44] If a price difference is not justified, then the price difference is deemed unlawful. One usual measure to determine reasonableness is an inquiry as to whether the different rates are offered to "similarly situated" customers.[45] That is, are the customers roughly the same size and do they exchange similar levels of traffic, or, for example, is one customer a wholesale customer while the other only buys at retail? In the standard course of regulating telecommunications rates, such distinctions permit different rates.[46]

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41. Depending on how one views the issue, this would be a positive result, because under the theory of two-sided markets, such a change in financing of last-mile networks could lead to sizeable reductions in end-user rates and thus expand adoption. Similarly, tariffing terminating access would now force edge providers to pay into universal service, thus raising the possibility that universal service contributions charged to end consumers would also be reduced.

42. *See, e.g.*, MCI Telecomms. Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990) and citations therein.

43. *Id.*

44. *Id.*

45. *See, e.g.*, Competition in the Interstate Interexchange Marketplace, *Notice of Proposed Rulemaking*, FCC 90-90, 5 FCC Rcd. 2627, at paras. 131-39 (1990) (citing Associated Gas Distribs. v. FERC, 824 F. 2d 981, 1007-1013 (D.C. Cir. 1987); *but cf.* Orloff v. FCC, 352 F.3d 415, 418 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 937 (2004) (allowing a mobile CMRS carrier to charge different promotional rates to similarly situated retail customers under competitive market conditions).

46. For a deeper exploration of this topic, *see, e.g.*, George S. Ford & Lawrence J. Spiwak, *Non-Discrimination or Just Non-Sense: A Law and Economics Review of the FCC's New Net Neutrality Principle* (Phx. Ctr. Policy Perspectives No. 10-03 (2010)), *available at* http://www.phoenix-center.org/perspectives/Perspective10-03Final.pdf.

Critically, a prioritized termination service is not the functional equivalent of the typical termination service, so there is no claim of unreasonable discrimination under Section 202 across the two services. To the extent network neutrality is about slow and fast lanes, reclassification offers no power to prohibit their creation. In fact, it seems more likely that reclassification facilitates the creation of prioritized termination.

In sum, under standard, utilities-style rate-setting rules, the tariffed rates for this "new" termination service "created" by reclassification must be positive to avoid a confiscatory rate, could be quite large under common rate setting methodologies, and may very well differ across edge provider types. These charges will apply to edge providers and not their carriers, and can reasonably be expected to apply to all edge providers—from Netflix, to Amazon, to a political candidate's website. Plainly, reclassification is a radical change on the Internet ecosystem, and, surprisingly, the agency's authority to impede fast and slow lanes under Title II is exceedingly weak.

IV. FORBEARANCE AND THE TERMINATING MONOPOLY PROBLEM

By any standard, Title II is burdensome and many parts of it are unnecessary for modern communications markets.[47] As a result, some of the more conscientious parties arguing for reclassification concede that the FCC should use its authority contained in Section 10 of the Communications Act to forbear from portions of Title II.[48] As we explain here, however, given both the D.C. Circuit's holding in *Verizon* and the FCC's prior holdings, forbearance from the tariffing requirements of Section 203 will prove difficult for the agency. As such, there appears to be significant legal challenges to the formation of a "Title II Lite" that excludes creating and tariffing a termination service.[49]

It is now recognized that Network Neutrality is rate regulation (albeit "zero" price regulation), and the reclassification proponents' reliance on

47. *See* Fed.-State Joint Bd. on Universal Servs., *Report to Congress*, FCC 98-67, 13 FCC Rcd. 11830, at para. 82 (1998), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf [hereinafter *Federal-State Joint Board*] ("classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it").

48. *See, e.g.*, Public Knowledge Comments, *supra* note 6, at 12 ("When combined with the Commission's Section 10 forbearance ability, Title II provides the clear statutory authority to implement rules critical to protecting an open internet while avoiding importing unnecessary legacy regulations of the past.").

49. For a detailed analysis of the FCC's forbearance authority, *see* George S. Ford and Lawrence J. Spiwak, *Section 10 Forbearance: Asking The Right Questions To Get The Right Answers*, 23 COMMLAW CONSPECTUS 126 (2014) *available at* http://scholarship.law.edu/commlaw/vol23/iss1/5.

Sections 201 and 202 make that fact clear enough.[50] Rate regulation of consumer rates under Section 201 and 202 is effectuated through the filing of tariffs under Section 203.[51] Oddly, we are unaware of any proposal that specifically recognizes that Section 203 is an essential element of any "Title II Lite," though at least one party alludes to the risk of forbearing from tariff filings.[52] Presumably, reclassification advocates take for granted that the FCC would forbear from Section 203.[53] Yet, there has been no serious analysis on the question of whether forbearance is a legitimate option for the enforcement of an "Open Internet," particularly in regard to tariff filings.[54] The FCC's prior holdings and the D.C. Circuit's ruling in *Verizon* would seem to preclude forbearance from Section 203 for the new termination service.

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50. Indeed, one of the reasons the D.C. Circuit struck down the FCC's last set of Open Internet rules is because the FCC forced BSPs to charge a "zero" price to all comers for broadband Internet access. *See* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014). For a full discussion, *see* Spiwak, *What Are the Bounds of the FCC's Authority*, *supra* note 5.

51. Section 203 requires that:

> Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. 47 U.S.C. § 203.

52. Comments of Pub. Knowledge, Benton Found., & Access Sonoma Broadband at 85, Protecting and Promoting the Open Internet, FCC GN Docket 14-28 (rel. July 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521480282. Many other Title II provisions, including the Section 203 requirements of carriers to report rates, provide consumers with the transparency necessary to protect their interests, whether through legal action or their exercise of buying power. Even in the presence of a competitive market, this transparency is necessary for consumers to take advantage of that competitive market. Without the necessary information to distinguish between providers, consumers are no better off with several providers to choose from. *Id.*

53. There has been some discussion of forbearance, but never a serious outline of a legally-sound algorithm to achieve it. For a cursory, slapstick (yet often cited) discussion of forbearance, *see* Harold Feld, *Title II Forbearance Is Actually So Easy It Makes Me Want to Puke*, WETMACHINE (July 14, 2014), http://www.wetmachine.com/tales-of-the-sausage-factory/title-ii-forbearance-is-actually-so-easy-it-makes-me-want-to-puke.

54. Unfortunately, the FCC is equally guilty in this regard. To wit, in both the FCC's *2010 Open Internet Notice of Inquiry* and again in its *2014 Open Internet NPRM*, the FCC "contemplated that, if it were to classify the Internet connectivity component of broadband Internet access service, it would forbear from applying all but a handful of core statutory provisions—sections 201, 202, 208, and 254—to the service." *2014 Open Internet NPRM*, *supra* note 3, at para. 154; *see also* Framework for Broadband Internet Serv., *Notice of Inquiry*, FCC 10-114, 25 FCC Rcd. 7866, at para. 68 (2010). However, the FCC provides zero specific guidance on how it would use Section 10 to forbear from the tariffing requirements of Section 203. *See id*.

Under Section 10 of the Communications Act, the FCC may forbear from sections of the Act if, after doing so, the rates, terms and conditions for telecommunications services remain just, reasonable, and nondiscriminatory. Forbearance must also be in the public interest.[55] In all significant cases of forbearance from Section 203, the FCC has concluded that it is the presence of competition in the relevant market that permits forbearance; that is, competition, rather than regulation, is trusted to keep rates just, reasonable, and nondiscriminatory.[56] When the FCC has found competition to be lacking, it has denied forbearance requests.[57] As stated in its *1996 Long Distance Detariffing Order*, in which the FCC forbore from applying Section 203 tariffing requirements to long distance service, the FCC "believe[d] that market forces will generally ensure that the rates, practices, and classifications of non-dominant interexchange carriers for interstate, domestic, interexchange services are just and reasonable and not unjustly or unreasonably discriminatory."[58] It appears that in all forbearance cases regarding Section 203 (if not *all* forbearances cases involving rates), an appeal to competition is made to justify forbearance from tariffing or other statutory mandates.[59]

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55. 47 U.S.C. § 160 (2012).

56. *See Section 10 Forbearance*, *supra* note 49 and citations therein. After forbearance, the FCC relies upon the complaint process contained in Section 208, 47 U.S.C. § 208, as a regulatory backstop to enforce Section 201 and 202. *See* Orloff v. FCC, 352 F.3d 415, 418 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 937 (2004).

57. *See, e.g.*, Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Memorandum Opinion and Order*, FCC 10-113, 25 FCC Rcd. 8622 (2010) [hereinafter *Phoenix Forbearance Order*], *aff'd*, Qwest v. FCC, 689 F.3d 1214 (10th Cir. 2012).

58. Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order*, FCC 96-424, 11 FCC Rcd. 20730, at para. 21 (1996), *aff'd*, MCI v. FCC, 209 F.3d 760 (D.C. Cir. 2000).

59. A similar result can be found in the FCC's experience in forbearing from Section 203 in the wireless context using its authority under Section 332 of the Communications Act, which contains language very similar to that contained in Section 10. As the FCC observed,

> Concerns about the ramifications of tariff forbearance are unwarranted. Despite the fact that the cellular service marketplace has not been found to be fully competitive, there is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings. [M]ost CMRS services are competitive. Competition, along with the impending advent of additional competitors, leads to reasonable rates. Therefore, enforcement of Section 203 is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory.

Implementation of Sections 3(N) and 332 of the Commc'ns Act, *Second Report and Order*, FCC 94-31, 9 FCC Rcd. 1411, at para. 174 (1994). The D.C. Circuit in *Orloff* reached a similar conclusion:

> When the common carrier designation fit, the regulatory consequences depended upon the requirements set forth in Title II. Much of ''the Communications Act's subchapter applicable to Common Carriers [had been]

Certainly, an argument can be made that competition in the broadband marketplace could be used to forbear from regulating transactions between BSPs and end users.[60] Those rates aren't regulated today, and we suspect that the FCC is inclined to forbear from retail rate regulation even after reclassification (though forbearance of retail rates may be difficult under the dicta of the *Phoenix Forbearance Order*, the D.C. Circuit's affirmation thereof, and the FCC's recent decision to raise the definition of broadband service to 25 Mbps).[61] As made plain above, however, advocates are making it clear that Net Neutrality is not about these retail transactions, but rather the transactions between edge providers and BSPs in the *termination market*. And, in light of the *2010 Open Internet Order*, the *2014 Open Internet NPRM*, and the D.C. Circuit's decision in *Verizon*, the FCC has already determined that the presence of competition is not a viable foundation for forbearance in the termination market. For example, in the *2010 Open Internet Order*, the FCC states:

> [T]hreats to Internet-enabled innovation, growth, and competition do not depend upon broadband providers having market power with respect to end users . . . [b]ecause broadband

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> premised upon the tariff-filing requirement of § 203.'' The Commission reviewed and approved rates and determined what level of profits the regulated carrier would earn. The carrier had to file its rates and make them publicly available; and it could not charge different rates without making a new filing and then waiting for a specified period of time (120 days under § 203(b)(1)). All of that has changed for CMRS …. Rates are determined by the market, not the Commission, as are the level of profits. With § 203 no longer applicable, there is no statutory provision even requiring that the carrier publicly disclose any of its rates, although competition will force it to do so.

See Orloff v. FCC, *supra* note 56, 352 F.3d at 418 (internal citations omitted).

60. FCC Chairman Tom Wheeler, however, apparently believes otherwise. *See* Tom Wheeler, Chairman, FCC, The Facts and Future of Broadband Competition at 1776 Headquarters, Washington, D.C. (Sept. 4, 2014) ("My goal is not to criticize, but to recognize that meaningful competition for high-speed wired broadband is lacking and Americans need more competitive choices for faster and better Internet connections, both to take advantage of today's new services, and to incentivize the development of tomorrow's innovations."), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf.

61. *See* Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable & Timely Fashion, *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, FCC 15-10, GN Docket No. 14-126 (2015), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0206/FCC-15-10A1.pdf. In imaginable scenarios, the regulation of the end-user rates may be necessary to regulate aggressively the termination market. *See generally Phoenix Forbearance Order*, *supra* note 57; Ford and Spiwak, *Section 10 Forbearance*, *supra* note 49; *see also* Haley S. Edwards, *The New FCC Definition of Broadband Could Change Everything for Comcast*, TIME.COM (January 30, 2015) *available at* http://time.com/3689378/fccs-broadband-comcast-twcs-merger-case ("if the merger is allowed to go through, then a whopping 63% of U.S. households would have only one choice for a broadband Internet provider").

> providers have the ability to act as gatekeepers even in the absence of market power with respect to end users.[62]

The agency is very clear here—*competition does not eliminate the incentive to violate the principles of the Open Internet*. In fact, market power is so irrelevant to the issue that the agency concluded it "need not conduct a market power analysis."[63] If competition does not favorably impact incentives, then competition cannot be used as a basis for forbearance.

Moreover, as noted above, both the FCC and the D.C. Circuit in *Verizon* view BSPs as "terminating monopolists," or monopolists in the *terminating market*.[64] This alleged "terminating monopoly" problem is explicitly addressed in the *2010 Open Internet Order*,[65] by the D.C. Circuit in *Verizon*,[66] and in the *2014 Open Internet NPRM*, where the FCC states that customer switching costs "creat[e] 'terminating monopolies' for content providers needing high-speed broadband service to reach end users."[67] In the presence of a terminating monopoly, competition cannot be used as a basis for forbearance for "terminating services," the exact services the "Open Internet" rules are supposed to be all about. Accordingly, given the FCC's finding that all BSPs are "terminating monopolists" (*i.e.*, each BSP is "dominant" for terminating access to their customers), forbearance from Section 203 does not appear to be a viable legal option.[68]

V. CONCLUSION

While the Federal Communications Commission has taken a light-touch regulatory approach to broadband Internet access, the agency is coming under intense political pressure to reverse course and reclassify

62. *2010 Open Internet Order*, *supra* note 16, at para. 32, n. 87.

63. *Id.*

64. The FCC failed to explain why a "terminating monopolist" has chosen, thus far, to charge a zero termination fee. Verizon v. FCC, 740 F.3d 623, 646 (D.C. Cir. 2014); *2010 Open Internet Order*, *supra* note 16, at para. 24.

65. *2010 Open Internet Order*, *supra* note 16, at n. 66.

66. *Id.* at para. 38.

67. *2014 Open Internet NPRM*, *supra* note 3, at para. 42.

68. This is not to say that the FCC cannot change its policy regarding the need to find a degree of competition before it grants forbeaance under Section 10. *See FCC v. Fox Television*, 556 U.S. 502 (2009). However, if the FCC elects to go that route and find that forbearance is acceptable in the face of a monopoly (i.e., *one firm*) in the relevant market, then the agency will have to reconcile that holding with its decisions both (a) to suspend special access regulation where it found that *two firms* were insufficient to warrant degregulation, Special Access for Price Cap Local Exchange Carriers, *Report and Order*, FCC 12-92, 27 FCC Rcd. 10557, (2012), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-92A1.pdf; and (b) its refusal to grant forbearance of residual undundling obligations, again finding that *two firms* in each relevant market was insufficient to invoke Section 10. *See Phoenix Forbearance Order*, *supra* note 57.

broadband Internet connectivity as a common carrier telecommunications service under Title II in order to protect the "Open Internet." Doing so would permit the FCC to regulate BSPs under Sections 201 and 202 of the Communications Act, which, it is argued, can be used to prevent Broadband Service Providers from establishing slow and fast lanes for the delivery of edge-provider traffic to consumers. Under current case law, the plain terms of the Communications Act, and the FCC's own precedent, it is clear that "reclassification" is more than a political platitude; reclassification invokes significant and complex legal and economic issues which, in turn, require significant and complex implementation, which, in turn, will have "significant consequences for the global development of the Internet."[69]

Specifically, upon reclassification, BSPs would be required to file tariffs under Section 203 of the Communications Act to charge all edge providers (*e.g.*, Netflix, Amazon) a positive price for terminating Internet access. These charges will be distinct from carrier-to-carrier relationships; edge providers are customers of the BSP, not telecommunications carriers. Moreover, because the FCC has found BSPs to be "terminating monopolists" with respect to their customers, forbearance under Section 10 of Section 203's tariffing requirements runs contrary to Commission precedent and, therefore, is not a viable legal option. Accordingly, we do not see how reclassification can avoid applying legacy regulatory frameworks to the Internet, and, in doing so, radically change the economic fabric of the Internet ecosystem. Whether such changes are "good" or "bad" we leave to others to judge.

69. *Federal-State Joint Board*, *supra* note 47, at para. 82.

The Scope of the FCC's Ancillary Jurisdiction After the D.C. Circuit's Net Neutrality Decisions

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TABLE OF CONTENTS

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I. INTRODUCTION

Whether the Federal Communications Commission can and should reenact net neutrality rules similar to those invalidated by the U.S. Court of Appeals for the D.C. Circuit in *Verizon v. FCC*[1] has been the focus of most commentary on the case. But the decision in *Verizon* is also noteworthy for its effect on the scope of the FCC's "ancillary jurisdiction"—that is, the FCC's authority to adopt regulations based largely on the provisions in Title I of the Communications Act of 1934[2] that grant the agency general, rather than specific, authority. This issue is important because the validity of many FCC regulations adopted since the enactment of the 1934 Act depends on the scope of the FCC's ancillary jurisdiction. Given the dynamic nature of the communications sector, questions concerning the scope of the FCC's ancillary authority are sure to arise again as new technologies emerge. This essay thus focuses on the scope of the FCC's ancillary authority after *Verizon*, rather than on how the FCC should respond to the opinion with respect to net neutrality.[3]

The provisions that provide the basis for the FCC's ancillary authority include section 2(a) of the Communications Act,[4] which gives the FCC jurisdiction over "all interstate and foreign communications by wire or radio;" section 1,[5] which provides that the FCC is required to endeavor to "make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service;" and section 4(i), which gives the FCC authority 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."[6]

As the Supreme Court has explained, although the Act gives the FCC "expansive powers,"[7] they are not "unbounded."[8] In 1968, in *United States v. Southwestern Cable*, the Court emphasized the expansive nature of the FCC's powers in approving the FCC's regulation of community antenna television ("CATV"), an early version of cable television, at a time when the

1. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014), *aff'g in part, vac'g in part sub nom.* Preserving the Open Internet, *Report and Order*, FCC 10-201, 25 FCC Rcd. 17905 (2010) [hereinafter *2010 Open Internet Order*].

2. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151–162 (2012 & Supp. 2013)) [hereinafter Communications Act].

3. After *Verizon*, the FCC initiated a rulemaking regarding the future of net neutrality. *See* Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, FCC 14-61, 29 FCC Rcd. 5561, 5569, paras. 22–24 (2014).

4. Communications Act § 2(a) (codified at 47 U.S.C. § 152(a) (2012)).

5. *Id.* § 1 (codified at 47 U.S.C. § 151 (2012)).

6. *Id.* § 4(i) (codified at 47 U.S.C. § 154(i) (2012)).

7. NBC v. United States, 319 U.S. 190, 219 (1943).

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

Communications Act made no mention of CATV.[9] The Court found "no need . . . to determine in detail the limits of the Commission's authority," adding that "[i]t is enough to emphasize that the authority which we recognize today under [section 2(a)] is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[10] The Court thus introduced the concept of "ancillary" jurisdiction.[11]

In 1979, in *FCC v. Midwest Video Corp.* (*Midwest Video II*), the Court held that the FCC "was not delegated unrestrained authority" and rejected the FCC's attempt to exercise its ancillary authority to require CATV operators to set aside a portion of their channel capacity for access by third parties.[12] The Court noted that the Act specifically prohibits the FCC from regulating broadcasters as common carriers, concluding that the FCC "may not regulate cable systems as common carriers" either.[13]

Since 1979, federal courts of appeals—primarily the D.C. Circuit—have attempted to develop the ancillary jurisdiction doctrine to recognize the FCC's broad authority under the Act while ensuring that it is not unbounded. Two recent net neutrality cases represent the court's most recent attempt to navigate between these poles.[14] The Communications Act is hardly a model of clarity with respect to the limits on the FCC's power and neither the Supreme Court nor the federal courts of appeals have provided a clear framework for determining whether a particular exercise of ancillary authority is permissible. In the second edition of *Digital Crossroads*, published before the D.C. Circuit's *Verizon* decision, telecommunications scholars Jonathan Nuechterlein and Phil Weiser opined that the scope of "ancillary authority has always been murky."[15] They also expressed concern that the legal issues involved in debates about questions such as the FCC's authority with respect to Internet issues "can be mind-numbing in their scholastic complexity" and "are increasingly unhinged from the underlying economic and engineering realities that should be driving the policy debate."[16]

Professor John Blevins, who wrote the most recent, comprehensive review of the scope of the FCC's ancillary authority, has described the relevant Supreme Court cases as "to put it mildly, not a model of

9. United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968).
10. *Id.*
11. *See id.*
12. *Midwest Video II*, 440 U.S. at 706.
13. *Id.* at 709.
14. *See* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010); Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
15. JONATHAN NUECHTERLEIN & PHIL WEISER, DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE 233 (2d ed. 2013) (internal quotations and citation omitted).
16. *Id.* at 230.

coherence."[17] While arguing for "a new theory of the FCC's ancillary jurisdiction, arguing that it is best understood as an authority to promote market competition,"[18] Blevins acknowledged that a case can be made that "there is simply no logic to the ancillary jurisdiction cases."[19] In 2010, Judge Tatel of the D.C. Circuit confronted this disjointed doctrine in *Comcast v. FCC*, in which his opinion for the court sought to reconcile all of the Supreme Court and D.C. Circuit ancillary authority decisions.[20] More recently, Judge Tatel's majority opinion in *Verizon v. FCC* illustrates how that standard is to be applied.[21] Despite his Herculean effort to harmonize the earlier cases, the scope of the FCC's ancillary authority remains murky and disconnected from economic and engineering realities.

Disputes over the scope of the FCC's ancillary authority are sure to arise again in varied and important contexts because, as the Supreme Court noted in 1943, the communications field is "dynamic."[22] Just as the Congress that enacted the Communications Act in 1934 did not foresee cable television or grasp the importance of broadcast networks,[23] and the Congress that substantially amended the Communications Act in 1996 did not fully appreciate how important broadband Internet service would become,[24] lawmakers have also surely overlooked emerging technologies and practices that will become important in the future. Under the law as it stands, whether the FCC may address such technologies will depend more on how complex and mind-numbingly scholastic legal issues are resolved than on whether particular regulations are warranted on the merits.

This essay first reviews the statutory framework and the Supreme Court decisions governing the scope of the FCC's ancillary authority. The essay then analyzes how Judge Tatel's decisions in *Comcast* and *Verizon* have reshaped the scope of the FCC's ancillary jurisdiction. Although Judge Tatel's synthesis of the relevant cases has produced a test that is largely true to D.C. Circuit precedent, this test is unlikely to shift judicial results away from complex issues having little to do with real-world matters and toward the merits of the FCC's actions as a matter of economic policy and engineering realities.

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17. John Blevins, *Jurisdiction as Competition Promotion: A Unified Theory of the FCC's Ancillary Jurisdiction*, 36 FLA. ST. U. L. REV. 585, 619 (2009).
18. *Id.* at 585.
19. *Id.* at 611.
20. *See* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).
21. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
22. NBC v. United States, 319 U.S. 190, 219 (1943).
23. *See id.*
24. *See* Edward Wyatt, *Communications Law to Be Reviewed*, N.Y. TIMES, May, 25, 2010, at B2, *available at* http://www.nytimes.com/2010/05/25/technology/25broadband.html?_r=0 (noting that the 1996 Act "barely mention[s] the Internet").

II. THE STATUTORY FRAMEWORK AND THE SUPREME COURT'S ANCILLARY AUTHORITY DECISIONS

In its 1943 decision in *NBC v. United States*, the Supreme Court reviewed FCC regulations that comprehensively regulated the relationships between broadcast networks and broadcast stations.[25] The issue of the FCC's authority arose because the Communications Act of 1934 set forth no rules regarding broadcast networks,[26] even though these networks had played an important role in broadcasting even prior to the Act's enactment. As Tom Krattenmaker and Richard Metzger have explained, although section 303(i) of the Act empowers the FCC to regulate "*stations* engaged in chain broadcasting," it does not apply to chain broadcasting itself—such as the operation of a broadcast network.[27] Hence the Court soon faced a dispute concerning the source of the FCC's authority over broadcast networks.

As Justice Frankfurter, writing for the Court, acknowledged, "[t]rue enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest."[28] Although the Court did not regard section 303(i) as resolving the issue,[29] it emphasized that "the Act gave the Commission not niggardly but expansive powers."[30] Among the provisions of the Act the Court discussed was section 303(r),[31] which gives the FCC authority to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this" Act;[32] and section 303(g), which directs the FCC to "generally encourage the larger and more effective use of radio in the public interest."[33] The Court described the public interest standard as "a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.'"[34] The Court held that those powers were broad enough to comprehensively regulate

25. *NBC*, 319 U.S. at 196.

26. *See generally* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151–162 (2012 & Supp. 2013)).

27. Tom Krattenmaker & Richard Metzger, *FCC Regulatory Authority over Commercial Television Networks: The Role of Ancillary Jurisdiction*, 77 NW. U. L. REV. 403, 448 (1982) (citing Communications Act § 303(i); 47 U.S.C. § 303(i) (2012) (emphasis added)).

28. *NBC*, 319 U.S. at 218–19.

29. *Id*. at 220.

30. *Id*. at 219.

31. Communications Act § 303(r) (codified at 47 U.S.C. §303(r) (2012)).

32. Section 303(r) is similar to section 4(i), the Act's "necessary and proper" clause, but section 303(r) is in Title I rather than Title III.

33. Communications Act § 303(g) (codified at 47 U.S.C. § 303(g) (2012)).

34. *NBC*, 319 U.S. at 216 (quoting FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940)).

networks' relationships with radio stations, notwithstanding the absence from the Act of a specific grant of authority to the FCC.[35]

In *United States v. Southwestern Cable Co.*, the first case to speak of the FCC's "ancillary" jurisdiction, the Court upheld the FCC's authority to broadly regulate CATV—now known as cable television—even though the Communications Act did not address CATV, as Congress had not anticipated the development of cable TV in 1934.[36] Justice John Marshall Harlan II emphasized the reach of section 2(a) of the Act, which gives the FCC authority over "'all interstate and foreign communication by wire or radio.'"[37] The Court rejected the argument that section 2(a) "does not independently confer regulatory authority upon the FCC, but instead merely prescribes the forms of communications to which the Act's other provisions may separately be made applicable."[38] Rather, the Court held that "[n]othing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions."[39] The Court also invoked section 1 of the Act, which provides that the FCC "is required to endeavor to 'make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.'"[40]

The Court quoted President Roosevelt's message to Congress concerning the need for the Communications Act and the Senate Report accompanying the bill, stating that the FCC is "to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.' It was for this purpose given 'broad authority.'"[41] However, as already noted, while finding "no need . . . to determine in detail the limits of the Commission's authority," the Court added that "it is enough to emphasize that the authority which we recognize today under [Section 2(a)] is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[42]

In *Midwest Video I*, decided in 1972, the Supreme Court upheld the FCC's program origination rules, which required cable operators to produce local programming.[43] Justice William J. Brennan, writing for the plurality,

35. *NBC*, 319 U.S. at 216–17.
36. United States v. Sw. Cable Co., 392 U.S. 157, 172 (1968).
37. *Id.* at 167 (quoting 47 U.S.C. § 152(a)).
38. *Southwestern Cable*, 392 U.S. at 171–72.
39. *Id.* at 172.
40. *Id.* at 167 (quoting 47 U.S.C. § 151).
41. *Southwestern Cable*, 392 U.S. at 167–68 & nn.25–28 (citations omitted).
42. *Id.* at 178.
43. United States v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649, 673 (1972) (plurality opinion).

did not dispute the lack of explicit congressional authorization for the rules, but emphasized an FCC report that stated the program origination rule furthered "long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression."[44] Justice Brennan emphasized the breadth of the policy goals enunciated in sections 1 and 303(g) of the Act, thus reading *Southwestern Cable* as holding that sections 2(a) and 303(r) are sources of regulatory power, not merely policy statements.[45]

Justice William O. Douglas, writing for four dissenters, stated that "there is not the slightest clue in the Act that CATV carriers can be compulsorily converted into broadcasters."[46] He also noted that "origination requires new investment and new and different equipment, and an entirely different cast of personnel."[47] The dissenters concluded that upholding the program origination rule under the FCC's ancillary authority "is a legislative measure so extreme that we should not find it interstitially authorized in the vague language of the Act."[48]

Chief Justice Warren Burger cast the deciding vote in *Midwest Video I*.[49] He acknowledged that "the Communications Act did not explicitly contemplate either CATV or the jurisdiction the Commission has now asserted."[50] But, he noted, the "statutory scheme plainly anticipated the need for comprehensive regulation as pervasive as the reach of the instrumentalities of broadcast," adding that "[c]andor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts."[51] The Chief Justice urged the national legislature to act "so that the basic policies are considered by Congress and not left entirely to the Commission and the courts."[52]

In *Midwest Video II*, decided seven years later, the Supreme Court, for the first and only time, struck down an FCC rule on the ground that it exceeded the FCC's ancillary authority.[53] The rules at issue required cable operators to develop a twenty channel capacity and to permit access to certain channels by third parties. The Court did not overrule *Midwest Video I*. Instead, Justice Byron White writing for the six-member majority

44. *Id.* at 654 (quoting Amendment of Part 74, Subpart k, of the Comm'n's Rules & Regulations Relative to Cmty. Antenna Television Sys., *First Report & Order*, FCC 69-1170, 20 F.C.C.2d 201, 202, paras. 3–4 (1969)).
45. *Midwest Video I*, 406 U.S. at 669 n.28.
46. *Id.* at 680 (Douglas, J., dissenting).
47. *Id.* at 678.
48. *Id.* at 681.
49. *Midwest Video I*, 406 U.S. at 675 (Burger, C.J., concurring).
50. *Id.*
51. *Id.* at 675–76.
52. *Id.*
53. *Midwest Video II*, 440 U.S. 689 (1979).

distinguished the case on the grounds that "the origination rule did not abrogate the cable operators' control over the composition of their programming, as do the access rules."[54] That distinction was critical, the Court concluded, because "the Commission has transferred control of the content of access cable channels from cable operators to members of the public . . . . Effectively the Commission has relegated cable systems, *pro tanto*, to a common carrier status."[55] The Court then held that this relegation was improper because section 3(h) prohibits the FCC from treating broadcasters as common carriers, concluding that this "limitation is not one having peculiar applicability to television broadcasting."[56] Given Congress' "outright rejection of a broad right of public access on a common-carrier basis," the Court held that the FCC "may not regulate cable systems as common carriers," either.[57]

More generally, the Court explained that "[t]hough afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority."[58] The Court did not dispute its earlier holding that section 2(a) grants the FCC broad jurisdiction over communication by wire and radio, but concluded that "without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2(a) would be unbounded."[59]

III. JUDGE TATEL'S SYNTHESIS OF THE D.C. CIRCUIT PRECEDENT

A. Comcast v. FCC

When the *Comcast* case reached the D.C. Circuit in 2010, Judge David Tatel, writing for a unanimous panel including Chief Judge David Sentelle and Senior Judge A. Raymond Randolph, described the principal issue before the court as whether the FCC has ancillary jurisdiction to regulate an Internet service provider's network management practices.[60] Judge Tatel described the test as turning on whether the FCC's rules were "ancillary . . . to the effective performance of its statutorily mandated responsibilities," concluding that the FCC had not adequately supported "its

54. *Id.* at 700.
55. *Id.* at 700–01.
56. *Id.* at 707.
57. *Id.* at 708–09.
58. *Id.* at 706.
59. *Id.*
60. Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010) (citing Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005)).

exercise of ancillary authority over Comcast's network management practices."[61]

In his opinion, Judge Tatel sought to harmonize the Supreme Court cases described above with the many D.C. Circuit ancillary jurisdiction cases that had been decided since *Midwest Video II* was handed down in 1979.[62] This was a Herculean effort—but most similar to Hercules' cleansing of the Augean stables. With respect to the Supreme Court cases, Judge Tatel read them as many prior D.C. Circuit decisions had, although not necessarily in the same way as the Court's opinions were written. Judge Tatel dismissed *NBC* as a case in which "ancillary authority was . . . never addressed."[63] He essentially dismissed the reliance on congressional statements of policy in *Southwestern Cable* and *Midwest Video I* as well. Following the approach set out in *National Ass'n of Regulatory Utility Commissioners v. FCC*,[64] Judge Tatel said that the FCC's ancillary authority "is really incidental to, and contingent upon, *specifically delegated powers under the Act*"—emphasis by the D.C. Circuit—notwithstanding the frequent references to statutory provisions such as sections 1 and 4(i) in the Supreme Court's decisions.[65]

Judge Tatel described "[t]he teaching of *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*," as interpreted by the D.C. Circuit in *NARUC II*, as being that "policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority."[66] Rather, the court invoked "the 'axiomatic' principle that 'administrative agencies may [act] only pursuant to authority delegated to them by Congress.'"[67] Judge Tatel thus read the D.C. Circuit authority as sustaining the exercise of ancillary authority only when the FCC "had linked the cited policies to express delegations of regulatory authority."[68]

Judge Tatel acknowledged that *Rural Telephone Coalition v. FCC* was a case where the D.C. Circuit had approved FCC action without linking it to any express delegation of regulatory authority.[69] In that case, which approved the FCC's creation of the Universal Service Fund at a time when the Act made no mention of such a fund, the D.C. Circuit upheld the FCC's creation of the Fund relying exclusively on sections 1 and 4(i).[70] Judge Tatel acknowledged it was "[t]rue, as the Commission observes, [that] our

61. *Comcast*, 600 F.3d at 644.
62. *Id*.
63. *Id.* at 658.
64. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (*NARUC II*), 533 F.2d 601 (D.C. Cir. 1976).
65. *Comcast* 600 F.3d at 653 (quoting *NARUC II*, 533 F.2d at 612).
66. *Comcast*, 600 F.3d at 654.
67. *Id.* (citing Am. Library Ass'n v. FCC, 406 F.3d 689, 691 (D.C. Cir. 2005)).
68. *Comcast*, 600 F.3d at 655.
69. *Id.* at 656 (citing Rural Tel. Coalition v. FCC, 838 F.2d 1307 (D.C. Cir. 1988)).
70. *Rural Telephone Coalition*, 838 F.2d at 1315.

discussion of ancillary authority never cites Title II"—which governs common carriers—or any other provision outside Title I of the Act.[71] But he explained the failure away: because "the Universal Service Fund was proposed in order to further the objective of making communication service available to all Americans at reasonable charges," and the FCC has authority under Title II to ensure that interstate telephone rates are reasonable, then "any such citation would simply have restated the obvious."[72]

Judge Tatel made clear that the *Comcast* decision—like *Midwest Video II*—reflected the court's concern about setting a precedent whereby "the Commission's [ancillary] jurisdiction . . . would be unbounded."[73] The *Comcast* court therefore rejected any reading of the statute that "would virtually free the Commission from its congressional tether."[74] The court also considered whether the network management rules at issue in Comcast were sufficiently linked to any of the more specific provisions outside of Title I of the Act cited by the FCC, but rejected each of the FCC's contentions.[75]

B. Verizon v. FCC

In *Comcast*, the court rejected the FCC's attempt to link its action to section 706 of the Telecommunications Act of 1996,[76] reasoning that the FCC had previously forsworn reliance on section 706 by construing it to be a policy statement rather than a grant of regulatory authority.[77] In the Open Internet Order on review in *Verizon v. FCC*, the FCC reexamined its interpretation of section 706 and concluded that it was not a mere statement of policy, but rather granted the FCC explicit regulatory authority.[78] The FCC then adopted the net neutrality rules at issue in *Verizon*, relying on section 706, among other provisions, as providing the link to regulatory authority outside Title I of the Act.[79]

Section 706 states that the FCC "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure

71. *Comcast*, 600 F.3d at 656.
72. *Id.*
73. *Id.* at 654 (quoting *Midwest Video II*, 440 U.S. 689, 706 (1979)).
74. *Comcast*, 600 F.3d at 655.
75. *Id*. at 658–61.
76. Telecommunications Act of 1996 § 706, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 1302 (2012)).
77. *Comcast*, 600 F.3d at 658–59 (citing Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-188, 13 FCC Rcd. 24012, 24044–45, para. 69 (1998)).
78. *See generally 2010 Open Internet Order*, *supra* note 1.
79. *Id.*

investment."[80] Judge Tatel, again writing for the D.C. Circuit—this time joined by Judge Judith Rogers and, in part, by Senior Judge Laurence Silberman—acknowledged that "this language could certainly be read as simply setting forth a statement of congressional policy."[81] "But," he added, "the language can just as easily be read to vest the Commission with actual authority to utilize such 'regulating methods' to meet this stated goal."[82] The court accepted the FCC's revised interpretation of section 706 in part because the Senate Report accompanying the 1996 Act had described section 706 "as a 'necessary fail-safe' 'intended to ensure that one of the primary objectives of the [Act]—to accelerate deployment of advanced telecommunications capability—is achieved.'"[83]

"Of course," the court noted, "we might well hesitate to conclude that Congress intended to grant the Commission substantive authority in Section 706(a) if that authority would have no limiting principle."[84] But the court found a sufficient limiting principle in section 2(a) of the Act—the provision that gives the FCC jurisdiction over interstate and foreign communication by wire and radio[85]—and in the language of section 706 itself, because:

> any regulations must be designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.' . . . Section 706(a) thus gives the Commission authority to promulgate only those regulations that it establishes will fulfill this specific statutory goal.'[86]

The majority added that, notwithstanding Judge Silberman's claim to the contrary in his dissenting opinion, this "burden" imposed by its test "is far from 'meaningless.'" [87]

The court then addressed Verizon's argument that the manner in which the Open Internet rules promote broadband deployment "is too attenuated from this statutory purpose to fall within the scope of authority granted" by section 706.[88] The court rejected this argument, concluding that the FCC

> could reasonably have thought that its authority to promulgate regulations that promote broadband deployment encompasses

80. 47 U.S.C. § 1302(a) (2012).
81. Verizon v. FCC, 740 F.3d 623, 637 (D.C. Cir. 2014).
82. *Id.* at 637–38.
83. *Id.* at 639 (citing S. REP. NO. 104-23, at 50–51 (1996)).
84. *Verizon*, 740 F.3d at 639.
85. Communications Act of 1934, ch. 652, § 2(a), 48 Stat. 1064 (codified at 47 U.S.C. § 152(a) (2012)).
86. *Verizon*, 740 F.3d at 640.
87. *Id.* (citing *id.* at 662 (Silberman, J., concurring in part, dissenting in part)).
88. *Verizon*, 740 F.3d. at 643.

> the power to regulate broadband providers' economic relationships with edge providers [such as Amazon or Google] if, in fact, the nature of those relationships influences the rate and extent to which broadband providers develop and expand their services for end users."[89]

Only then did the court address Verizon's merits argument—the argument that Nuechterlein and Weiser pointed out should be the heart of the decision[90]—and concluded that "the Commission's prediction that the *Open Internet Order* regulations will encourage broadband deployment is, in our view, both rational and supported by substantial evidence."[91]

But although the court concluded that section 706 provided the requisite jurisdictional basis for regulation of Internet service providers and the rules were rational and supported by substantial evidence,[92] it invalidated the FCC's anti-discrimination and anti-blocking rules on the ground that they effectively imposed common carrier regulation on certain information service providers—Internet service providers—in contravention of the Communications Act's explicit proscription of such regulation.[93] The basis for the bar on common carrier regulation of Internet service providers lies in the statutory definition of "telecommunications carrier," which provides that "[a] telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent it is engaged in providing telecommunications services,"[94] together with the FCC's decision to classify Internet service providers as "information service providers" rather than as "telecommunications carriers."[95]

Judge Tatel described *Midwest Video II* as the "seminal case" for this analysis.[96] He reasoned that the anti-discrimination rule is essentially a

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89. *Id.* (citation omitted).

90. *See* NUECHTERLEIN & WEISER, *supra* note 15, and accompanying discussion.

91. *Verizon*, 740 F.3d at 644.

92. *Id.* at 649–50.

93. *Id.* at 655.

94. Communications Act of 1934, ch. 652, § 3(51), 48 Stat. 1064 (codified at 47 U.S.C. § 153(51) (2012)).

95. The Supreme Court upheld the FCC's interpretation of cable broadband service as an information service in Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 968 (2005), *aff'g* Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77, 17 FCC Rcd. 4798 (2002). In 2005, the FCC decided to treat all wireline broadband service as an information service. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150, 20 FCC Rcd. 14853, 14858, para. 5 (2005).

96. *Verizon*, 740 F.3d at 651 (citing *Midwest Video II*, 440 U.S. 689, 692–94 (1979)). In *Midwest Video II*, the Supreme Court struck down the FCC's rules requiring CATV companies to provide access to third parties, concluding that the FCC could not impose common carrier requirements on CATV operators. *See supra* notes 53–59 and accompanying text.

common carriage rule,[97] pointing out that in *NARUC II* the court described the "*sine qua non* of common carrier status" as "the undertaking to carry for all people indifferently."[98] Treating people "indifferently," of course, is precisely what an anti-discrimination rule requires.[99]

The court found that the question whether the anti-blocking rule is a common carrier rule to be "somewhat less clear"[100] than whether the anti-discrimination rule mandates common carriage. The court looked to its earlier opinion in *Cellco Partnership v. FCC*—also written by Judge Tatel—that upheld the FCC's data roaming rule, which requires wireless carriers "to come to the table and offer a roaming agreement where technically feasible."[101] In other words, this rule requires wireless carriers such as Verizon to allow other carriers' customers to use Verizon's network—a common carriage requirement—to obtain access to an information service (because the rule requires *data* roaming rather than *voice* roaming).[102] In upholding the rule, the court concluded that "common 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*."[103] Acknowledging that the data roaming rule "shares some aspects of traditional common carrier obligations," the court nevertheless found the rule to be on the light gray side of the line.[104] The court reasoned that the "rule leaves substantial room for individualized bargaining and discrimination in terms" and "spells out sixteen different factors plus a catch-all 'other special or extenuating circumstances' factor that the Commission must take into account in evaluating whether a proffered roaming agreement is commercially reasonable."[105] While upholding the rule in response to Verizon's facial challenge, the court quickly added that an as-applied challenge might be successful even though "the rule *sounds* different from common carriage" if, as applied, that language "turn[s] out to be no more than 'smoke and mirrors.'"[106]

With respect to the anti-blocking rule, Judge Tatel found "some appeal" in Verizon's argument that the anti-blocking rule is a common carrier rule because it requires Internet service providers to carry traffic from edge providers.[107] But Judge Tatel also spoke favorably of a contention advanced by the FCC at oral argument that, under *Cellco*, the rule left

97. *Verizon*, 740 F.3d at 651.
98. *Id.* at 651 (quoting *NARUC II*, 533 F.2d 601, 608 (D.C. Cir. 1976)).
99. *Verizon*, 740 F.3d at 654.
100. *Id.* at 657.
101. Cellco P'ship v. FCC, 700 F.3d 534, 548 (D.C. Cir. 2012).
102. *Id.* at 544.
103. *Id.* at 547.
104. *Id.* at 548.
105. *Id.*
106. *Id.* (citations omitted).
107. Verizon v. FCC, 740 F.3d 623, 658 (D.C. Cir. 2014).

"sufficient 'room for individualized bargaining and discrimination in terms' so as not to run afoul of the statutory prohibitions on common carrier treatment."[108] But because the FCC had not advanced that argument in its order or briefs, the court struck down the anti-blocking rule as an impermissible common carrier rule.[109]

IV. THE ANCILLARY JURISDICTION TEST AFTER *VERIZON*

While some creativity was involved, Judge Tatel's test for judging the FCC's exercise of its ancillary jurisdiction is as faithful to precedent as possible in light of the failures of earlier decisions to reasonably reconcile themselves.[110] Under the test articulated in *Verizon*, the FCC (a) may regulate "interstate and foreign communications by wire or radio"[111] if (b) it can link its exercise of ancillary authority to an express delegation of "ancillary jurisdiction," not just a "policy statement[],"[112] and (c) show that the regulation is not inconsistent with some principle found to be embodied in the Act.[113] The effect of this test remains unclear. On the one hand, it might lead to predictable results and allow the FCC and the courts to focus on the merits of FCC action. On the other hand, it could result in what Nuechterlein and Weiser called issues of "scholastic complexity,"[114] which will neither lead to predictable results nor results focused on the merits of the FCC action at issue. The outcome will depend on how the test is applied. The two key questions moving forward are first, how provisions that expressly delegate statutory authority are distinguished from provisions that are mere policy statements; and, second, how regulations are evaluated to determine their consistency with the Act, especially with respect to what constitutes "common carrier regulation."

A. Express Delegations Versus Mere Policy Statements

Under the D.C. Circuit's test, there is an important distinction between an express delegation of authority and mere policy statements.[115] It is possible that this distinction will be read in a way that severely limits the scope of the FCC's ancillary jurisdiction. But it is also possible that the D.C. Circuit's decision to accept the FCC's reinterpretation of section 706 as an express delegation of authority could lead to broader jurisdiction for the FCC.

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108. *Id.* (quoting *Cellco*, 700 F.3d at 548).
109. *Verizon*, 740 F.3d at 658–59.
110. *See supra* notes 36–59 and accompanying discussion.
111. *Verizon*, 740 F.3d at 629.
112. *Id.* at 632 (internal quotation marks and citations omitted).
113. *Id.* at 634.
114. *See* NUECHTERLEIN & WEISER, *supra* note 15, at 230.
115. *Verizon*, 740 F.3d at 632.

As applied in *Verizon*, the jurisdiction the FCC is found to have with respect to the Internet is not "ancillary" in any meaningful sense. The court identified in section 706 an express delegation of authority that authorized the FCC to take steps to ensure that advanced telecommunications capability—broadband—is deployed on a reasonable and timely basis.[116] Ultimately, the court's decision that the FCC has authority to adopt regulations concerning the Internet depended entirely on section 706 rather than any provision of Title I.[117] The lengthy discussions of ancillary authority in *Comcast* and *Verizon* actually have nothing to do with the resolution of the case. What mattered was that Congress had enacted a broadly worded provision concerning "advanced telecommunications capability."[118]

Senior Judge Silberman, dissenting in part, thought the majority went too far in reading section 706 to authorize regulation of the Internet on the theory that the FCC may take any steps it plausibly determines will promote broadband deployment.[119] "Presto," Judge Silberman cautioned, the FCC determined that section 706 is a grant of authority rather than a mere policy statement and "we have a new statute granting the FCC virtually unlimited power to regulate the Internet."[120] Whether Judge Silberman is right that the FCC's power to regulate the Internet is now "virtually unlimited" or Judge Tatel accurately responded that the majority's interpretation of section 706 erects requirements that are "far from 'meaningless'"[121] will have important consequences concerning the validity of any further FCC regulation of the Internet.

But the more general question regarding rulemaking after *Verizon* is whether the FCC must now not only establish a link to some provision outside of Title I, but also show that such provision authorizes the regulation at issue. If so, ancillary jurisdiction could amount to very little. A new technology involving wire or radio communications would be subject to FCC jurisdiction only if Congress happened to have adopted a provision—such as section 706—that could plausibly be interpreted to provide jurisdiction with respect to the new technology. In addition, *Southwestern Cable* and *Midwest Video I* seemingly provide ancillary jurisdiction if the FCC can show that the new technology affects communications services plainly covered by the Communications Act.[122] But the tone of the D.C. Circuit's decisions in *Comcast* and *American Library Association*, in which the court emphasized it is "axiomatic" that agencies may act "only pursuant to authority delegated to them by Congress"[123] and do not possess "unbounded" authority,[124]

116. *Id.* at 640 (citing 47 U.S.C. § 1302 (2012)).
117. *Id.*
118. *Id.*
119. *Id.* at 660–62. (Silberman, J., concurring in part, dissenting in part).
120. *Id.* at 662.
121. *Id.* at 640 (citation omitted).
122. *See supra* notes 36–49 and accompanying discussion.
123. Comcast Corp. v. FCC, 600 F.3d 642, 654 (D.C. Cir. 2010).
124. Am. Library Ass'n v. FCC, 406 F.3d 689, 694 (D.C. Cir. 2005).

suggests that the D.C. Circuit would be unlikely to uphold such FCC action absent a very clear effect on a provision outside Title I.

Alternatively, *Verizon* could be applied in a way that would broaden the scope of the FCC's ancillary jurisdiction considerably. That would happen if a court deferred to an FCC reading of sections 1, 2(a), and 4(i) as express delegations of authority, just as the D.C. circuit accepted the FCC's reinterpretation of section 706 as such. Under *Chevron v. NRDC*,[125] of course, the FCC is entitled to substantial deference in its interpretation of the Communications Act, while under *City of Arlington v. FCC*,[126] the agency is entitled to deference even in matters concerning the scope of its authority. In addition, under *FCC v. Fox*, the FCC may change its interpretation of a statute under a standard no more rigorous than the generous *Chevron* standard.[127] Accordingly, it is possible that a court would defer to a future FCC interpretation of Title I as granting the FCC broad authority.

In *Verizon*, Judge Tatel acknowledged that section 706 reads like a policy statement but can also be read as a grant of authority.[128] It is at least arguable that the same can be said for the key provisions of Title I. Section 2(a) gives the FCC jurisdiction over "interstate and foreign communication by wire or radio,"[129] while section 4(i), the Act's "necessary and proper clause," gives the FCC authority to "perform any and all acts" that "are necessary in the execution of its functions" and "not inconsistent with" the Act.[130] The key phrase, however, is the provision in section 1 stating that the FCC's goal is ensuring "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[131] That phrase seems as definite as the language in section 706 stating that the FCC "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[132] Presto, Senior Judge Silberman might say, the FCC has broad authority over all wire and radio communications, including those not specifically addressed by the Communications Act.[133]

Even many of us who have worked at the FCC—perhaps especially those of us who have worked at the FCC—would balk at such a broad reading of the FCC's authority. But such a reading is far from frivolous. As Justice Harlan explained in *Southwestern Cable*, nothing "limits the FCC's authority to those activities and forms of communication that specifically described by the Act's other provisions."[134] Justice Harlan also introduced

125. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).
126. City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013).
127. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009).
128. Verizon v. FCC, 740 F.3d 623, 637–38 (D.C. Cir. 2014).
129. 47 U.S.C. § 152(a) (2012).
130. *Id.* § 154(i).
131. *Id.* § 151.
132. *Id.* § 1302.
133. *Cf. Verizon*, 740 F.3d at 662 (Silberman, J., concurring in part, dissenting in part).
134. United States v. Sw. Cable Co., 392 U.S. 157, 172 (1968).

the term "ancillary" to the analysis in that opinion, noting that the rules at issue in *Southwestern Cable* plainly affected broadcasters, over whom the FCC has broad authority in Title III, thus establishing a link to provisions of the Act outside of Title I in that case.[135] But it is not clear from the *Southwestern Cable* opinion whether a link to a provision outside Title I is necessary or that the Court perceived *Southwestern Cable* to be an easy case on account of that link and therefore, as it said, had "no need here to determine in detail the limits of the Commission's authority to regulate CATV."[136] In addition, the Supreme Court in *Brand X* clearly thought that the FCC has ancillary authority with respect to information service providers, although the D.C. Circuit dismissed this view in *Comcast*.[137]

Moreover, a broad reading of the FCC's authority is consistent with the Supreme Court's many statements that the New Deal Congress that adopted the 1934 Communications Act plainly intended to give the FCC broad authority. Both Justice Frankfurter, in his 1943 decision for the Court in *NBC*, and Justice Harlan, in his 1968 decision for the Court in *Southwestern Cable*—the two decisions regarding ancillary authority closest in time to the enactment of the Communications Act in 1934—emphasized Congress' intention to give the FCC extremely expansive powers.[138] That New Deal Congress regularly pushed the boundaries of delegation to administrative agencies.[139]

Nevertheless, as the D.C. Circuit stated in *American Library Association* and reiterated in *Comcast*, it is "axiomatic" that agencies may act "only pursuant to authority delegated to them by Congress" and their

135. *See id.* at 178.

136. *Id*. It should be noted that the link identified by Justice Harlan in *Southwestern Cable* was not to any precise requirement of the Act, but rather to the FCC's application of the public interest standard as favoring local programming, so that the FCC could regulate CATV on account of its threat to local programming. The Court did note that a Senate Report had spoken favorably of the FCC's local programming policy, *id.* at 174 n.39, but of course that is not the same a statutory provision requiring local programming.

137. *See* Comcast v. FCC, 600 F.3d 632, 649 (D.C. Cir. 2010) (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 996) (noting that "the Court went on to say that 'the Commission remains free to impose special regulatory duties on [cable Internet providers] under its Title I ancillary jurisdiction,'" but that the Court did not specify what rules could be supported by the FCC's ancillary jurisdiction).

138. NBC v. United States, 319 U.S. 190, 218–20 (1943); *Southwestern Cable*, 392 U.S. at 167, 171.

139. It is unlikely that the D.C. Circuit would read the provisions of Title I as analogous to section 706, given its statement in *Comcast* that "it is Titles II, III, and VI that do the delegating." *Comcast*, 600 F.3d at 654. But section 706 is not in any of those titles, and the forbearance provision—Section 10 of the Communications Act, 47 U.S.C. § 160—which delegates highly unusual power authorizing the FCC to decline to enforce statutory provisions, is in Title I. In any event, most FCC decisions are reviewable in courts other than the D.C. Circuit, 47 U.S.C. § 402(a), and, of course, all decisions of the federal circuits are reviewable in the Supreme Court. As Professor Blevins reports, other circuits have regularly "upheld the FCC's exercise of ancillary jurisdiction citing Title I alone." Blevins, *supra* note 17, at 604.

authority may not be "unbounded."[140] But the constitutional test to determine whether a delegation is too broad is the nondelegation doctrine. Only two statutes have been struck down under the nondelegation doctrine, both in 1935.[141] The D.C. Circuit attempted to revive the nondelegation doctrine in 1999 when it struck down an Environmental Protection Agency (EPA) regulation adopted pursuant to a statute instructing the EPA to establish ambient air quality standards that "are requisite to protect the public health."[142] The Supreme Court reversed.[143] In his opinion for the Court, Justice Antonin Scalia explained that it was settled under the nondelegation test that Congress must provide an "intelligible principle" for an agency to apply, but that the Court "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[144] Justice Scalia cited *NBC* as an example of a decision upholding a very broad grant of authority—namely, authority to regulate under the "public interest" standard.[145]

Perhaps a nondelegation challenge could be mounted, arguing that promoting "rapid and efficient wire and radio communication service with adequate facilities at reasonable charges" in section 1 of the Communications Act is not a constitutionally adequate limiting principle, but it is at least as intelligible as the public interest standard. And, in truth, it is at least as intelligible as many of the other key standards in the Communications Act, including the "just and reasonable" standard and the prohibition on "unreasonable discrimination,"[146] although courts and advocates sometimes contend that those provisions have fixed meanings.

Notwithstanding the heated rhetoric from *American Library Association*, although it is axiomatic that agencies have only the power that Congress confers upon them, it is settled that Congress may confer very broad power. And while the exact scope of the power conferred by the Communications Act is subject to debate, it is clearly expansive. In any event, there is no basis for a court to narrow a congressional delegation to an administrative agency that is permissible under the nondelegation doctrine simply because the court—and even many FCC lawyers and alumni—would have preferred Congress to provide more detailed instructions than it did.[147]

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140. Am. Library Ass'n. v. FCC, 406 F.3d 689, 691 (D.C. Cir. 2005); *Comcast*, 600 F.3d at 654.

141. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

142. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 465 (2001) (citing 42 U.S.C. § 7409(b)(1) (2012)), *aff'g in part, rev'g in part sub nom.* Am. Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4, 8 (D.C. Cir. 1999).

143. *Am. Trucking Ass'ns*, 531 U.S. at 458.

144. *Id.* at 474-75.

145. *Id.* at 474.

146. Communications Act of 1934, ch. 652, §§ 201(b), 202(a), 48 Stat. 1064 (codified at 47 U.S.C. §§ 201(b), 202(a) (2012)).

147. Susan Crawford, in an article focused on agency capture issues at the FCC, read the FCC's ancillary jurisdiction broadly but argued for congressional limitations because an

All that is certain at this time is that, when the FCC is next faced with an issue relating to its authority over a new technology, both a very broad and a very narrow interpretation of the scope of the FCC's authority could claim support from the *Comcast* and *Verizon* decisions. And the resolution of this issue will depend not on the merits of the FCC's actions but on the resolution of issues such as how to distinguish express delegations of authority from mere policy statements and how much deference the FCC is owed in making such distinctions.

B. Consistency with the Act

Under the D.C. Circuit's test, it is also necessary that an exercise of ancillary authority not be inconsistent with any specific requirement in the Act. As applied in *Verizon*—which, as noted above, did not actually depend on *ancillary* authority—this part of the test is a straightforward application of the principle that the specific controls the general: a general provision granting the FCC authority over the Internet could not trump a specific provision stating that information service providers may not be treated as common carriers. It must be correct that Internet service providers cannot be regulated as common carriers because section 3(51) of the Act clearly and specifically prohibits such treatment.[148] Even sections 4(i) and 303(r) acknowledge that the broad authority they grant must give way if a regulation would be "inconsistent with this Act" or "inconsistent with law."[149]

But there are two important ways in which the application of this principle is unclear. First, while the court in *Verizon* relied on a specific prohibition, the Supreme Court in *Midwest Video II* arguably authorizes courts to strike down FCC action that is contrary to a principle thought to be embodied in the Act rather than a specific provision. Second, as questions relating to what constitutes common carrier regulation illustrate, distinguishing prohibited common carrier regulations from permissible regulations may be the ultimate example of an exercise in mind-numbing, scholastic complexity.

In *Midwest Video II*, the Court relied on section 3(h), the provision prohibiting the FCC from treating broadcasters as common carriers, as embodying a general principle that also applied to cable operators.[150] But no provision of the Act then prohibited the FCC from treating cable operators as common carriers. Moreover, when Congress enacted provisions governing cable operators, it adopted provisions similar to those the Court struck down—cable operators may be required to carry public, educational,

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agency such as the FCC is inherently likely to use broad authority to favor the incumbents it deals with regularly. Susan Crawford, *The Ambulance, the Squad Car, and the Internet*, 21 BERKELEY TECH. L.J. 873, 925–31 (2006).

148. Communications Act § 3(51) (codified at 47 U.S.C. § 153(51) (2012)).

149. *Id.* §§ 4(i), 303(r) (codified at 47 U.S.C. §§ 154(i), 303(r) (2012)).

150. *See generally Midwest Video II*, 440 U.S. 689 (1979).

and governmental ("PEG") channels, to provide leased access to other channels, and to carry broadcast channels.[151] Together with these carriage requirements, however, Congress declared that cable systems "shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."[152]

It is hard to know what to make of these provisions. Perhaps Congress did not think that requiring cable operators to devote space to PEG channels, leased access channels and broadcasters amounted to a common carriage requirement. Or perhaps Congress meant to say that cable operators shall not be treated as common carriers other than with respect to those requirements. But it is clear that the Supreme Court in *Midwest Video II* was wrong to think that Congress was unalterably opposed to requiring cable operators to make "available certain channels for access by third parties" because an overarching principle emanating from section 3(h) prohibited such treatment.[153]

Nevertheless, *Midwest Video II* supports the contention that a court may strike down an FCC action on the ground that it is contrary to a principle of the Act, rather than a specific provision in the Act. This could lead to creative constructions that significantly limit any exercise of ancillary jurisdiction. Take, for example, the forbearance provision: while its terms apply only to telecommunications carriers—despite its odd placement in Title I, rather than Title II—it arguably embodies the principle that competition protects consumers better than regulation.[154] Although that is a sound principle in my view, it would seem to be an unreasonable stretch for a court to conclude that any regulation adopted by the FCC using its ancillary authority is invalid if it can be argued that it is contrary to the principle of the forbearance provision preferring competition to regulation. But it is hard to distinguish this hypothetical situation from *Midwest Video II*.[155]

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151. Communications Act § 611– 614 (codified at 47 U.S.C. §§ 531–534 (2012)).

152. 47 U.S.C. § 541(c).

153. *Midwest Video II*, 440 U.S. at 691.

154. Communications Act § 10 (codified at 47 U.S.C. § 160 (2012)); *see supra* note 139 and accompanying text.

155. Professor Blevins presents an interpretation of the ancillary jurisdiction decisions that is similar to the hypothetical limitation suggested in the text, but which focuses on which exercises of ancillary jurisdiction have been and should be upheld. Blevins makes the descriptive argument that the courts have been most likely to approve of an exercise of ancillary jurisdiction when the FCC's goal is to promote market competition rather than to advance a social goal and a normative argument that such an approach is desirable. To the extent the descriptive argument has merit, it may simply represent the inclinations of the judges deciding the cases. The normative argument is not consistent with the statutory text. Section 1 sets the goal of making "available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" and section 4(i) broadly authorizes "[a]ny and all such acts" not inconsistent with the Act—and while promoting market competition is an excellent way to achieve those goals, it is hard to read that broad language as limited to market competition. Blevins, *supra* note 17, at 585, 611.

In addition, questions are sure to recur as to what constitutes common carrier regulation, particularly since the Communications Act provides that Internet service providers, broadcasters, and cable operators may not be treated as common carriers. The clearest example of common carrier regulation would seem to be mandated carriage—but as mentioned above, Congress both mandated carriage by cable operators and prohibited cable operators from being treated as common carriers. Perhaps some mandatory carriage is permissible as long as an entity is not required to carry "all people indifferently."[156] But this would surely be a hard line to draw.

Similarly, Judge Tatel's decision in *Cellco* acknowledged that there is a "gray area" in which there are regulations that "share[] some aspects of traditional common carrier obligations" but "are not common carriage *per se*."[157] Although he upheld the FCC's data roaming rule because the FCC's sixteen factor test for judging whether a proffered data roaming agreement is reasonable left enough room for "individualized bargaining and discrimination in terms" that it was not on its face an impermissible common carrier rule, Judge Tatel then quickly acknowledged that as-applied challenges might be meritorious.[158] It appears that what the FCC needs to do is apply its test so that some discrimination that would be considered unreasonable discrimination under section 202(a) is nevertheless permissible. If it does not, and all discrimination that is reasonable is permitted and all discrimination that is unreasonable is struck down, then the sixteen factor test is, indeed, "smoke and mirrors," as Verizon alleged.[159] It amounts to nothing more than a ban on unreasonable discrimination—and section 202(a), which prohibits "unreasonable discrimination," is a classic example of common carrier regulation.[160] While perfectly sensible as an application of the complicated common rules, this approach seems to be the height of scholasticism.

Perhaps after a number of decisions, the FCC will find a way to permit some amount of unreasonable discrimination so that its data-roaming rule will not fall to a steady stream of as-applied challenges. And if net neutrality rules ultimately are upheld under section 706 alone, perhaps the FCC would find a way to permit Internet service providers to enter into agreements with edge providers that manage to permit the requisite amount of unreasonable discrimination so that they cannot be invalidated as common carrier regulations. But a sixteen factor test, which includes a "catch-all" factor, seems unlikely to result in clarity. And what a strange test it is that requires some amount of unreasonable discrimination.

Even if the common law process results in more or less clear rules for data roaming agreements and net neutrality rules after many years, it will

156. Verizon v. FCC, 740 F.3d 623, 651 (D.C. Cir. 2014) (quoting *NARUC II*, 533 F.2d 601, 608 (D.C. Cir. 1976)).
157. Cellco P'ship v. FCC, 700 F.3d 534, 547 (D.C. Cir. 2012).
158. *Id.* at 548.
159. *Id.*
160. *See Verizon*, 740 F.3d at 657.

undoubtedly be difficult to determine how those rules will translate to the next new technology. Given the lack of clarity as to what constitutes common carrier regulation and the statutory ban on treating information service providers, broadcasters, and cable operators as common carriers, advocates for any new technology will plausibly claim that (a) only telecommunications carriers may be regulated as common carriers and (b) at least some of the regulations the FCC devises in response to new technologies have characteristics of common carrier regulation, since opening networks and prohibiting unreasonable discrimination are frequent themes in the regulation of communications services.

V. CONCLUSION

In *Comcast*, Judge Tatel synthesized the Supreme Court and D.C. Circuit ancillary jurisdiction cases and developed a test that is as faithful to those cases as possible. Under the test, the FCC (a) may regulate "interstate or foreign communications by wire or radio" if (b) the FCC can link its exercise of ancillary authority to an "express delegation of ancillary authority," not just a "policy statement," and (c) show that the regulation is not inconsistent with some principle found to be embodied in the Act. This test has uncertain consequences for future cases involving new technologies.

If applied as in *Verizon*, the test might be read to require the FCC to identify a specific provision in which Congress anticipated the new technology, which will severely limit the scope of the FCC's ancillary jurisdiction. On the other hand, the court's willingness to accept the FCC's interpretation of section 706 as a provision that is not a mere policy statement but instead delegates authority to regulate the Internet could open to door to a similar reading of the provisions of Title I—although it seems doubtful that the D.C. Circuit would accept such an argument because it would come close to releasing the FCC from any congressional tether.

In addition, it is unclear whether the requirement that FCC rules not conflict with other provisions in the Act will be strictly or loosely applied. In particular, whether a rule is a prohibited common carrier rule is an issue that is sure to arise again—and the current state of the law calls for application of a test that makes little sense and appears to permit the FCC to adopt rules only if they permit some degree of unreasonable discrimination. In short, this area of the law remains murky and will require further analysis of issues far removed from the merits.

American Broadcasting Cos. v. Aereo, Inc.

Steven Tepp*

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Few things are as central to Americans' lives as their television. But the medium that has for decades been defined by the device on which it has traditionally been viewed is now undergoing a transformation to computers, tablets, and smartphones. Americans want their television programming to be available no matter where, no matter when, and no matter on what device.

Creative industries have responded by addressing that demand with a multitude of licensed services; at least 100 unique platforms for viewing television and full-length films are available in the United States alone.[1] Still, when a service appears that offers another attractive alternative, it will draw viewers—even if its legality is questionable.

Aereo,[2] and its competitor Aereokiller/FilmOn,[3] fit that description. Like iCraveTV and other previous services, Aereo and FilmOn burst onto the scene, offering customers an opportunity to view television programming remotely across the Internet. And like iCraveTV,[4] Aereo did not have permission from either the broadcaster or the copyright owner, and litigation ensued.

Part I of this comment will briefly summarize the legal background against which the Aereo service was engineered. Part II will describe the pertinent design and functions of the Aereo service. Part III will review and analyze the recent decision of the U.S. Supreme Court in *American Broadcasting Cos. v. Aereo, Inc.*,[5] as well as the dissent.[6] The issues presented in this litigation have implications beyond the specific facts of the case, and those issues remain controversial. This comment is intended to provide an even-handed account of the Court's opinions and, while it will note unanswered questions, it does not seek to offer answers to them.

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1. *See Technology and Innovation*, MPAA.ORG, http://www.mpaa.org/technology-and-innovation/ (last visited Dec. 1, 2014).

2. *See* Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2503 (2014) (describing Aereo's business model and functionality).

3. Aereokiller was a competitor to Aereo that adopted the same technological construct and used similar names to provide essentially the same service. Aereo's proprietor, Barry Diller, sued Aereokiller's owner, Barry Driller Content Systems, alleging, among other claims, trademark infringement and "[s]eeking to unfairly capitalize on the success [of Diller's business]… . . ." Diller v. Barry Driller, Inc., No. CV 12-7200 ABC EX, 2012 WL 4044732, at *2 (C.D. Cal. Sept. 10, 2012). The court issued a preliminary injunction against Aereokiller, finding that it had "intended to capitalize on Plaintiff's name and involvement with Defendants' competitor Aereo." *Id.* at *7. Aereokiller subsequently changed its name to "FilmOnX." *Id.* at *2. For the balance of this comment, I will refer primarily to "Aereo," although the operation of each system, and therefore presumably the legal liability, are essentially identical.

4. *Aereo*, 134 S. Ct. at 2503.

5. *Id.*

6. *Id.* at 2511 (Scalia, J., dissenting).

I. BACKGROUND

The Golden Age of Television of the 1950s must surely seem like the Dark Ages to modern television audiences. Back then, there existed a scant three broadcast networks,[7] supplemented by a handful of low-power local stations, if at all: no ability to record or rewind live broadcasts; no 'on demand' content; no ability to purchase television episodes or movies on videotape, DVD, or download; and reception that depended on each home's location, antenna positioning, weather, and other factors.

Some towns, isolated from broadcast stations by distance from a broadcast market and/or local topography, found broadcast television signals difficult or impossible to receive.[8] To rectify that shortcoming, in many communities, a single large tower was erected to receive broadcast television signals and transmit them over cables to nearby residences.[9] This "community access television" or "CATV" was the early forerunner of modern cable systems.[10]

A. Fortnightly *and* Teleprompter

These CATV systems posed an interesting copyright question: did they publicly perform the television shows they enabled people to view, thus implicating the Copyright Act—which secures to copyright owners the exclusive right to publicly perform their original creative works? In 1968, the Supreme Court addressed this question when it decided *Fortnightly Corp. v. United Artists Television, Inc.*[11] The defendant/appellant, Fortnightly Corporation, operated a CATV system that made available copyrighted works to subscribers without licenses from the copyright holders.[12] The plaintiff/appellee, United Artists Television, Inc., was the copyright holder of several of the works that Fortnightly transmitted.

United Artists' perspective was straightforward: the CATV operator, it argued, was performing its programming—embodied in broadcast signals—without permission. But Fortnightly's perspective was equally straightforward: it claimed it did not "perform" anything, but merely passed along signals of television performances to its subscribers.

To determine whether Fortnightly "performed" the works it broadcasted, the Court turned to the Copyright Act in force at that time—the

7. *See* JOSEPH STRAUBHAAR, ROBERT LAROSE & LUCINDA DAVENPORT, MEDIA NOW: UNDERSTANDING MEDIA, CULTURE, AND TECHNOLOGY 248 (8th ed. 2013).

8. United States v. Sw. Cable Co., 392 U.S. 157, 163–64 (1968).

9. *Id.*

10. *See* Daniel J. Smith, *Stay the Course: A History of the FCC's Response to Change in the Cable Industry*, 13 J.L. & POL. 715, 725 (1997).

11. 392 U.S. 390 (1968).

12. *Id.* at 392.

1909 Act, as amended[13]—which provided two relevant exclusive rights: "to play or perform [a nondramatic literary work] . . . in public for profit"[14] and "to perform . . . publicly if it be a drama . . . ."[15] The Court considered that broadcasters make active choices in selecting and procuring programming and that, as such, broadcasters "perform" works within the meaning of the Act.[16] Viewers, however, are more like the members of a live audience who receive the performance and thus do not "perform" it themselves, the Court reasoned.[17]

Having established that dividing line, the Court had to determine the side on which CATV fell. Because the Court considered CATV to be a passive retransmitter, compared to the affirmative programming selections made by broadcasters, it rejected the plaintiff's views, essentially finding CATV services amounted to no more than long cables:

> If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.[18]

A similar case made its way to the Supreme Court a few years later. In *Teleprompter Corp. v. Columbia Broadcasting System, Inc*.,[19] the Court considered whether the public performance analysis under the 1909 Act was any different with regard to a CATV system that facilitated the viewing of television signals so distant that they were not viewable through other antennae in the community.[20] The broadcasters and copyright owners argued that because of new developments in CATV, such as the production by CATV systems of their own original programming and their sale of commercial advertising, cable television had crossed the line over to the broadcaster side of the Court's performance analysis in *Fortnightly*.[21] Again, the Court was unpersuaded:

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13. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, *amended by* Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541 (codified at scattered sections of 17 U.S.C.) [hereinafter 1976 Act].
14. Copyright Act of 1909 § 1(c) (repealed 1976).
15. Copyright Act of 1909 § 1(d) (repealed 1976).
16. *Fortnightly*, 392 U.S. at 397–98.
17. *Id*.
18. *Id*. at 400.
19. 415 U.S. 394 (1974).
20. *Id*. at 401.
21. *Id*. at 403–04.

> The copyright significance of each of these functions—program origination, sale of commercials, and interconnection—suffers from the same logical flaw: in none of these operations is there any nexus with the defendants' reception and rechanneling of the broadcasters' copyrighted materials. As the Court of Appeals observed with respect to program origination, "[e]ven though the origination service and the reception service are sold as a package to the subscribers, they remain separate and different operations, and we cannot sensibly say that the system becomes a 'performer' of the broadcast programming when it offers both origination and reception services, but remains a nonperformer when it offers only the latter." Similarly, none of the programs accompanying advertisements sold by CATV or carried via an interconnection arrangement among CATV systems involved material copyrighted by the petitioners.[22]

While its copyright analysis had driven it to a result contrary to the desires and views of the broadcasters and copyright owners, the Court was not ignorant to the commercial effect of its rulings. However, it was unwilling to impose its own policy judgments on such questions: "Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress."[23]

B. 1976 Act

Congress did indeed take heed of these cases, and it did not like what it saw. As fate would have it, the long process of comprehensively revising the Copyright Act was at hand, providing an opportune vehicle to address these issues.

The Copyright Act of 1976, which remains in force as amended, carried forward the exclusive right of public performance "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly . . . ."[24]

But unlike the 1909 Act, the new law provided a statutory definition of the pivotal terms. To "perform" a works means "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."[25]

22. *Id*. at 405 (alteration in original) (citation omitted).
23. *Id.* at 414.
24. 17 U.S.C. § 106(4) (2012).
25. 17 U.S.C. § 101 (2012).

This is a broad definition, encompassing even the viewers of television shows. The legislative history confirms this intent, as well as a limiting element:

> [A]ny individual is performing whenever he or she . . . communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to occur would itself not be actionable as an infringement unless it were done "publicly" . . . .[26]

And to perform or display a work "publicly" means:

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[27]

The second clause of the definition of "publicly," known as the "Transmit Clause," makes clear that not only broadcasters, but also CATV systems' activities implicate the public performance right. Motivated by *Fortnightly* and *Teleprompter*, and a subsequent Supreme Court decision extending the reasoning in these decisions to the public performance of music in a fast-food restaurant,[28] Congress wrote specifically that "[t]his basis for the decision is completely overturned by the present bill . . . ."[29]

And so the law stood for decades. Indeed, the above recitation is so well accepted that it essentially mirrors the review the Supreme Court provided in the *Aereo* decision.[30] But unlike this comment, the Court's

26. H.R. REP. NO. 94-1476, at 63 (1976).

27. 17 U.S.C. § 101 (2012).

28. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 162–63 (1975).

29. H.R. REP. NO. 94-1476, at 34. It is worth noting that at the same time Congress made clear that cable systems are engaged in public performances, it also provided a statutory license for the retransmission, under certain circumstances, of broadcast signals. *See* 17 U.S.C. § 111 (2012).

30. *See* Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2502–06 (2014).

recitation stops short of mentioning the case that provides the bridge between the 1976 Act and the engineering of the Aereo service: *Cablevision*.[31]

C. Cablevision

Cablevision is a traditional cable service that conceived of a new, cloud-style approach to digital video recorders.[32] Instead of customers recording chosen programming on a set-top digital storage device, the programming would be stored on and replayed from Cablevision's servers at a Cablevision facility.[33] This "remote DVR" service would appear to the customer to function the same way as a set-top DVR, allowing them to record chosen programs and watch that recording at a later time. Of course, the overwhelming majority of television programming is copyrighted, but Cablevision did not obtain any licenses for this service.[34]

While technological efficiency might have dictated that Cablevision store a single copy of all programs on its servers from which viewers could choose to watch, they constructed the system differently. Instead, Cablevision's service recorded programming multiple times, as specifically indicated by its various customers. And those customers would then later view the particular copy they had indicated (by pressing remote control buttons) they wanted to record.[35]

The litigation against Cablevision arising from this service involved several copyright issues, but the one relevant here is the claim that Cablevision's playback of the recorded programming infringed the public performance right. The plaintiff copyright owners relied on the Transmit Clause to argue that the playback of the copies housed on Cablevision's remote servers constituted a transmission of a performance to the public.

It was undisputed that Cablevision transmitted the performance. But Cablevision argued that the transmission, and thus the performance, was not available "to the public" because each particular copy, and the playback of that copy, was available only to the customer who had it recorded. Thus, each transmission was unique to the corresponding customer; the public was not "capable of receiving" it.[36]

The Second Circuit agreed with Cablevision, based on a statutory analysis of the transmit clause that focused on whether the performance of the *copy* was available to the public, rejecting the plaintiffs' arguments that

31. Cartoon Network LP, v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121 (2d Cir. 2008).
32. *Id.* at 125.
33. *Id.*
34. *Id*. at 124.
35. *Id*. at 125.
36. *Cablevision*, 536 F.3d at 135.

the proper reading of the statute turns on whether the performance of the *work* is available to the public.[37]

II. AEREO

Thus the scene was set for the emergence of the Aereo service. Aereo is an Internet-based service that allows subscribers to view broadcast television over the Internet. It has no licenses for these transmissions.

A. Operational facts

Aereo's service obtains broadcast television signals through the use of thousands of antennae, which are notable for their small size (comparable to a dime).[38] When a subscriber logs on and selects programming in one of the cities in which Aereo operates, a particular antenna is dedicated to that subscriber.[39] The programming is received by means of the antenna, buffered in a dedicated copy on Aereo's server, and transmitted to that subscriber moments later.[40]

Aereo's decision to engineer its system this way—and, it hoped, avoid implicating the public performance right by relying on individual, dedicated copies like the RS-DVR at issue in *Cablevision*—was not lost on the Court. Chief Justice Roberts, in particular, pursued this in his questioning of Aereo's counsel at oral argument:

> CHIEF JUSTICE ROBERTS: Just to make sure I've got it – there's no reason it's a user-specific copy, is it? They're making 10,000 copies. It'd be much easier for you if you'd just have to make one copy and everybody could get a copy.
>
> MR. FREDERICK: Well, that's where the issue about replicating what happens in the home matters, Mr. Chief Justice, because if I'm in my home and I start the program two minutes in, using Aereo's technology, I missed the first two minutes, I never get to watch it. It happens to be when I push the button to initiate the copy, just like if I'm at home watching on a DVR, the same principle. And so that copy will always be different because I have control over it versus –
>
> CHIEF JUSTICE ROBERTS: Surely, you can make a program where you have just one copy and starting [sic] it at different times. You don't need every viewer to have his own copy.

37. *Id.* at 135–39.
38. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2503 (2014).
39. *Id.*
40. *Id.*

> MR. FREDERICK: But that is – that is the key distinction between video on demand and the service that Aereo provides, the kinds of equipment and technology that Aereo provides. We don't have a brief to defend the master copy because in the master copy situation, that is indisputably public because there is no right to exclude anyone else. With Aereo's technology, if I'm making a copy using Aereo's system, no one else can look at it. Even if you happen to have watched the same program, you can't watch my copy, I can't download it –
>
> CHIEF JUSTICE ROBERTS: That's just saying your copy is different from my copy.
>
> MR. FREDERICK: Correct.
>
> CHIEF JUSTICE ROBERTS: But that's the reason we call them copies, because they're the same.
>
> CHIEF JUSTICE ROBERTS: All I'm trying to get at, and I'm not saying its outcome determinative or necessarily bad, I'm just saying your technological model is based solely on circumventing legal prohibitions that you don't want to comply with, which is fine. I mean, that's – you know, lawyers do that. But I'm just wondering why –
>
> CHIEF JUSTICE ROBERTS: -- whether you can give me any technological reason, apart from compliance with a particular legal issue, for your technological mind.[41]

Counsel for Aereo avoided an admission that the service's inefficient construction was solely for legal reasons.[42] Indeed, several lower courts did not seem troubled by that possibility.[43] But, as discussed below, the Supreme Court seemed to reach that conclusion nonetheless.[44]

B. Lower Court Litigation

The litigation battle over Aereo ranged far and wide. Over the course of less than two years, numerous copyright infringement lawsuits were filed

41. Transcript of Oral Argument at 40–42, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (No. 13-461), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-461_o7jp.pdf.

42. *Id.*

43. *See* discussion *infra* Part II.B.

44. *See* discussion *infra* Part III.A.

against Aereo and its competitor FilmOn, resulting in decisions across five federal judicial circuits.[45]

The first case was filed on March 1, 2012 in the Southern District of New York.[46] The decision was issued on July 11, 2012, applying the *Cablevision* precedent and ruling in favor of Aereo.[47] The plaintiffs appealed to the Second Circuit, but fared no better—this was, after all, the same circuit that had decided *Cablevision*.[48]

On August 12, 2012, suit was filed against FilmOn in the Central District of California. The Central District rejected the *Cablevision* court's focus on the transmission and performance of a *copy* in favor of an analysis that considers the transmission and performance of a *work*.[49] Analyzing the facts as applied to that reading of the law, the District Court found a likelihood of success on the merits and ordered an injunction against FilmOn applicable throughout the Ninth Circuit.[50]

The third case was filed on May 23, 2013, against FilmOn in the District of Columbia. The District Court was presented with a choice between following the reasoning of the Second or of the California District Court. It chose the latter, ruling that FilmOn infringed the public performance right and granting an injunction that applied nationwide, except for the Second Circuit.[51]

On July 9, 2013, suit was filed against Aereo in Massachusetts. That court followed the *Cablevision* precedent of its neighboring circuit and denied the plaintiff's motion for a preliminary injunction.[52]

The fifth case was filed against Aereo on October 7, 2013 in Utah. That court followed the precedent of its neighboring circuit, agreeing with the California court—along with the D.C. court and the dissent in the Southern District of New York—and enjoining the service throughout the Tenth Circuit.[53]

Against the backdrop of this dizzying array of litigation and split decisions, and given the importance of the issues at stake, it is not surprising

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45. *See infra* notes 46–53 and accompanying text (discussing cases from the Second, Ninth, District of Columbia, First, and Tenth Circuits).

46. *See* Complaint at 1, Am. Broad. Cos. v. Aereo, Inc., 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (No. 12 Civ. 1540).

47. *Aereo*, 874 F. Supp. 2d at 382–96 (denying plaintiffs' Motion for a Preliminary Injunction) *rev'd and remanded*, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

48. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680 (2d Cir. 2013), *rev'd and remanded sub nom.* Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

49. Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1143–46 (C.D. Cal. 2012).

50. *Id*. at 1148.

51. Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30 (D.D.C. 2013).

52. Hearst Stations Inc. v. Aereo, Inc., 977 F. Supp. 2d 32 (D. Mass. 2013).

53. Cmty. Television of Utah, LLC v. Aereo, Inc., 997 F. Supp. 2d 1191, 1199 (D. Utah 2014).

that the Supreme Court took an interest. Certiorari was granted in the New York case on January 10, 2014.[54]

III. SUPREME COURT DECISION

On June 25, 2014, the Supreme Court ruled six-to-three that Aereo's service infringes the public performance right and remanded the case back to the Second Circuit.[55] The majority opinion was written by Justice Breyer, which took some by surprise as his votes on the Court have tended towards narrower protection of copyright.[56] Justice Scalia wrote the dissenting opinion, joined by Justices Thomas and Alito.

A. Majority opinion

In each of the lower court decisions, the courts explicitly grappled with the competing interpretations of the Transmit Clause: the *Cablevision* case from the Second Circuit that the district court in Massachusetts also followed, and the view of the broadcasters and copyright owner plaintiffs that federal courts accepted in California, Washington, D.C., and Utah. While the same question was presented to the Supreme Court, it is noteworthy that Justice Breyer's majority opinion never mentions the *Cablevision* case by name.[57]

This is, perhaps, further evidence that interest in the *Aereo* case, like many Supreme Court decisions, is as much about the potentially broad implications of the ruling as it is about the facts before the Court. Indeed, numerous amici briefs addressed the implications of the case for the legality of cloud computing models.[58] The majority opinion refers explicitly to this issue as well, as discussed below.

1. If it walks like a duck and quacks like a duck…

In the tradition of *Fortnightly* and *Teleprompter*,[59] the Court's ruling relied as much on analogy as it did on legal analysis. Starting from the

54. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 896 (2014) (granting petition for certiorari) [hereinafter *Aereo petition for certiorari*].

55. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2511 (2014).

56. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 242 (2003) (Breyer, J., dissenting); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 949 (2005) (Breyer, J., concurring); Golan v. Holder, 132 S. Ct. 873, 899 (2012) (Breyer, J., dissenting).

57. The *Aereo* majority cites the *Cablevision* opinion only once, indirectly, while reviewing the procedural history of the Aereo litigation. *See Aereo*, 134 S. Ct. at 2504.

58. *See, e.g.*, Brief for BSA | The Software Alliance as Amicus Curiae in Support of Neither Party, *Aereo*, 134 S. Ct. 2498 (No. 13-461), 2014 WL 844499.

59. *See supra* notes 11–23 and accompanying text.

undisputed fact that Congress in the 1976 Act intended to bring CATV and cable systems within the public performance right, the Court considered whether Aereo's service is sufficiently similar to those services that it must also implicate the public performance right.

a. *Does Aereo "perform"?*

The Court noted the similar functions of CATV and Aereo to use technology outside of the home to provide television broadcast signals to additional viewers, concluding that "Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach."[60] It was not persuaded of the significance of the distinction that while CATV services transmitted constantly,[61] Aereo only transmits on demand, an attribute that Aereo (and the dissent) likened to a copy shop that allows customers to copy only what they select:

> But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into "a copy shop that provides its patrons with a library card."[62]

Having determined that Aereo performs the works it provides its subscribers, the Court turned to whether those performances are "public."

b. *Is Aereo's performance "public"?*

Aereo argued to the Court, as it did in the various lower courts, that because each of its performances is dedicated to a particular subscriber, no performance its service provides is available to the public.[63] Again, the Court analogized Aereo to CATV and cable systems in light of the congressional intent underlying the 1976 Act:

> In terms of the Act's purposes, these differences do not distinguish Aereo's system from cable systems, which do perform "publicly." Viewed in terms of Congress' regulatory objectives, why should any of these technological differences matter? They concern the behind-the scenes way in which Aereo delivers television programming to its viewers' screens. They

60. *Aereo*, 134 S. Ct. at 2506.

61. *Id.* at 2507.

62. *Id.* at 2507. The Court did acknowledge that, in other cases, the particulars of equipment and selection of material could bear on copyright liability. *Id.*

63. *Id.* at 2507-08.

> do not render Aereo's commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers. Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one small dedicated antenna, whether they arrive instantaneously or after a few seconds' delay, or whether they are transmitted directly or after a personal copy is made? And why, if Aereo is right, could not modern CATV systems simply continue the same commercial and consumer-oriented activities, free of copyright restrictions, provided they substitute such new technologies for old? Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.[64]

Regardless of what the proper interpretation of the Transmit Clause is, the Court scarcely could be clearer that it is unwilling to allow clever collaboration between lawyers and engineers to defeat the unambiguous legislative intent of the Copyright Act.

2. Clouded *Cablevision*

What remains of the public performance aspect of the *Cablevision* decision? The Court never even mentions that case by name,[65] much less explicitly overrules any aspect of it. But the Court dismisses as irrelevant the operational technology that drove the Second Circuit's analysis and conclusion.

The closest the Supreme Court comes to saying the Second Circuit's interpretation of the statute is wrong is a passage concerning the interpretive question of whether the Transmit Clause looks to performances of *copies* or performances of *works*:

> [W]hether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it "transmit[s] . . . a performance" to all of them.[66]

It is difficult to see what is left of the Second Circuit's interpretation of the Transmit Clause in *Cablevision* in light of this holding by the Supreme Court. But, as noted below, the Court did not assert it would have reached a different result in that case.

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64. *Id*. at 2508–09.
65. *See supra* note 57.
66. *Id*. at 2509.

The Court was clearly mindful of the implications beyond the facts of this case; almost immediately after making this clear statement, it hemmed it in. First, the Court noted that its decision is rooted in the history of CATV and cable systems and the adoption of the Transmit Clause, and may not determine whether other types of providers in other contexts publicly perform works.[67] The Court mentioned whether the user is paying for "something other than the transmission of copyrighted works, such as the remote storage of content" as a potentially distinguishing factor.[68] The Court also left open the application of fair use,[69] noting that "[w]e have said that [our holding in this case] does not extend to those who act as owners or possessors of the relevant product."[70]

In sum, the Court articulated the limits of its holding (and disclaimed reversing the result in *Cablevision*) with reference and deference to Congress:

> We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us. We agree with the Solicitor General that "[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which 'Congress has not plainly marked [the] course,' should await a case in which they are squarely presented."[71]

There is much room for further consideration and interpretation in this area.

B. Dissent

The dissent concludes that Aereo does not perform works and is dismissive of the majority's analysis-by-analogy approach.[72]

Justice Scalia wrote that, in order to directly infringe a copyright, the defendant must have engaged in some volitional act that implicates the rights of copyright owners, beyond an automated function initiated by a customer.[73] Applying this rule to the facts at bar, the dissent concludes that because Aereo does not transmit anything unless and until a subscriber selects a particular program, it is the customer that has engaged in the volitional act,

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67. *Id*. at 2510.

68. *Id.* at 2511 (citing Brief for the United States as Amicus Curiae Supporting Petitioners at 31, *Aereo*, 134 S. Ct. 2498 (No. 13-461) 2014 WL 828079 (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984))).

69. *Id.* at 2511.

70. *Id*. at 2510.

71. *Id*. at 2511 (alterations in original) (citing Brief for the United States, *supra* note 68, at 34).

72. *Id*. at 2512 (Scalia, J., dissenting).

73. *Id*. at 2513–17 (Scalia, J., dissenting).

not Aereo.[74] "In sum," the dissent explains, "Aereo does not 'perform' for the sole and simple reason that it does not make the choice of content. And because Aereo does not perform, it cannot be held directly liable . . . ."[75]

The dissent dismisses the majority's analogy likening Aereo to CATV and cable systems, finding it built on what it describes as "the shakiest of foundations" of legislative history.[76] Instead, the dissent sees importance in the technological distinctions that cable and CATV are constantly transmitting programming—unlike Aereo—and that Aereo, unlike the CATV system in Teleprompter, does not import distant signals, create its own programming, or sell advertising.[77]

Nonetheless, Aereo did not seem to generate much more sympathy with the dissent than it did with the majority. As Justice Scalia wrote in his dissent, "I share the Court's evident feeling that what Aereo is doing (or enabling to be done) to the Network's copyrighted programming ought not to be allowed."[78] Accordingly, the dissent offers the possibility that Aereo could be infringing by virtue of secondary liability related to a public performance, or directly or secondarily liable for the reproductions created on its system.[79]

But these alternative bases of potential liability are likely of cold comfort to copyright owners. It is well established that secondary liability may arise only where there is underlying direct infringement.[80] And if the dissent believes that it is Aereo's subscribers who perform the works, it is difficult to see how that could result in a public performance from which Aereo's secondary liability could arise.[81] With regard to the reproduction of televised works on Aereo's remote servers, the same approach to volition from which the dissent concluded that Aereo does not perform seems likely to lead those Justices to conclude it does not make the copy, either.[82] And unless the dissent believes that the Supreme Court's *Sony* decision, which established that home recording of television programming for purposes of timeshifting constitutes fair use, would not apply here,[83] there is again an

74. *Id.* at 2514 (Scalia, J., dissenting).
75. *Id.*(Scalia, J., dissenting).
76. *Id.* at 2515 (Scalia, J., dissenting).
77. *Id.* at 2515–16 (Scalia, J., dissenting).
78. *Id.* at 2517 (Scalia, J., dissenting).
79. *Id.* (Scalia, J., dissenting).
80. *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005).
81. One could certainly imagine that an Aereo subscriber might allow a wide enough group to view the programming he received through the Aereo service that the performance would be public. But tying that back to Aereo through any of the doctrines of secondary liability is far less plausible.
82. *See* Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 130–33 (2d Cir. 2008).
83. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447–55 (1984).

apparent absence of underlying direct infringement to support a finding of secondary liability.

Perhaps recognizing the weaknesses of its own proposed alternatives, the dissent notes that despite its willingness to allow Aereo to prevail through a "'loophole' in the law," it is Congress' responsibility to close it.[84]

IV. CONCLUSION

The Supreme Court's decision in *American Broadcasting Cos. v. Aereo, Inc.* decided one dispute with absolute clarity: Aereo publicly performs copyrighted works. The consequences for Aereo have been dire. With no apparent exception in the Copyright Act to excuse the infringement, and with the Copyright Office having rejected Aereo's claim of eligibility for the section 111 statutory license for cable systems,[85] Aereo has filed for Chapter 11 bankruptcy protection and expects to pay millions of dollars in damages to copyright owners.[86] Proceedings in the lower courts are ongoing at the time of this publication.[87]

As for the ongoing questions implicated by the Court and the dissent, such as the application of the public performance right to cloud computing and other contexts and the relevance of volitional conduct, there is something for everyone to cite to as the consideration of those matters continues.

84. *Aereo*, 134 S. Ct. at 2517 (Scalia, J., dissenting).

85. 17 U.S.C. § 111 (2012); *see also US Copyright Office Says Aereo Not a Cable Company Under Terms of Copyright Act*, CNBC (July 17, 2014, 9:51 AM), http://www.cnbc.com/id/101838646#.

86. *See* Joshua Brustein, *Aereo Files for Bankruptcy and (Almost) Declares Defeat*, BUSINESSWEEK (Nov. 21, 2014), http://www.businessweek.com/articles/2014-11-21/aereos-files-for-bankruptcy-and-almost-declares-defeat.

87. *Id.*

Private Performances for the Public Good: Aereo and the Battle for Broadcast's Soul

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I. INTRODUCTION

In 2013, the average price for a cable television subscription was $64.41, 5 percent higher than it was in 2012 and nearly three times the average price in 1995.[1] They say that the best solution to high prices is competition, and the advent of services offering television and other media via the Internet may present an attractive alternative to conventional cable bundle subscriptions.[2]

One such service is Aereo, the brainchild of Chaitanya "Chet" Kanojia.[3] Kanojia founded Navic Networks, whose technology allows cable and broadcast providers to measure audience demographics and place advertisements accordingly in real time.[4] Finding that, at any given moment, approximately half of pay TV subscribers were watching free, over-the-air broadcast channels, Kanojia engineered Aereo as a means of separating the two, enabling consumers to view broadcast television without the added cost of an antenna or cable or satellite subscription.[5] In order to protect their current business model, which depends in large part on retransmission fees, broadcast networks brought copyright infringement claims against Aereo and similar services that allow users to stream broadcast channels via the Internet to various devices.[6]

The Copyright Act grants a copyright owner several exclusive rights, including the right to publicly perform her copyrighted work.[7] Broadcasters

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1. Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, *Report on Cable Industry Prices*, DA 14-672, MM Docket No. 92-266, para. 3, Table 3 (rel. May 16, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0516/DA-14-672A1.pdf.

2. *See, e.g.*, Dorothy Pomerantz, *How Much Are You Willing to Pay to Cut the Cord?*, FORBES (Feb. 29, 2012, 1:49 PM), www.forbes.com/sites/dorothypomerantz/2012/02/29/how-much-are-you-willing-to-pay-to-cut-the-cord/; Gerry Smith, *My Year Using Aereo: How a Dime-Sized Antenna Met My TV Needs*, HUFFINGTON POST (Aug. 12, 2013, 3:33 PM), www.huffingtonpost.com/gerry-smith/my-year-using-aereo_b_3745981.html; Brian Stelter, *Cable Is Holding Web TV at Bay, Earnings Show*, N.Y. TIMES, Oct. 31, 2011, at B4, *available at* http://www.nytimes.com/2011/10/31/business/media/cable-tv-holding-web-rivals-at-bay-earnings-show.html?pagewanted=1&_r=0 (explaining that cord-cutting losses have adversely affected distributors, but have been largely offset by increases in broadband subscriptions and business services).

3. Jon Healey, *Bamboom Takes Over-the-Air TV Over the Top*, L.A. TIMES (Apr. 5, 2014, 3:15 pm), http://latimesblogs.latimes.com/technology/2011/04/bamboom-takes-over-the-air-tv-over-the-top.html.

4. *Id.*

5. *See id.*

6. *Compare* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680 (2d Cir. 2013), *rev'd sub nom.*, Am. Broad. Cos. v. Aereo, Inc. 134 S. Ct. 2498 (2014), *with* Fox Television Stations, Inc. v. Barrydriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1140-41 (C.D. Cal. 2012).

7. *See* 17 U.S.C. § 106(4) (2012).

alleged that Aereo, in retransmitting their signals to the public without authorization, violated this exclusive right.[8] Aereo, used thousands of dime-sized antennas to retransmit broadcasters' signals on a "one-to-one" basis—assigning each user her own particular antenna and remote DVR, with which only the assigned user could record and access content. It argued that this individualized form of retransmission made its performances private, not public.[9] Federal courts across the county disagreed whether Aereo's conduct violated broadcasters' exclusive rights under the Copyright Act.[10] After previously declining to directly address the public performance right in this context,[11] the Supreme Court finally addressed the issue in June 2014, holding that Aereo publicly performed broadcasters' copyrighted works, in violation of their exclusive rights under the Copyright Act.[12]

This Note argues that the Supreme Court erred in its holding and that Aereo's retransmission was not a public performance, based on several important considerations. Congress intended that the public performance inquiry take into account the nature and medium of the performance, and the plain language of the Copyright Act reflects as much.[13] Consequently, the unique, one-to-one manner in which Aereo transmitted its performances distinguishes it from other cable and satellite operators who publicly perform copyrighted works. Furthermore, the Court should strive to interpret the law in a manner that promotes both predictability and consistency. This includes construing the law in such a way as to avoid "surprising consequences,"[14] such as prohibiting intuitively innocent behavior. Aereo's technology, like the legally legitimate Sony Betamax and Cablevision RS-DVR before it, functionally mimicked currently available home-use technology.[15] Additionally, Aereo represented an innovative technology that improved accessibility for the public and streamlined the dissemination of creative content and information. The Court's holding that Aereo infringed on the public performance right runs afoul of the principal purpose of U.S. copyright law, to "promote the Progress of Science and the useful Arts,"[16] and the Communication Act's principal objective, to "make available, so far as possible, to all the people of the United States, without discrimination . . .

8. *See WNET*, 712 F.3d at 686.

9. Brief for Respondent at 2–3, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2013) (No. 13-461).

10. *See id* at 3.

11. *See* Cartoon Network LP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121 (2d Cir. 2008), *cert. denied sub nom.*, Cable News Network, Inc. v. CSC Holdings, Inc., 557 U.S. 946 (2009).

12. *See* Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (holding that Aereo publicly performed within the meaning of the Copyright Act).

13. See *infra* Part III.A.1.

14. Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1362 (2013).

15. In this case, Aereo purports to mimic a conventional antenna (and DVR), which allows a consumer to receive over-the-air broadcast signals for free. *See infra* Part III.B.

16. U.S. CONST. art. I, § 8, cl. 8.

, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[17]

Furthermore, Aereo's technology promises a significant positive impact for the entire industry, including broadcasters shifting to alternative network structures and potential implementation of Aereo-like technology by multichannel video programming distributors. Finally, even if Aereo ought to be subject to certain copyright restrictions as a matter of good policy, the Court improperly stretched the public performance right in order to reach Aereo's conduct. Rather than engaging in results-oriented judicial rulemaking, the Court should have examined Aereo's service under an alternative theory of liability or left the task to Congress to form a more elegant and comprehensive legislative solution.

II. BACKGROUND

A. The Interested Parties

Whether Aereo's retransmission is public or private has many potential effects on the entire broadcasting industry, implicating the interests of many different parties. Included among the various players are the broadcasters who own the content, the multichannel video programing distributors ("MVPDs") who partner with broadcasters to provide the content to consumers, and the IP broadcast video providers who seek to provide the content without broadcaster consent.

1. Broadcasters

On one side of the debate are broadcast television networks who, in conjunction with local broadcast affiliates, create, assemble, and distribute television programming free over-the-air to the American public. Broadcast networks and stations hold copyrights in the content they produce and distribute via over-the-air broadcast signals, and therefore are entitled to certain protections and exclusive rights under U.S. copyright law.[18] For television broadcasters, this includes the right "to perform the copyrighted work publicly."[19] Thus, any party seeking to transmit such copyrighted programming to the public must first obtain a license or otherwise receive the consent of the broadcaster.[20]

Most broadcasters also partner with MVPDs to transmit their programming to paying cable and satellite subscribers. Under the Cable

17. Communications Act of 1934, ch. 652, § 151, 48 Stat. 1064 (codified at 47 U.S.C. § 151 (2012)).
18. *See* 17 U.S.C. § 106 (2012).
19. *Id.* § 106(4).
20. *See id.*

Television Protection and Competition Act of 1992 (the "Cable Act"), if an MVPD wishes to carry a broadcaster's signal, the MVPD must first obtain the station's consent.[21] MVPDs thus engage in private negotiations with broadcasters (under certain FCC guidelines), and frequently offer them monetary compensation (known as "retransmission fees") or other forms of consideration in exchange for their consent, without which MVPDs would be prohibited from transmitting said channels to their subscribers.[22]

2. Online Broadcast Video Providers

Opposite the broadcasters are providers such as Aereo and FilmOn X, who offer a fee service that enables subscribers to stream free, over-the-air broadcast television via the Internet.[23] Users can either watch a program almost contemporaneously with the over-the-air broadcast[24] or record a program for later viewing.[25]

Aereo housed and managed an antenna farm comprised of thousands of antennas.[26] Each user was assigned a tiny individual antenna and remote DVR that they controlled via Internet-connected device.[27] When a user selected a program to watch or record, the server tuned the individual's antenna to the broadcast frequency of the channel showing the desired program.[28] A unique copy of the program was saved to a portion of a hard drive reserved for the particular user.[29] The user could play back only the copies that she created.[30] Throughout the entirety of this process, each antenna, data stream, and digital recording was segregated by user, and even if two users chose to view the same television program at the same time, they never shared an antenna or viewed the same data stream or digital recording containing the copyrighted content.[31] Furthermore, this process could only be initiated by the user and did not run independently of user direction.[32] Most notably, Aereo did not obtain a statutory license or pay any

21. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 6, 106 Stat. 1460, 1482; *see also Retransmission Consent*, FCC (Apr. 6, 2014, 6:37 PM), http://www.fcc.gov/encyclopedia /retransmission-consent.

22. *Retransmission Consent*, supra note 21.

23. *See, e.g.*, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2503 (2014).

24. *Id.* There is at least a six second delay, if not longer. Brief for Respondent, *supra* note 9 at 4.

25. *See, e.g.*, *Aereo*, 134 S. Ct. at 2503.

26. *Id. See also* Jeff John Roberts, *Aereo CEO: Our Cheap TV Wouldn't Exist Without Cloud Computing*, GIGAOM (Dec. 5, 2012, 12:31 PM), http://gigaom.com/2012/12/05/aereo-ceo-our-cheap-tv-wouldnt-exist-without-cloud-computing.

27. *Aereo*, 134 S. Ct. at 2503; Brief for Respondentt, *supra* note 9, at 3.

28. *Aereo*, 134 S. Ct. at 2503.

29. *Id.*

30. *Id.*

31. *Id. See also* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 683 (2d Cir. 2013).

32. Brief for Respondent, *supra* note 9, at 47.

retransmission fees, or otherwise obtain consent from broadcasters in order to retransmit broadcasters' over-the-air signal.[33]

3. Cable Television Providers and other MVPDs

Under the Cable Act, an MVPD is "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."[34] Commonly, MVPDs are television cable or satellite operators such as Comcast or DirecTV, who offer broadcast and cable television programming to subscribers. The Cable Act requires MVPDs to obtain retransmission consent from broadcasters in order to carry their broadcast signal,[35] which often results in the payment of retransmission fees to broadcasters.[36]

B. The Public Performance Right

The 1976 Copyright Act (the "Copyright Act") sets forth a list of exclusive rights afforded to copyright owners.[37] In the case of "motion pictures and other audiovisual works," these enumerated rights include the right "to perform the copyrighted work publicly."[38] According to the Copyright Act, to perform or display a work 'publicly' means:

> to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[39]

The crux of the issue is whether Aereo's unauthorized transmissions to its subscribers are transmissions to the "public" within the scope of this clause. If so, Aereo's conduct constitutes a "public performance" and therefore infringes broadcast program owners' exclusive right to publicly perform their own copyrighted works. Although federal courts disagreed on how to determine whether a transmission is made to the public or not,[40] the

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33. Petition for Writ of Certiorari. at i, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (No. 13-461).

34. 47 U.S.C. § 522(13) (2012).

35. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 6, 106 Stat. 1460, 1482 (amending 47 U.S.C. § 325).

36. *Retransmission Consent*, *supra* note 21.

37. Pub. L. No. 94–553, § 106, 90 Stat. 2541 (1976) (codified at 17 U.S.C. § 106 (2012)).

38. 17 U.S.C. § 106(4) (2012).

39. *Id.* § 101.

40. While the Second Circuit held that the relevant inquiry is the particular audience of a particular transmission, a California district court maintained that the focus should be

Supreme Court ultimately held that the relevant inquiry was whether the "same contemporaneously perceptible images and sounds" were transmitted to "a large number of people who are unrelated and unknown to each other."[41]

In *Twentieth Century Music Corp. v. Aiken*, the Supreme Court held that receiving and playing a radio broadcast of copyrighted material in a public establishment did not constitute a "public performance" within the meaning of the Copyright Act.[42] Therefore, business establishments only needed to obtain copyright licenses to receive and retransmit broadcasts to its patrons if the broadcast being retransmitted was itself unlicensed.[43] The Court based its decision, in part, on the "practical unenforceability" of requiring every radio listener to obtain a license for each broadcast he receives, noting that such a ruling would be highly inequitable.[44] Justice Blackmun, in his concurrence, acknowledged the inadequacy of the existing legal framework used to justify the majority's opinion, instead urging "resolution of these difficult problems and the fashioning of a more modern statute . . . from the Congress."[45]

C. Retransmission Consent

Anticipating future issues with cable television operators and their retransmission of copyrighted works, Congress amended the Copyright Act in response to the Supreme Court's decision in *Aiken*, introducing a compulsory licensing system for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to FCC rules and regulations.[46] Some years later, after the Cable Act of 1992 was enacted, the FCC promulgated regulations requiring that MVPDs seeking to retransmit the signal of any commercial broadcasting station first obtain the station's express retransmission consent.[47] As part of any such retransmission consent agreement, broadcast stations and MVPDs may negotiate money or other consideration, often resulting in MVPDs paying retransmission fees to stations in exchange for permission to carry their signals.[48]

Aereo and other similar internet broadcasting services do not fall under the FCC's definition of an MVPD, which currently only includes

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on who is capable of receiving the underlying work. *Compare* WNET, Thirteen v. Aereo Inc., 712 F.3d 676, 680 (2d Cir. 2013) *with* Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1143–46 (C.D. Cal. 2012).

41. *See* Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2509 (2014).
42. *See* 422 U.S. 151 (1975).
43. H.R. REP. NO. 94-1476, at 86–87 (1976).
44. *Aiken*, 422 U.S. at 162.
45. *Id.* at 166 (Blackmun, J., concurring).
46. H.R. REP. NO. 94-1476 at 88–89 (1976).
47. 47 C.F.R. § 76.64(a) (2014).
48. *Retransmission Consent*, *supra* note 21.

certain video programming distributors as provided for by statute and regulation.[49] Consequently, Aereo and the like have so far operated outside the existing retransmission consent framework, intercepting and retransmiting over-the-air broadcast signals without negotiating retransmission consent agreements or paying retransmission fees to those broadcast stations.[50] Were Aereo permitted to continue operating without first obtaining consent from broadcasters or paying retransmission fees, MVPDs might either refuse to continue paying retransmission fees—thus ceasing carriage of many broadcast stations—or adapt their own Aereo-like technology. Although such a change would deprive broadcasters of a portion of their revenue stream and bargaining power with MVPDs, it could also revolutionize the current creation, retransmission, and distribution models of broadcast television,[51] leading to a more efficient, competition-driven market and greater consumer choice and accessibility.[52]

D. The Issue Before the Supreme Court

On October 11, 2013, the broadcasters in *WNET, Thirteen* filed a petition for a writ of certiorari.[53] The petitioners included sixteen broadcasting companies, including ABC, Disney, CBS, NBC, Fox, Telemundo, PBS, and others.[54] The question presented was "whether a company 'publicly performs' a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet."[55]

The broadcasters challenged the Second Circuit's analysis of the Transmit Clause in *WNET, Thirteen* as "fundamentally flawed."[56] They argued that the Second Circuit conflated transmission and performance.[57]

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49. Michael Grotticelli, *FCC Considers a Change of Definition That Could Shake Up Broadcast Business*, BROADCAST ENGINEERING (June 10, 2013), http://broadcastengineering.com/business-announcements/fcc-considers-change-definition-could-shake-broadcast-business; *see* 47 C.F.R. § 76 (2014); *see also* Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs., *Notice of Proposed Rulemaking*, FCC 14-210, MB Docket No. 14-261, paras. 6–8 (2014).

50. *E.g.*, Luis Nunez, *The Aereo Victory and the End of Broadcast Television*, BLIP CLINIC (Apr. 3, 2013), www.blipclinic.org/2013/04/the-aereo-victory-and-the-end-of-broadcast-television.

51. WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 286 (2d Cir. 2012).

52. *See* Brief for Consumer Federation of America & Consumers Union as Amici Curiae Supporting Appellees at 13–15, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2012) (No. 12-2786).

53. Order Granting Certiorari, Am. Broad. Cos. v. Aereo, Inc., No. 13-461 (U.S. Jan. 10, 2014).

54. Petition for Writ of Certiorari, Am. Broad. Cos. v. Aereo, Inc., No. 13-461 (U.S. Oct. 11, 2013).

55. *Id.* at i.

56. *Id.* at 25.

57. *Id.* at 26.

The Copyright Act asks whether the public is capable of receiving a particular *performance*, not whether it is capable of receiving a particular *transmission*.[58] Thus, the broadcasters argued, the Second Circuit's focus on the individual nature of Aereo's antennas and the limited audience of a particular *transmission* was a misguided, erroneous interpretation of the statute.[59] To support their interpretation, the petitioners pointed to the statutory language clarifying that a performance is public "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."[60] Thus, whether a retransmission service makes one transmission or ten thousand does not change the basic reality that a service transmitting the same underlying broadcast of a program to ten thousand strangers is "transmit[ting] . . . a performance to the public, by means of a[] device or process."[61] Therefore, for the sake of determining whether a performance is public, Aereo's thousands of simultaneous but distinct transmissions should be viewed in the aggregate, treated the same as a single transmission to ten thousand households.[62] Aereo's system of individual dime-sized antennas and digital copies is merely another "device or process" for transmitting a performance "to the public."[63]

Aereo also urged the Supreme Court to grant certiorari despite the company's victory before the Second Circuit,[64] arguing that the appeals court's interpretation of the Act was correct.[65] Under Aereo's preferred interpretation, when only one member of the public is capable of receiving a particular transmission, the transmission is private and therefore beyond the scope of the Copyright Act.[66] Therefore, because each unique copy of the performance of a work was created at the direction of a particular user and because each transmission could go only to that particular user, Aereo's retransmissions did not violate broadcasters' exclusive rights to publicly perform their copyrighted works.[67] Additionally, Aereo argued that even assuming its transmissions were public performances, it was not directly liable for infringement because each user controlled the individual antenna

58. *Id.*
59. *Id.* at 11–12.
60. *Id.* at 27 (quoting 17 U.S.C. § 101) (internal quotation marks omitted).
61. *Id.* at 21 (quoting 17 U.S.C. § 101).
62. *See id.* at 22.
63. *See id.* at 25 (quoting 17 U.S.C. § 101).
64. Brief for Respondent at 18, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (No. 13-461) [*hereinafter* Cert. Brief] ("The decision below is correct, and no court of appeals has ruled to the contrary. For four reasons, however, Aereo nonetheless believes that the Court should grant the petition to resolve the important issue of federal law at issue in this case.").
65. *Id.* at 12.
66. *Id.* at 15.
67. *Id.* at 15–16.

and DVR that enabled her to receive and copy programming.[68] Therefore, like a library that makes a copier machine available for public use, Aereo should not be held liable for direct infringement.[69]

E. The Supreme Court Opinion

The Supreme Court ultimately ruled for the broadcasters, finding that Aereo publicly performed broadcasters' copyrighted content within the meaning of the Copyright Act.[70] The Court first rejected Aereo's argument that it was a merely an equipment supplier, instead finding that Aereo "performs" the works that it transmits.[71] The Court likened Aereo to the CATV (cable television) defendants in *Teleprompter*[72] and *Fortnightly*,[73] which Congress sought to bring under the public performance right with its 1976 overhaul of the Copyright Act.[74] Due to the similarities between Aereo and CATV providers, the Court concluded that the 1976 Act that brought CATV systems within the public performance right also evinced a legislative intent to include Aereo under such copyright regime.[75] Furthermore, the Court clarified that the transmission of a performance constitutes the communication of "contemporaneously visible images and contemporaneously audible sounds of the work."[76] Therefore, a provider publicly performs when it distributes an audiovisual work to a number of people, regardless of the number of discrete communications.

However, acknowledging the far-reaching, potential implications of such a holding, the Court limited its decision in two ways. First, the Court adopted the Second Circuit's holding in *United States v. ASCAP* that the work must be contemporaneously perceptible with its transmission in order to implicate the performance right.[77] Therefore, a host that makes available a file for download would not perform the contents of the file, even if the downloader plays the file after downloading. Second, intending to exclude cloud services that host user-owned content, the Court determined that the term "public" does not extend to "those who act as owners or possessors of the relevant product."[78]

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68. *Id.* at 17–18.
69. *See id.* at 18.
70. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014).
71. *Id.* at 2504.
72. Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974).
73. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).
74. *Aereo*, 134 S. Ct. at 2504–07.
75. *Id.* at 2507–11.
76. *Id.* at 2509.
77. *Id.* at 2508 (citing United States v. Am. Soc'y of Composers, Authors & Publishers, 627 F.3d 64, 73 (2d Cir. 2010)).
78. *Id.* at 2510–11.

III. ANALYSIS

A. The Statutory Language and Legislative Intent Support a Different Interpretation

In the Copyright Act, Congress distinguishes between persons who "'perform' a work" and those who "perform or display a work 'publicly.'"[79] Specifically, "public performance" in this context means "to transmit . . . a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."[80] The Court held that this plain language encompasses Aereo's conduct.[81] Specifically, the majority maintained that because a performance may be public "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times," the individualized nature of Aereo's retransmissions to persons in the privacy of their own homes was not enough to render them private performances.[82]

In citing this particular passage, however, the majority succumbed to a red herring and missed the true crux of the dispute. The fundamental issue under consideration is not *where* or *when* a performance is received, but *who* may receive it. As such, the portion of the Transmit Clause under scrutiny should be the first half, which defines what constitutes a "performance or display of the work . . . to the public."[83]

Because Aereo transmits *one* performance to *one person*, it is not "a performance" to "the public," but rather a series of private performances to individual persons.[84] The Transmit Clause prohibits the transmission of "*a* performance . . . to the public"[85], indicating that the restriction applies only where one, *single* performance is transmitted to many different persons. Consequently, because Aereo does not transmit any one performance to more than one person, its retransmissions fall outside the purview of the Transmit Clause and therefore should be considered private performances.

The Court rejected such an argument, noting that "an entity may transmit a performance through one or several transmissions, where the performance is of the same work."[86] However, this presupposes the Ninth Circuit's assumption that the relevant "performance" inquiry involves the potential audience of the underlying work, not the potential audience of a

79. *See* 17 U.S.C. § 101 (2012).
80. *Id.* This portion of the statute is known colloquially as the "Transmit Clause."
81. Am. Broad. Cos. v. Aereo, 134 S. Ct. 2498, 2509-10 (2014).
82. *Id.*
83. *See* 17 U.S.C. § 101.
84. Brief for Respondent, *supra* note 9 at 1.
85. 17 U.S.C. § 101 (emphasis added).
86. *Aereo*, 134 S. Ct. at 2509.

particular transmission.[87] Congress, however, has made clear that, in defining a particular performance, courts should focus on the actual process by which the content is *created*, *stored*, and *shown*, and not the underlying content itself:[88]

> The purely aural performance of a motion picture sound track, or of the sound portions of an audiovisual work, would constitute a performance of the 'motion picture or other audiovisual work'; but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.[89]

Although in both examples the content of the underlying work would be the same, only where the audio track has been created and stored concurrently and inseparably with the visual track is the performance of the audio track a performance of the "motion picture or other audiovisual work" as well. Where the track has been reproduced on a separate phonorecord, a performance of the phonorecord is its *own performance*, separate from a performance of the underlying work. This means that each time Aereo creates and transmits an individual program for a particular user, Aereo creates a new, separate *performance*, distinct from the one transmitted by broadcasters. Therefore, rather than one performance being transmitted to the public, each user is receiving her own distinct performance. Such individualized conduct falls outside the Transmit Clause.

B. Prohibiting Aereo Leads to "Surprising Consequences"

In *Kirtsaeng v. John Wiley & Sons*, the Supreme Court declined to adopt a particular statutory interpretation of the Copyright Act, noting that such an interpretation would produce "surprising consequences."[90] The Second Circuit used similar reasoning to justify its decision in *Cablevision*. It concluded that holding Cablevision's RS-DVR infringing could lead to the unintuitive result that "a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work because some other party had once transmitted the same underlying performance to the public."[91] Likewise, finding Aereo infringing produces an equally counterintuitive result, holding

87. *See, e.g.*, Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138, 1144 (C.D. Cal. 2012).
88. H.R. REP. NO. 94-1476, at 63–64 (1976).
89. *Id.*
90. Kirtsaeng v. John Wiley & Sons, 133 S. Ct. 1351, 1362 (2013).
91. *Cablevision*, 536 F.3d 121, 136 (2d Cir. 2008).

illegal a practice that is unquestionably legitimate when implemented by private individuals.

Functionally, Aereo's technology is nearly identical to equipment easily obtained for private consumer use.[92] Justice Scalia, in his dissent, likens the Aereo system to "a copy shop that provides its patrons with a library card."[93] "The owner of a copier available for public use . . . [is not] liable for direct infringement when a customer uses the copier to reproduce a copy of a popular book," merely because he "maintains the copier, provides electric power for its operation and instructions on the copier's use, and charges a per-page fee for making the copies."[94] Similarly, the owner of an antenna available for public use (Aereo) should not be directly liable for infringement when a customer uses the antenna to receive free, publicly available broadcast signals. Would it be impermissible for a person to pay a professional to come to her house and install an antenna so that she might be able to receive broadcast programming? Similarly, would it be impermissible for a person to pay a professional to come to her house to set her DVR to record a particular show? Why does someone offering services to the public for a fee that would otherwise be indisputably legal if executed by a private person (e.g., Geek Squad) suddenly violate content holders' rights?

The Court's attempt to distinguish Aereo's service from a consumer's own operation of similar equipment is tenuous at best. The Court claims that merely because Aereo resembles a cable system in certain aspects, it must perform unlawfully.[95] Congress has made it clear in the Transmit Clause that the time and location of the performance does not determine whether it is public or not.[96] Furthermore, unlike cable systems, Aereo does not constantly transmit. Rather, it only begins to transmit at the direct instruction of the user. As such, Aereo much more represents an assistive technology for the consumer rather than a cable service provider. Merely because Aereo provides for the upkeep and maintenance of the necessary equipment should not subject it to liability for behavior that is otherwise permissible.

Despite the Court's proclamations to the contrary,[97] such a holding also has far-reaching repercussions outside the broadcast television industry, potentially reaching digital "cloud" storage systems like Google Drive, Amazon Cloud Player, Imgur, Dropbox, etc. These services allow users to

92. *See* Cert. Brief, *supra* note 64, at 3–5.
93. Am. Broad. Cos. v. Aereo, 134 S. Ct. 2498, 2514 (2014) (Scalia, J., dissenting).
94. *See* Cert. Brief, *supra* note 64, at 18.
95. *Aereo*, 134 S. Ct. at 2507, 2511.
96. *See* 17 U.S.C. § 101 (2012) ("To perform or display a work 'publicly' means . . . to transmit or otherwise communicate a performance or display of the work . . . to the public . . . whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places.").
97. *Aereo*, 134 S. Ct. at 2510–11.

upload and store their digital data and media on a remote server, from which they can then access, view, or play back said files contemporaneously with the transmission.[98] Similar to Aereo's individually assigned antennas, digital platforms like Amazon Cloud Player assign a user a personal allocation of memory, which he, and only he, can upload to and access.[99] For example, for each person that uploads a personal copy of "Hey Jude," there exists one corresponding digital audio file on Amazon's servers.[100] Due to the Supreme Court's holding that Aereo's individualized transmissions constitute public performances, digital cloud-based distribution and consumption lockers must too be deemed public performers.[101] Although the Court attempts to exclude such services from its decision, claiming that it "[has] not considered whether public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works,"[102] it is difficult to see how something as immaterial and irrelevant to the actual performance as the consumer's primary intent in purchasing the service could distinguish such virtually-identical services. A user's primary purpose in purchasing storage space on Google Drive does not change the nature of the transmission when she is streaming a video, nor is it a sufficiently concrete factor upon which to differentiate such transmissions.

C. Aereo's Innovation Promotes the Progress of the Arts and Sciences

Aereo represents a conceptual and technological innovation that increases content owners' available exposure while also creating greater public accessibility to creative works and information. Rejecting Aereo artificially deters future technological innovation and denies consumers access to (what is essentially) a public good. Such an action directly contravenes the Copyright Clause's congressional mandate "to promote the Progress of Science and the useful Arts."[103]

The Copyright Clause of the Constitution empowers Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective

98. Cullen Kiker, *Amazon Cloud Player: The Latest Front in the Copyright Cold War*, 17 J. TECH. L. & POL'Y 235, 239–44 (2012).

99. *Id.* at 244.

100. *See id.*

101. It is unclear whether such cloud storage services would be immunized from liability under the DMCA safe harbor protection at 17 U.S.C. § 512. However, the safe harbor does not apply to any service that "receive[s] a financial benefit directly attributable to the infringing activity." 17 U.S.C. § 512 (2012). Additionally, while the safe harbor might protect mere file storage systems, it is unlikely to extend to more comprehensive services like Amazon's Cloud Player—which allows a user to upload her own music to the cloud and then play it back online from anywhere. *See* Kiker, *supra* note 98, at 243-44.

102. *Aereo*, 134 S. Ct. at 2511.

103. U.S. CONST. art. I, § 8, cl. 8.

Writings and Discoveries."[104] The Supreme Court previously noted in *Sony Corp. of America v. Universal City Studios* that the fundamental aim of statutory copyright protection is to serve the important public purpose of "motivat[ing] the creative activity of authors and inventors by the provision of a special reward, and [] allow[ing] the public access to the products of their genius."[105] Consequently, copyright statutes should be drafted by Congress and interpreted by courts to give effect to this public policy: broad enough to induce creativity but limited enough to give the public appropriate access to their work product.[106] As the Court noted in *Aiken*:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, *but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.*
>
> The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. The sole interest of the United States and the primary object in conferring the monopoly, this Court has said, lie in the general benefits derived by the public from the labors of authors. *When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.*[107]

As such, the Transmit Clause should be construed to promote the broadest public availability of literature, music, and other arts. Aereo's technology serves this basic purpose by giving the public greater, more expansive access to creative works—allowing consumers, who might not otherwise be able to receive broadcast television—for example, because they live in an apartment complex where they are unable to install a roof-top television antenna—to receive free, over-the-air broadcast programming. Even in situations where Aereo's service is borne more out of a desire for convenience rather than necessity—for example, because a consumer prefers to watch television on his smartphone rather than on his home television[108]— it helps eliminate

104. *Id.*
105. 464 U.S. 417, 429 (1984).
106. *Id.*
107. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (emphasis added) (internal quotations and citations omitted).
108. WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 288 (2d Cir. 2012) (explaining that "there is a delicate distinction between enabling broad public access and enabling ease of access to copyrighted works" and that, even if an injunction is granted, "the service provided by ivi is targeted more toward convenience than access, and the public will still be able to access

barriers to access by providing an alternative means of receiving creative content to which the public is already entitled.[109]

Broadcasters, nonetheless, maintain that Aereo may cause them to lose retransmission fees and remove the "fair return" sought by copyright holders in order to incentivize the continued creation of artistic works.[110] However, merely because Aereo may weaken broadcasters' existing revenue model does not mean that Aereo necessarily threatens the creation and availability of literature, music, and other arts. Aereo can best be thought of as what Tim Wu describes as a "disruptive innovation."[111] Like the invention of the automobile, which replaced the horse and buggy before it, disruptive innovations threaten the market position of firms reliant on existing technology.[112] Historically, copyright holders have sought to block or slow the dissemination of copyright and communications technologies despite their potentially positive social value, merely because such inventions pose a threat to their existing market positions.[113] Broadcasters similarly attacked the legality of the Sony Betamax and Cablevision RS-DVR technologies when they were introduced, both of which were held to be noninfringing.[114] Thus, it comes as no surprise that broadcasters and MVPDs alike oppose Aereo's technology.[115] Although an invention may injure the rights holder, often the positive public externalities will outweigh the potential harm.[116] Despite only providing access to content to which viewers are already legally entitled, Aereo offers significant social efficiencies, such as allowing distribution of creative content across a wider variety of platforms and audiences and providing consumers a convenient alternative to view broadcast television "without the cost and inconvenience of purchasing and

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plaintiffs' programs through means other than ivi's Internet service, including cable television.").

109. The public is already entitled to receive broadcast television in their area by virtue of the signal being free and over-the-air. Additionally, FCC regulations require that broadcast television licensees make their signals available over-the-air to viewers at no charge. *See* 47 C.F.R. § 73.624(b) (2014).

110. Brief for Petitioner, *supra* note 9, at 38–39 (citation omitted).

111. Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123, 140 (2006).

112. *Id.*

113. *Id.* at 139.

114. *See generally* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984) (holding that the sale of timeshifting equipment did not constitute contributory infringement); *Cablevision*, 536 F.3d 121 (2d Cir. 2008) (holding that RS-DVR playback transmissions did not infringe on public performance right).

115. *See, e.g.*, Brief of the National Ass'n of Broadcasters et al. as Amici Curiae in Support of Petitioners and Reversal, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (No. 13-461) (urging the Court to hold Aereo's service infringing); Brief of Cablevision Systems Corp. as Amicus Curiae in Support of Petitioners, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (No. 13-461) (urging the Court to hold Aereo's service infringing on narrower grounds so as not to disturb the Second Circuit's holding in *Cablevision*).

116. Wu, *supra* note 111, at 139. Wu discusses this balance of interests in the context of broad licensing, but I believe it is applicable to the Aereo context as well.

installing television sets, digital antennas, and DVRs."[117] Television broadcasters similarly opposed cable television when it was first introduced,[118] which led to Congressional intervention in 1976 and 1992. However, such statutory and regulatory overprotection of the dominant rightsholder can often lead to industry stagnation—making such decentralizing, competitive forces all the more critical.[119]

D. Holding Aereo Noninfringing Promises Significant Industry Benefits

Had the Supreme Court instead held that Aereo does not publicly perform the works it transmits, interested parties could have turned such a decision into respective gains in many ways. Broadcasters, despite losing out on potential retransmission fees, have multiple means for retaining leverage in retransmission consent disputes and could even benefit from the increased viewership. MVPDs that currently negotiate for retransmission consent could use Aereo either as a supplement to their own programming or implement similar technology themselves. The FCC could take this opportunity to revise its retransmission consent rules in order to more effectively carry out Chairman Wheeler's declared mission of reducing collusion in retransmission negotiations[120] and retransmission consent blackouts.[121] Furthermore, aside from the obvious benefit of broader accessibility to broadcast television, consumers may face greater marketplace competition among television providers, leading to greater consumer choice and lower prices.

1. Broadcasters

Validation of Aereo's model presents a serious threat to broadcasters' current revenue structure.[122] Networks have come to rely on a combination of advertising fees, retransmission fees, and statutory licensing royalties for revenue; if Aereo and MVPDs develop a way to integrate the widespread adoption of Aereo-like systems and technologies that allow for the

117. Cert. Brief, *supra* note 64, at 16 n.6.
118. *Id.*
119. *See id.* at 140.
120. *See* Tom Wheeler, *Protecting Television Consumers by Protecting Competition*, FCC BLOG (Mar. 6, 2014), http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition.
121. *See* Doug Halonen, *Retrans Reform Heats Up in Washington*, TVNEWSCHECK (Jan. 14, 2014, 5:49 AM), http://www.tvnewscheck.com/article/73261/retrans-reform-heats-up-in-washington.
122. *See, e.g.*, Brian Stelter, *Broadcasters Circle Wagons Against a TV Streaming Upstart*, N.Y. TIMES, Apr. 10, 2013, at B1, *available at* http://www.nytimes.com/2013/04/10/business/media/aereo-has-tv-networks-circling-the-wagons.html.

retransmission without the associated fees, this could signify a possible return to the singular, ad-based revenue stream of the past.[123] Even if overall viewership does increase due to the addition of Aereo subscribers, advertising revenues from online outlets often do not match off-line advertising revenues.[124] Thus, a shift of viewers from traditional TV to web-based sources could still ultimately hurt ad revenues.[125]

However, although Aereo threatens their collection of retransmission fees for over-the-air broadcast signals, broadcasters still have a number of means for controlling and profiting from the distribution of their content. Even if MVPDs or customers can gain access to their free, over-the-air channels, many larger broadcasters can still use their affiliated pay channels as bargaining chips in negotiations with MVPDs. Additionally, broadcasters could consider alternative network structures, either switching completely to pay channels or offering tiered packages.

a. *Access to Affiliated Networks*

Even if Aereo technology were upheld as legitimate under the Copyright Act, larger broadcasters would still wield a powerful weapon to defend against MVPDs considering going the Aereo route. Many over-the-air broadcasters also own popular cable networks, which can be used as bargaining chips in retransmission consent negotiations.[126] For example, Fox could threaten to withhold its pay channels like Fox News or FX from cable operators who opt to intercept Fox's signal instead of paying retransmission fees to carry Fox.[127] Thus, MVPDs looking to avoid paying retransmission fees would be faced with a choice: continue to negotiate retransmission consent and pay the agreed-upon fees or lose out on popular cable channels such as ESPN (owned by Disney, which also owns ABC) and Bravo (owned by NBC).[128] Due to the massive popularity of many of these pay channels, this may not be a risk many cable and satellite operators would be willing to

123. *See id*. See analysis *infra* Part III for further discussion and explanation.

124. Christopher S. Stewart, *Over-the-Air TV Catches Second Wind, Aided by Web*, WALL ST. J., Feb. 21, 2012, *available at* http://online.wsj.com/news/articles/SB10001424052970204059804577229451364593094.

125. *Id.*

126. Joe Flint, *Having an Aereo Service Won't Necessarily Solve Retransmission Dilemma*, L.A. TIMES, Oct. 25, 2013, *available at* http://articles.latimes.com/2013/oct/25/entertainment/la-et-ct-directv-aereo-charter-time-warner-cable-20131025.

127. *Id.*

128. *See id*; David Lieberman, *Aereo CEO: Fight with Broadcasters Is About the Pay TV Bundle, Not Retransmission Consent*, DEADLINE HOLLYWOOD (Jan. 8, 2014, 11:04 AM), http://www.deadline.com/2014/01/aereo-ceo-fight-with-broadcasters-is-about-the-pay-tv-bundle-not-retransmission-consent.

take, even if it means paying for content that they would otherwise be able to obtain for free.

b. *Alternative Network Structures*

Had the Supreme Court affirmed the Second Circuit's holding that Aereo's retransmission of over-the-air broadcast signals does not constitute a "public performance," broadcast channels might turn to alternative network structures in order to preserve the dual-revenue stream from both ad and retransmission income.

First, many channels have threatened to convert from broadcast to pay-only channels, thus moving exclusively onto cable/satellite where their signals are protected from interception by Aereo's antennae.[129] Such a move would make it impossible for Aereo to intercept their channels, presumably protecting retransmission fees by forcing those consumers interested in receiving those channels to subscribe to conventional MVPDs in order to gain access. However, with the recent cord-cutting phenomenon,[130] consumers may opt not to follow these channels back to cable operators, threatening both MVPDs and broadcast stations by driving down viewership—and, consequently, ad revenue).[131]

Alternatively, networks might implement a two-tiered system, in which its stations would broadcast "a light version over the airwaves that would be without hit sports and entertainment programming, and a fuller version for subscribers to cable and satellite providers that pay the necessary fees."[132] Such a model more closely represents that of Internet media content services like Hulu and Spotify, which both offer an option between free, more limited programming and paid, premium services (Hulu Plus and Spotify Premium).[133] Such services have seen relative success in their

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129. *See id.*; Adam Liptak, *Justices Take Case on Free TV Streaming*, N.Y. TIMES, Jan. 11, 2014, at B1, *available at* http://www.nytimes.com/2014/01/11/business/media/supreme-court-to-hear-case-on-retransmission-of-tv-signals-by-aereo.html?_r=0.

130. *See generally* Dorothy Pomerantz, *How Much Are You Willing to Pay to Cut the Cord?*, FORBES (Feb. 29, 2012, 1:45 PM), http://www.forbes.com/sites/dorothypomerantz/2012/02/29/how-much-are-you-willing-to-pay-to-cut-the-cord/; Gerry Smith, *My Year Using Aereo: How A Dime-Sized Antenna Met My TV Needs*, HUFFINGTON POST (Aug. 13, 2013, 3:33 PM), http://www.huffingtonpost.com/gerry-smith/my-year-using-aereo_b_3745981.html; Stelter, *supra* note 2.

131. *See* David Lieberman, *Aereo's Victory Could Eventually Upend Retransmission Consent, Analysts Warn*, DEADLINE HOLLYWOOD (July 12, 2012, 6:10 AM), http://deadline.com/2012/07/aereo-lawsuit-local-tv-lawsuit-retransmission-consent-299265/ (estimating that MVPDs could lose about 10% of the viewer population that depend on free, over-the-air TV by becoming exclusively cable channels).

132. Stelter, *supra* note 2.

133. Hulu Plus Overview, HULU.COM, http://www.hulu.com/support/forum/184226 (last visited Jan. 14, 2014); Jake Smith, *Spotify Free vs Spotify Premium: What's the*

respective markets, both in terms of growing subscriber bases[134] and profit-per-subscriber.[135] The two-tiered model could present a win-win for both cable operators and their customers, increasing operator profits via increased viewership and value while simultaneously offering greater choice to consumers.[136]

c. *Viewership*

While services like Aereo threaten retransmission fees, they may also have a beneficial effect on viewership by giving content creators and broadcasters new outlets to reach consumers. AMC's show *Breaking Bad* enjoyed only modest ratings in its first five years, but enjoyed a meteoric rise in viewership in its final season.[137] A popular explanation for the show's sudden increase in popularity is that viewers who had previously missed out on the critically-acclaimed series were able to catch-up before the final season by watching the show on Netflix.[138] Changing the available mediums of access can directly affect consumers' television viewing habits;[139] in the case of *Breaking Bad*, Netflix allowed viewers to come around to the show

Difference?, POCKET-LINT (Dec. 12, 2013), http://www.pocket-lint.com/news/125771-spotify-free-vs-spotify-premium-what-s-the-difference.

134. Maggie McGrath, *Amazon and Hulu Could Slow Netflix Growth in 2014, Morgan Stanley Says*, FORBES (Jan. 7, 2014, 11:33 AM), http://www.forbes.com/sites/maggiemcgrath/2014/01/07/amazon-and-hulu-could-slow-netflix-growth-in-2014-morgan-stanley-says.

135. Jay Frank, *Why Music Streaming Is More Lucrative for Labels*, HYPEBOT.COM (Jan. 6, 2014), http://www.hypebot.com/hypebot/2014/01/why-music-streaming-is-more-lucrative-for-labels.html (finding that "[t]he average 'premium' subscription customer in the U.S. was worth about $16 a year to [a major record label], while the average buyer of digital downloads or physical music was worth about $14.").

136. Although this would result in less content or higher costs to those who currently rely solely on antennae to receive over-the-air broadcast television, the relatively low number of persons who rely solely on an antenna for over-the-air television, compared with the growing numbers of persons receiving television over the Internet, suggest that this may be a reasonable tradeoff. *See* Press Release, Consumer Electronics Ass'n, Only Seven Percent of TV Households Rely on Over-the-Air Signals, According to CEA Study (July 30, 2013) [hereinafter CEA Study], *available at* http://www.ce.org/News/News-Releases/Press-Releases/2013-Press-Releases/Only-Seven-Percent-of-TV-Households-Rely-on-Over-t.aspx (finding that only 7% of American TV households rely solely on an antenna for television programming, whereas 28% of American TV households receive programming on their TVs through the Internet).

137. Merrill Barr, *Three Shows That Changed the Way Networks Think About Viewership*, FORBES (Nov. 4, 2013, 10:30 AM), http://www.forbes.com/sites/merrillbarr/2013/11/04/three-shows-that-changed-the-way-networks-think-about-viewership.

138. *Id.*

139. *See id.*; *see also* Christopher S. Stewart, *Over-the-Air TV Catches Second Wind, Aided by Web*, WALL ST. J., Feb. 21, 2012, *available at* http://online.wsj.com/news/articles/SB10001424052970204059804577229451364593094.

outside the conventional channels of viewership.[140] Like Netflix, Aereo helped deliver content to an entirely new audience who might not otherwise receive it. Content creators and broadcast networks who are able to change their business models to embrace and integrate these new possibilities can expand their audiences, generating increased ratings, and even venture into new and riskier programming frontiers.[141]

d. *Spectrum Auction*

The FCC's upcoming incentive auction presents an option that would allow broadcast networks to deny Aereo access to their programming while simultaneously raising a large amount of capital.[142] The incentive auction gives television broadcasters a voluntary, opt-in opportunity to sell spectrum in exchange for cash.[143] Broadcast networks that choose to become cable channels could submit their now unused spectrum licenses to the auction, removing Aereo's source of programming and receiving billions of dollars in the process.[144] Although such a move might negatively impact a network's total viewership,[145] selling spectrum could be a viable way for broadcasters and their affiliates to "stick" it to Aereo—denying Aereo a source of content, regaining full control over the distribution of its content—while making significant profit from the proceeds of the sale. Furthermore, from a public policy perspective, such a move could help reallocate valuable spectrum to more productive or efficient uses—infusing broadcast stations with needed capital and furthering the spectrum priorities established by Congress[146] and the FCC.[147]

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140. *Id.*

141. *See* Barr, *supra* note 137; Stewart, *supra* note 139.

142. Kevin Eck, *Broadcast Networks May Use the FCC to Beat Aereo and Make Billions Doing It*, TVSPY (May 7, 2013, 11:24 AM), http://www.adweek.com/tvspy/broadcast-networks-may-use-the-fcc-to-beat-aereo-and-make-billions-doing-it/90545.

143. Chris Ziegler, *Crazy Like a Fox: How Broadcast Networks Could Rake in Billions by Going Cable-Only*, THE VERGE (May 6, 2013, 5:14 PM), http://www.theverge.com/2013/5/6/4305688/crazy-like-a-fox-how-broadcast-networks-could-rake-in-billions-by-going-cable-only.

144. *Id.*

145. An estimated 7% of American households rely solely on over-the-air television. CEA Study, *supra* note 136. Thus, if a network moves exclusively to a pay channel, it risks losing that portion of its viewership that does not pay for subscription television.

146. *See, e.g.*, Middle Class Tax Relief & Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6401-6414, 126 Stat. 155 (codified at 47 U.S.C. §§ 1451-1457).

147. *See, e.g.*, Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions, *Report and Order*, FCC 14-50, 29 FCC Rcd. 6567 (2014).

2. Multichannel Video Programming Distributors

a. *Integration*

Had the Supreme Court affirmed the Second Circuit's holding that Aereo's retransmission of over-the-air broadcast signals does not constitute a "public performance," MVPDs might seek to implement Aereo-like structures to reduce costs and supplement their own programming.

Using conventional retransmission technology, cable and satellite providers incur billions of dollars in retransmission fees in order to carry broadcast networks such as NBC, ABC, and CBS.[148] Aereo, on the other hand, was not subject to the same regulations regarding retransmission consent, and therefore did not pay such fees.[149] Although some saw Aereo as a threat to the longtime MVPD industry business model,[150] others suggested that cable companies could adopt similar systems and technologies as a way to reduce costs by avoiding billions of dollars in broadcast retransmission fees and copyright liability.[151] For example, Verizon could drop NBC from its FiOS television package and instead offer NBC via a separate online broadcast video service that mimics Aereo's technology.[152] Television providers like DirecTV, Time Warner Cable, and Charter Communications have considered implementing Aereo-like methods for capturing free broadcast-TV signals or even buying Aereo outright.[153] Furthermore, removing costs related to retransmission fees could also benefit consumers by presenting a way for MVPD operators to reduce rising bills.[154]

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148. Gerry Smith, *Aereo Wins Another Court Battle Against Big TV*, HUFFINGTON POST (Oct. 10, 2013, 1:49 PM), http://www.huffingtonpost.com/2013/10/10/aereo-lawsuit_n_4078740.html.

149. *Id.*

150. *Id.*

151. David Carr, *VCR's Past is Guiding Television's Future*, N.Y. TIMES, July 29, 2013, at B1, *available at* http://www.nytimes.com/2013/07/29/business/media/vcrs-past-is-guiding-televisions-future.html.

152. As an MVPD, Verizon would still be subject to retransmission consent requirements. However, it is unclear whether a stand-alone Aereo-like service offered by Verizon would be subject to the same retransmission consent rules. Thus, presumably Verizon could continue to provide its traditional cable service (sans NBC) while offering a supplementary, Aereo-like service carrying NBC, without paying retransmission fees.

153. Andy Fixmer, Alex Sherman & Jonathon Erlichman, *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services*, BLOOMBERG (Oct. 26, 2013), http://www.bloomberg.com/news/print/2013-10-25/directv-time-warner-cable-said-to-consider-aereo-type-services.html.

154. John McDuling, *Aereo: The Cloud Based Content Upstart That Could Upend the TV Industry*, QUARTZ (Oct. 15, 2013), http://qz.com/135136/aereo-the-cloud-based-content-upstart-that-could-upend-the-tv-industry.

b. *Supplemental Programming*

Additionally, MVPDs mired in retransmission consent disputes might use Aereo to supplement programming that would otherwise be subject to blackout.[155] Disputes over retransmission agreements and related fees are resulting in an ever-increasing number of programming blackouts.[156] According to the American Television Alliance, blackouts have grown more common over the last four years, from twelve in 2010 to over 114 in 2013.[157] Since his appointment, FCC Chairman Tom Wheeler has declared it a priority to prevent "consumers [from being] held hostage over corporate disputes" and losing access to broadcast signals during retransmission consent blackouts.[158] Aereo might have provided a potential solution, allowing consumers access to broadcasting programming during such a blackout.[159] In the event of a retransmission impasse, cable and satellite companies could adopt Aereo-like technology themselves[160] or even recommend Aereo to their subscribers in order to allow them uninterrupted access to the blacked-out programming.[161] Were Aereo an alternate source of programming during blackouts, some of the bargaining power would shift away from broadcasters in negotiating retransmission agreements by removing the leverage granted by the threat of a channel blackout.[162]

155. *See* Brian Stelter, *Aereo as Bargaining Chip in Broadcast Fees Battle*, N.Y. TIMES, July 22, 2013, at B5, *available at* http://http://www.nytimes.com/2013/07/22/business/media/with-prospect-of-cbs-blackout-time-warner-cable-to-suggest-aereo-as-alternative.html.

156. Halonen, *supra* note 121.

157. *TV Blackouts Hit All-Time High*, AMERICAN TELEVISION ALLIANCE, http://www.americantelevisionalliance.org/wp-content/uploads/2013/05/ATVA_FactSheet_Blackout_Map_v10.pdf (last visited Jan. 27, 2014).

158. Halonen, *supra* note 121.

159. *See id.*; *see also* Stelter, *supra* note 122.

160. David Lieberman, *Aereo's Victory Could Eventually Upend Retransmission Consent, Analysts Warn*, DEADLINE HOLLYWOOD (July 12, 2012, 6:10 AM), http://deadline.com/2012/07/aereo-lawsuit-local-tv-lawsuit-retransmission-consent-299265/.

161. Stelter, *supra* note 155 Time Warner Cable said it would recommend Aereo to its New York subscribers if its retransmission dispute with CBS was not resolved before the blackout deadline. Time Warner Cable and CBS eventually came to an agreement without ever resorting to any further Aereo involvement.

162. *See id.*; Halonen, *supra* note 121; *cf.* Joe Flint, *Having an Aereo Service Won't Necessarily Solve Retransmission Dilemma*, L.A. TIMES, Oct. 25, 2013, *available at* http://articles.latimes.com/2013/oct/25/entertainment/la-et-ct-directv-aereo-charter-time-warner-cable-20131025 (explaining that broadcasters with additional cable properties could possibly maintain leverage in retransmission negotiations by virtue of their other properties, while those without cable properties to tie into distribution deals could be harmed by cable and satellite companies building their own version of Aereo).

3. Consumers

Beyond the primary advantage of greater accessibility to creative content, legitimizing Aereo also has the potential to benefit consumers in a number of other ways. The introduction of Internet television providers introduces competition in a marketplace where there is currently very little: lowering the cost of television programming to consumers and increasing consumer choice, both in terms of *who* provides the content and *what* content the consumer receives.

Giving the public multiple avenues for viewing broadcast television promotes competition—and where programming distributors compete, consumers win.[163] Competition between Internet streaming services and conventional cable/satellite operators can lead to lower prices and greater consumer choice.[164] While normal cable customers pay a subscription fee that goes to both cable operators and broadcast stations (via retransmission fees), the subscription fee paid by Aereo subscribers ended at Aereo (who was not liable to broadcast stations for retransmission payments). Because many cable operators recoup the cost of paying transmission fees by passing such costs onto customers,[165] consumers may actually see lower costs by choosing Internet broadcasting services like Aereo, which have no retransmission fees to pass on to customers. Furthermore, if the Commission declines to treat Aereo as an MVPD, subscribers would have the opportunity to "unbundle," allowing viewers to obtain broadcast programming without the added burden of a 500-channel cable subscription.[166] In short, Aereo could mean consumers paying less to get less of what they do not want.

E. Congress and the FCC Are Better Equipped Than the Court to Handle Such an Issue

In his dissent from *International News Service*, Justice Brandeis famously warned against the dangers of judicial rulemaking:

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163. *See, e.g.*, Wheeler, *supra* note 120.

164. *See* Carr, *supra* note 151.

165. Bob Fernandez, *Fight Continues over Cable Retransmission Fees*, PHILA. INQUIRER, Jan. 6, 2014, *available at* http://articles.philly.com/2014-01-06/business/45885511_1_retransmission-fees-tv-stations-similar-fees.

166. *See* Lieberman, *supra* note 160. Aereo is currently not subject to the same MVPD-specific regulations, including Must-Carry and public, educational, and governmental access, and therefore does not need to accept bundled channels in exchange for retransmission consent. Consequently, consumers only interested in receiving broadcast programming can do so without the added burden of additional, required channels. *See also* Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, *Notice of Proposed Rulemaking*, FCC 14-210, MB Docket No. 14-261 (2014) [hereinafter *MVPD NPRM*], available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-210A1_Rcd.pdf

> [T]he creation or recognition by courts of a new private right may work serious injury to the general public unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment, and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.[167]

Consequently, even if prudential and policy concerns mandate that Aereo's service be brought within the constraints of the Copyright Act, "the proper course is not to bend and twist the Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave Congress the task of deciding whether the Copyright Act needs an upgrade."[168] Thus, where the statutory language compels a particular result, rather than risk engaging in results-oriented judicial rulemaking, the Court should allow the proper legislative bodies to inform any change of direction.

1. Congress Could Legislate to Bring Aereo Within the Scope of the Copyright Act

In 1976, Congress amended the Copyright Act in response to prior decisions by the Supreme Court in *Fortnightly Corp. v. United Artists Television, Inc.* and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, where the Court narrowly construed the definition of a "performance" in the Copyright Act.[169] The Court in *Fortnightly* held that community antenna television systems, in receiving, reproducing, and transmitting television programs received from television stations, did not "perform" said programs and therefore did not infringe on the exclusive rights of the television stations.[170] Similarly, the Court in *Teleprompter* held that the importation of "distant signals" from one community to another does not

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167. Int'l News Serv. v. Associated Press, 248 U.S. 215, 262–63 (1918) (Brandeis, J., dissenting).

168. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2518 (2014) (Scalia, J., dissenting); *see also* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 456 (1984) ("It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed."); Eldred v. Ashcroft, 537 U.S. 186, 212 (2003) ("[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives.").

169. *See generally* Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968); Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974).

170. *Fortnightly Corp.*, 392 U.S. at 395.

constitute a "performance" under the Copyright Act, thus allowing a community antenna television system to maintain its "nonbroadcaster" status and continue carrying signals from distant sources without violating copyright holders' rights.[171] Acknowledging its narrow reading of "performance," the Court maintained that its job was to interpret statutory language, and that where new technologies emerged that made such language outdated or ambiguous, the responsibility fell on Congress—not the courts—to address such policy and regulatory questions:

> These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.[172]

As a result, Congress revised the Copyright Act to clarify the intended retransmission relationship between television stations and cable television providers by redefining what constitutes a performance and inserting the Transmit Clause.[173] While cable operators were previously able to retransmit distant broadcast signals without permission because such retransmissions were not "performances" under the 1909 Act, the 1976 Copyright Act now deemed such retransmissions "performances," and therefore required cable operators to pay statutory royalties to the owners of copyrighted programs retransmitted by their systems, or otherwise infringe on broadcasters' exclusive rights.[174] In addition, Congress passed the 1992 Cable Act, implementing, among other things, the must carry and retransmission consent schemes that governed the basic relationships between broadcast stations and MVPDs.[175]

If Congress does in fact wish for Aereo to be governed by the current retransmission consent structure, rather than having the Supreme Court stretch the meaning of the Transmit Clause to reach activity outside its statutory language, Congress should simply amend the Copyright Act to bring Aereo within its scope. Aereo, once again, threatens a shift in the current business and commercial relationships of the communications

171. *Teleprompter Corp*., 415 U.S. at 408–09.
172. *Id.* at 414 (citation omitted).
173. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; H.R. REP. NO. 94-1476, at 88–89 (1976).
174. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 709 (1984).
175. Cable Television Consumer Protection & Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

industry, and should therefore not "be controlled by means of litigation based on copyright legislation enacted [almost] half a century ago."[176] Instead, regulation of the industry should fall to Congress, which can impose its will simply and unambiguously via legislation.

2. Congress Could Reconcile the Retransmission Consent and the Compulsory License System

Currently, the United States Copyright Office has concluded that Internet retransmission systems, such as Aereo, are not cable systems and therefore do not qualify for section 111 compulsory licenses under the Copyright Act.[177] Furthermore, the legislative history indicates that if Congress had intended to extend section 111 to Internet retransmissions, it would have done so expressly—either through the explicit language of section 111 as it did for microwave retransmissions, or by codifying separate statutory provisions as it did for satellite carriers.[178] Given Aereo's placement outside the retransmission consent scheme of the Cable Act, Congress has an opportunity to not only regulate Aereo, but also develop a regulatory framework that better reconciles the competing principles behind retransmission consent provisions and the MVPD compulsory licenses.

The retransmission consent provisions of the Cable Act come into direct conflict with the MVPD compulsory licensing scheme.[179] While compulsory licenses enabled cable systems to bypass the transaction costs and impracticalities of negotiating individual licenses with dozens of copyright owners while simultaneously ensuring that copyright owners were compensated, [180] retransmission consent has effectively reimplemented many of those transaction costs by once again promoting copyright exclusivity.[181] While the compulsory license provides cable operators with the right of retransmission under the Copyright Act upon payment of the statutory royalty fee, retransmission consent effectively permits broadcasters to stop the operation of the compulsory license through withholding consent of retransmission to a cable operator.[182]

Although, as a matter of general policy and equity, it is unlikely that Congress would eliminate retransmission consent requirements entirely,[183]

176. *Teleprompter Corp*., 415 U.S. at 414.

177. *See* WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 283 (2d Cir. 2012); *see also* Letter from Jacqueline C. Charlesworth, Gen. Counsel & Associate Register of Copyrights, U.S. Copyright Office, to Matthew Calabro, Aereo, Inc. (July 16, 2014), *available at* http://www.scribd.com/doc/234281034/071614-Aereo-Copyright-Office-Letter.

178. *Id.* at 282; *see also* 17 U.S.C. §§ 119, 122.

179. RALPH OMAN, REGISTER OF COPYRIGHTS, THE CABLE AND SATELLITE COMPULSORY LICENSES: AN OVERVIEW AND ANALYSIS at xviii (1992) [hereinafter *Copyright Report*].

180. ivi, Inc., 691 F.3d at 281.

181. *Copyright Report*, *supra* note 179, at 143.

182. *Id.* at 148.

183. The Register of Copyrights offered eliminating retransmission consent as one possible option for reconciling the 1992 Act and the Copyright Act. *Id.* at 151.

Congress could amend both the Copyright Act and the Communications Act to allow Internet retransmission services such as Aereo to operate outside retransmission consent but still require them to obtain compulsory licenses—similar to those granted to other MVPDs. Given Aereo's more limited scope, both in terms of audience and content offerings, it makes little sense to regulate it identically to large MVPDs like Comcast or Time Warner Cable. Unlike traditional MVPDs that also carry channels that are not available over-the-air, Aereo offers little value beyond what subscribers could accomplish themselves with their own equipment and a few lines of code. As such, Aereo obtaining retransmission consent seems largely symbolic, and there is little threat of Aereo significantly undermining broadcasters' revenue stream simply by failing to obtain retransmission consent. Furthermore, the requirement that Aereo-style services obtain compulsory licenses and pay statutory royalties alleviates any moral ambiguities from retransmitting broadcasters' content without express authorization while also lending financial support and incentive to broadcasters to continue producing creative works.

3. The FCC Should Consider Aereo's Effect on the MVPD Market

The Communications Act defines an MVPD as:

> [A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.[184]

In December 2014, the FCC issued a Notice of Proposed Rulemaking seeking to reinterpret this statutory definitionto classify online video distributors—such as Aereo—as MVPDs if they offer multiple, linear channels of video programming.[185] If the FCC determines that such services constitute MVPDs, they would be subject to the same regulatory privileges and obligations as other MVPDs, specifically subject to the FCC's program access, program carriage, and retransmission consent rules.[186]

Since his appointment, FCC Chairman Wheeler has expressed concerns about pay-televison subscribers losing access to broadcast signals during retransmission consent blackouts, and has made it a priority to address corporate disputes that result in consumers being held hostage.[187] Aereo

184. 47 U.S.C. § 552(3).
185. *MVPD NPRM*, *supra* note 166..
186. *See id.*; *see also* 47 C.F.R. §§ 76.1001, 76.1002, 76.1301, 76.65 (2014).
187. Halonen, *supra* note 121.

retransmitted broadcast signals without needing to obtain retransmission consent,[188] and therefore offered a means for viewers to continue receiving their broadcast channels during retransmission consent blackouts.[189] For Wheeler and the Commission, Aereo could play a role in protecting consumers from corporate collateral damage, ensuring they do not suffer from a lack of service during retransmission impasses. Consequently, if Wheeler is truly trying to safeguard consumer interests in light of retransmission blackouts, ensuring that Aereo can continue to retransmit blacked out broadcast channels may be a viable means of doing so.[190]

If the FCC does expand the definition of MVPD to include Internet-based video distribution platforms, the number of distributors may increase significantly.[191] An influx of new distribution platforms into the market would inevitably create a surplus of distributors and reduce the ability of current MVPDs to put downward pressure on carriage fees.[192] Such a shift would give broadcasters even greater leverage in retransmission consent disputes, perhaps encouraging even more blackouts and driving up retransmission fees (and potentially consumer cable prices). There are many competing interests in discerning the definition of an MVPD, but if the FCC truly cares about preserving consumer television access, it should continue to define MVPDs to exclude services like Aereo.

Nonetheless, even if the FCC classifies online video distributors resembling Aereo as MVPDs, consumers may still see a boon in the form of greater competition in the MVPD marketplace. Despite the increased regulatory burden, MVPD status would allow Aereo to take advantage of certain MVPD-specific privileges as well, including the FCC's program access rules[193] and good faith obligations regarding retransmission consent,[194] allowing Aereo to compete more effectively in the provision of video programming. Where there is increased competition, expanded consumer choice and lower prices typically follow.

188. *See, e.g.*, Nunez, *supra* note 50.
189. Stelter, *supra* note 155.
190. Aereo is not currently considered a cable system or MVPD, and therefore is not subjected to 47 U.S.C. § 325(b)(1)(A). However, this may change depending on the outcome of the FCC's rulemaking regarding the interpretation of the MVPD classification. *See MVPD NPRM*, *supra* note 166.
191. Nunez, *supra* note 50.
192. *Id.*
193. 47 C.F.R. §§ 76.1001, 76.1002 (2014).
194. 47 C.F.R. § 76.65 (2014).

F. The Public Performance Right is the Wrong Theory of Liability

As suggested by Justice Scalia[195] and various law professor amici,[196] infringement of the public performance right is an inapt theory of liability for attacking Aereo's conduct. Rather than stretching the public performance right to reach Aereo, the Court should have waited to invalidate Aereo's service on the basis of broadcasters' reproduction right or a theory of secondary liability.

1. The Reproduction Right

In addition to the right to publicly perform their works, the Copyright Act also bestows upon copyright owners the exclusive right "to reproduce the[ir] copyrighted work."[197] Thus, when a customer presses record and Aereo creates a copy of the broadcast programming, it potentially infringes on broadcasters' exclusive right to reproduce their copyrighted content. Not only is this a much more elegant and straightforward solution than pursuing a contorted version of the public performance right, it also avoids disrupting the intricate system of rights established by Congress in the Copyright Act. As explained in the Law Professors' Brief:

> The rights must be read in concert, rather than in isolation, and the system's integrity depends crucially on distinguishing among them . . . . Often, what appears to be a gap in a right is simply the boundary where it abuts another . . . . Blurring or eliminating lines between the rights creates uncertainty, frustrating development of healthy licensing markets.[198]

Applying the wrong rights framework threatens to upend the carefully constructed balance between rights holders and the public. For example, the first sale doctrine, which allows someone who has purchased a copy of a copyrighted work to sell her copy without the permission of the copyright owner,[199] is an affirmative defense to claims involving infringement of the distribution right—not the reproduction right. Thus, while the first sale doctrine allows a student to resell his copy of a textbook, it does not permit him to print and sell new copies. Just as conflating the reproduction and distribution rights in the first sale context leads to nonsensical results, so too

195. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2512–14 (2014).
196. *See* Brief for 36 Intellectual Property & Copyright Law Professors as Amici Curiae in Support of Respondent at 5, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (No. 13-461) [hereinafter Law Professors' Brief].
197. 17 U.S.C. § 106(1) (2012).
198. Law Professors' Brief, *supra* note 196, at 9–10.
199. *See* 17 U.S.C. § 109 (2012).

does holding Aereo infringing under the performance right rather than the reproduction right.

2. Secondary Liability

The doctrine of secondary liability allows a copyright owner to litigate against a defendant for infringement by third parties where the defendant himself has not directly engaged in infringing activity.[200] As Justice Scalia pointed out, "[m]ost suits against equipment manufacturers and service providers in volve secondary-liability claims," citing suits against Sony and Grokster for their respective provision of VCR and peer-to-peer technologies.[201] In those cases, rather than holding the individual defendants directly liable, the Supreme Court pronounced that Sony and Grokster could be liable even without actually infringing any copyrights themselves. In *Sony*, the Court held that an equipment manufacturer might be liable if the device was incapable of "significant noninfringing uses,"[202] and the Court in *Grokster* held that a defendant who induced its users to infringe could be liable as a matter of contributory infringement.[203]

Given the clear, established secondary liability framework and Aereo's acknowledged resemblance to Sony's Betamax, it makes very little sense that the Court opted to find Aereo to be a direct infringer, rather than force the broadcasters to proceed on their secondary liability claims. As the dissent noted, the Court's "cable-TV-lookalike" test is significantly less straightforward than the jurisprudence surrounding secondary liability, and offers little guidance to Aereo, broadcasters, or other technology-forward innovators and services.[204] Rather, by trying to shoehorn Aereo under the public performance right, the Court has unnecessarily muddled the waters regarding the legality of both future and existing services.[205]

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200. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 435 (1984).

201. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2512 (2014) (Scalia, J., dissenting) (citing *Sony*, 464 U.S. at 433; Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005)).

202. *See Sony*, 464 U.S. at 442.

203. *See Grokster*, 545 U.S. at 935.

204. *See Aereo*, 134 S. Ct. at 2516–18 (Scalia, J., dissenting).

205. *Id.* at 2517 (Scalia, J., dissenting).

> It will take years, perhaps decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment. (And automated systems now in contemplation will have to take their chances.) The Court vows that its ruling will not affect cloud-storage providers and cable-television systems . . . but it cannot deliver on that promise given the imprecision of its result-driven rule. *Id.*

IV. CONCLUSION

In order to be consistent with principles of statutory interpretation, promote predictability and consistency, and further the purposes of the Copyright Act, the Supreme Court erred in reversing the Second Circuit's holding in *American Broadcasting Cos. v. Aereo, Inc*.. Attempting to constrain Aereo under the public performance right is forced at best, and there are many more effective, legally defensible alternatives for regulating such Internet video services. Especially given the guiding purpose of copyright protection, to promote the progress of the useful arts and sciences, the Court should not be straying from the letter of the law in order to discourage innovation merely because of its potentially disruptive consequences for contemporary industry structures and relationships. Instead, as technology evolves and causes industry-wide changes, it should be the responsibility Congress, administrative agencies, and market competitors to adapt and respond accordingly.

A Tale of Two Agencies: Exploring Oversight of the National Security Administration by the Federal Communications Commission

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I. INTRODUCTION

> "In the years to come, we will have to keep working hard to strike the appropriate balance between our need for security and preserving those freedoms that make us who we are. That means reviewing the authorities of law enforcement, so we can intercept new types of communications, but also build in privacy protections to prevent abuse."
>
> -President Obama, May 23, 2013[1]

According to recent disclosures, the National Security Agency ("NSA") has been collecting information from hundreds of millions of email accounts and phone numbers, many belonging to Americans.[2] The NSA's strategy is to use this information to "draw detailed maps of a person's life, as told by personal, professional, political, and religious connections."[3] Former NSA director Gen. Keith Alexander argued that the agency's bulk collection of email and call detail records is necessary because the government "need[s] the haystack to find the needle."[4]

The NSA's extensive surveillance of U.S. citizens was brought into the spotlight by the recent disclosures of former NSA contractor Edward Snowden.[5] The first of Snowden's disclosures, released by The Guardian on Wednesday, June 5, 2013, revealed that the NSA was collecting phone call detail records from millions of U.S. consumers on a daily basis.[6] This has prompted widespread public concern about the extensive information collection policy of the NSA. As technology continues to develop and the Internet continues to play a major role in modern life, governmental monitoring of Internet activity will likely become an area of increasing concern. The best way to ensure proper oversight of this monitoring is by empowering an administrative agency: namely, the Federal Communications Commission (the "FCC").

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1. Remarks by the President at the National Defense University, The White House, Office of the Press Secretary, May 23, 2013, *available a*t http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

2. Barton Gellman & Ashkan Soltani, *NSA Collects Millions of E-mail Address Books Globally*, WASH. POST, Oct. 14, 2013, http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_story.html?ref=twttr.

3. *Id.*

4. *Id.*

5. *See, e.g.*, James Bamford, *Edward Snowden: The Most Wanted Man in the World*, WIRED (Aug. 13, 2014), http://www.wired.com/2014/08/edward-snowden/.

6. Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN, June 5, 2013, http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order.

This Note will address what role the FCC could and should play in overseeing intelligence activities that implicate individual privacy on the Internet and telecommunications networks. This Note argues that the FCC, as the expert independent agency that routinely deals with the Internet and telecommunications networks, has both the tools and capacity to provide some oversight and protection for Internet users. Part II discusses the background of each agency, beginning with the NSA, then delves into the FCC and its efforts to keep pace with the ever-changing Internet. Part III argues that, because the existing mechanisms for overseeing governmental, domestic surveillance programs are inadequate, and given the FCC's long history of scrutinizing the interplay of national security and privacy involving telecommunications, Congress should empower the FCC to address privacy concerns raised by the NSA's surveillance of U.S. citizens. Part IV discusses how the FCC could address NSA surveillance activities, laying out possible, practical solutions that Congress should provide.

II. TWO CHANGING AGENCIES: THE NSA AND THE FCC

A. The NSA has increasingly turned its surveillance towards the American public.

The NSA, originally formed to monitor outside threats to the security of the United States, has increasingly turned its surveillance towards the American public.[7] The NSA was originally formed in 1952 growing out of intelligence and cryptology analytics developed during WWII, which naturally developed the agency's mission to monitor threats coming from outside the United States.[8] Today, the NSA is "authorized to collect, process, analyze, produce, and disseminate signals intelligence information and data for foreign intelligence and counterintelligence purposes to support national and departmental missions, and to provide signals intelligence support for the conduct of military operations."[9]

Under the letter of the law, this power is significantly limited in the domestic arena. The Foreign Intelligence Surveillance Act of 1978 ("FISA") [10] bars the NSA from intercepting any domestic, electronic communications of persons inside the United States unless a judge on the

7. *See, e.g.*, Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. TIMES, Apr. 16, 2009, A1, *available at* http://www.nytimes.com/2009/04/16/us/16nsa.html.

8. *See generally* THOMAS L. BURNS, CTR. FOR CRYPTOLOGIC HISTORY, NAT'L SEC. AGENCY, THE ORIGINS OF THE NATIONAL SECURITY AGENCY: 1940–1952 (1990), *available at* https://www.nsa.gov/public_info/_files/cryptologic_histories/origins_of_nsa.pdf.

9. *Frequently Asked Questions: Oversight*, NAT'L SEC. AGENCY, http://www.nsa.gov/about/faqs/oversight.shtml (last visited Dec. 20, 2014) (citing Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,947–48 (Dec. 4, 1981)).

10. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1885c).

Foreign Intelligence Surveillance Court ("FISA Court") issues a warrant upon finding that "the purpose of the surveillance is to obtain foreign intelligence information . . . and there is probable cause to believe that the target of the surveillance is an agent of a foreign power."[11] FISA also places various restrictions on other forms of domestic surveillance activities that do not intercept the contents of communications, such as the "installation and use" of pen registers or trap and trace devices, which capture the origin and destination of phone calls or other communications to and from a particular telephone number or other device.[12] In 2001, Congress substantially expanded FISA with the USA PATRIOT Act,[13] adding, among other provisions, a section that authorizes the Director of the Federal Bureau of Investigation ("FBI")—or FBI agents designated by the Director—to petition the FISA Court for "an order requiring the production of any tangible things . . . for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities."[14] Moreover, under Executive Order 12,333, when the NSA conducts intelligence-gathering activities abroad—which are not regulated by FISA[15]—it may collect, retain, or disseminate information about United States persons "only in accordance with procedures established by the head of the agency and approved by the Attorney General."[16]

Despite its foreign-centric mission and the express limits on its domestic authority, the NSA has increasingly turned its attention to activities of persons within the United States in the wake of 9/11. For instance, in 2006, it was discovered that the NSA had created a call database in 2001 that collected tens of millions of citizens' phone records from data provided by AT&T, Verizon, and BellSouth.[17] "[T]he largest database ever assembled in the world" at the time, its goal was to log "every call ever made within the nation's borders."[18] The NSA itself has acknowledged its serious obligation

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11. PRESIDENT'S REVIEW GRP. ON INTELLIGENCE AND COMMC'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD 131 (2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf; *see also* FISA § 104, 50 U.S.C. § 1804 (2012) (procedures for issuance of surveillance order); *but see* FISA § 102, 50 U.S.C. § 1802 (2012) (permitting President to authorize surveillance of "communications used exclusively between or among foreign powers").

12. FISA § 402, 50 U.S.C. § 1842 (2012) (authorizing a designated government attorney to apply for pen register or trap and trace order upon certifying its relevance to "international terrorism or clandestine intelligence activities").

13. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended at scattered sections of U.S.C.).

14. *Id.* § 215 (codified as amended at FISA § 501, 50 U.S.C. § 1861 (2012)).

15. *See* PRESIDENT'S REVIEW GRP. ON INTELLIGENCE AND COMMC'NS TECHS., *supra* note 11, at 183; *see also* 50 U.S.C. § 1812 (2012).

16. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,950 (Dec. 4, 1981).

17. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY (May 11, 2006, 10:38 AM), http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm.

18. *Id.* (internal quotation marks omitted).

to operate effectively in an increasingly interconnected and globalized world without stepping on the toes of civil liberties for the sake of national security.[19]

Additionally, the NSA's intrusions into domestic communications extend beyond call data to reach citizens' activity on the Internet.[20] For years, the NSA "unlawfully gathered tens of thousands of emails and other electronic communications between Americans" as part of the agency's broader collection of communications as they "flow across Internet hubs" under Section 702 of FISA.[21] Pursuant to these practices, the NSA may have intercepted as many as 56,000 domestic electronic communications through various methods, [22] some of which the FISA Court has found unconstitutional.[23]

The disclosure of these NSA practices triggered a substantial backlash. Many Americans reacted by taking steps to insulate themselves from what they considered unwarranted government intrusion on their private lives and activities.[24] Even though several crucial FISA Court rulings have been partially declassified and released to the public[25] in an effort to demonstrate that the NSA's powers are not unrestrained, public trust and confidence in the agency has clearly diminished.[26] In the wake of these disclosures, forty-five percent of Americans felt that the government went too far in its surveillance programs pursuant to anti-terrorism efforts.[27] This "massive

19. NSA, The NSA: Missions, Auths., Oversight and P'ships (Aug. 9, 2013) *available at* http://www.nsa.gov/public_info/_files/speeches_testimonies/2013_08_09_the_nsa_story.pdf [hereinafter NSA: Missions, Authorities, Oversight, & Partnerships].

20. Ellen Nakashima, *NSA Gathered Thousands of Americans' E-mails Before Court Ordered It to Revise Its Tactics*, WASH. POST (Aug. 21, 2013), http://www.washingtonpost.com/world/national-security/nsa-gathered-thousands-of-americans-e-mails-before-court-struck-down-program/2013/08/21/146ba4b6-0a90-11e3-b87c-476db8ac34cd_story.html.

21. *Id.* (citing FISA § 702, 50 U.S.C. § 1881a (2012)).

22. *Id.*

23. Gov't's Ex Parte Submission of Reauthorization Certification and Related Procedures (Foreign Intelligence Surveillance Court Oct. 3, 2011) [hereinafter FISC Memorandum Opinion], *available at* http://apps.washingtonpost.com/g/page/national/fisa-court-documents-on-illegal-nsa-e-mail-collection-program/409/; *see also* Nakashima, *supra* note 20.

24. Grant Gross, *People Flock to Anonymizing Services After NSA Snooping Reports*, PCWORLD (Oct. 10, 2013 1:10 PM), http://www.pcworld.com/article/2054040/people-flock-to-anonymizing-services-after-nsa-snooping-reports.html (discussing people protecting themselves by anonymizing their own Internet traffic to hide from governmental surveillance).

25. *See, e.g.*, *Now Declassified: FISA Court Ruling Documents*, WALL ST. J. (Aug. 21, 2013, 5:17 PM), http://blogs.wsj.com/washwire/2013/08/21/now-unclassified-fisa-court-ruling-documents/.

26. *See* Jonathan D. Salant, *Snowden Seen as Whistle-Blower by Majority in New Poll*, BLOOMBERG (July 10, 2013 6:00 AM), http://www.bloomberg.com/news/2013-07-10/snowden-seen-as-whistlebloweer-by-majority-in-new-poll.html.

27. *Id.*

swing" in public opinion about government policies embodies "the public reaction and apparent shock at the extent to which the government has gone in trying to prevent future terrorist incidents."[28] Coupled with the steps that many Internet users are taking to prevent government intrusion on their online activities and communication, this shift in public opinion shows that Americans are dissatisfied with the reach of government surveillance.[29]

B. The Federal Communications Commission is a dynamic agency, adapting to new communications technology as it emerges.

The FCC makes a conscious effort to adapt to new technology. Established by the Communications Act of 1934,[30] the FCC regulates interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia, and U.S. territories.[31] As the agency's then-Chairman acknowledged in 2012, the FCC necessarily plays a role in facilitating the continuing development of the Internet.[32] Moreover, the FCC's governing statutes empower the agency to investigate and regulate actual and potential breaches in communications privacy that threaten customer proprietary network information ("CPNI"), among other types of customer information.[33] This authority encompasses not only traditional mediums of telecommunications,[34] such as the Public Switched Telephone Network,[35] but also newer mediums, such as the

28. *Id.* (quoting Peter Brown, assistant director of Quinnipiac's polling institute).

29. *Id.*; Gross, *supra* note 24.

30. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–620 (2012 & Supp. 2013)).

31. *See* Communications Act § 1, 47 U.S.C. § 151.

32. Julius Genachowski, Chairman, FCC, Prepared Remarks on Cybersecurity at the Bipartisan Policy Center 2 (Feb. 22, 2012) [hereinafter Genachowski Cybersecurity Speech], *available at* http://www.fcc.gov/document/chairmans-remarks-cybersecurity-bipartisan-policy-center. Former Chairman Genachowski noted that "it's critical that we preserve Internet freedom and the open architecture of the Internet, which have been essential to the Internet's success as an engine of innovation and economic growth." *Id.*

33. *See, e.g.*, Communications Act § 222, 47 U.S.C. § 222 (2012) (imposing a duty on "[e]very telecommunications carrier . . . to protect the confidentiality of proprietary information" involving subscribers and other carriers); *see also* Alan J. Chang, *The Federal Communications Commission and the NSA Call Database: The Duty to Investigate*, 30 HASTINGS COMM. & ENT. L.J. 581, 586 (2008).

34. *See* Implementation of the Telecomms. Act of 1996, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 07-22, 22 FCC Rcd. 6927, 6954–57, paras. 54–59 (2007), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-07-22A1.pdf (extending CPNI privacy rules to providers of "interconnected VoIP service").

35. For a detailed discussion of the PSTN and the FCC's role in regulating it, see Kevin Werbach, *No Dialtone: The End of the Public Switched Telephone Network*, 66 FED. COMM. L.J. 203, 205–07 (2014).

Internet, to the extent that the FCC considers providers of Internet traffic to be "telecommunications carriers."[36]

Communications privacy plays an important role in the FCC's formulation of policies and procedures to promote the use and development of the Internet, and the FCC may even have substantial authority to act in this area.[37] The agency recognizes that the adoption of broadband is affected by consumer's perception of their online privacy and security.[38] Indeed, the FCC has made a point of adapting to and fostering privacy and security on the Internet by developing industry standards to regulate communications providers as new technology has developed.[39] To that end, the agency puts a strong emphasis on working with industry leaders, academics, engineers, federal partners, as well as companies that work to build and expand Internet infrastructure and services, representatives from state and local entities, and Internet entrepreneurs and pioneers.[40] The FCC has thus made a point to stay abreast of new technological developments in Internet and broadband technology, while working to facilitate consumer use of and confidence in this technology.

III. OVERSIGHT IS NEEDED, AND THE FCC SHOULD PROVIDE IT

A. Existing executive and legislative oversight mechanisms are inadequate in promoting efficiency and public confidence in the NSA.

The executive and legislative mechanisms currently in place to provide oversight of the NSA are inadequate in promoting public confidence and effective national security. Ostensibly, the activities of the NSA are generally governed by the Constitution, federal law, executive orders, and regulations of the Executive Branch. [41] On the legislative side, there are two

36. *Cf.* Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, FCC 14-61, 29 FCC Rcd. 5561, 5612–16, paras. 148–55 (2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1_Rcd.pdf (seeking comment on whether the FCC should reinterpret Title II of the Communications Act, 47 U.S.C. §§ 201–276, to include Internet service providers as telecommunications carriers).

37. *See* Verizon v. FCC, 740 F.3d 623, 644-46 (identifying § 706 of the Communications Act as the source of this authority).

38. Genachowski, *supra* note 32, at *3.

39. *See id.* at 4. Former Chairman Genachowski noted that, "[a]s the nation's expert agency on communications, the FCC has a long history of engagement on network reliability and security, working with commercial communications providers, wired and wireless, to develop industry-based, voluntary best practices that improve security and reliability." *Id.*

40. *Id.*

41. *Frequently Asked Questions Oversight*, NAT'L SEC. AGENCY, http://www.nsa.gov/about/faqs/oversight.shtml (last visited Feb. 20, 2015); *see About the*

congressional bodies—the House Permanent Select Committee on Intelligence ("HPSCI") and the Senate Select Committee on Intelligence ("SSCI") —that are responsible for ensuring that the NSA follows the applicable laws and regulations.[42] In the executive branch, NSA oversight is vested in the President's Intelligence Advisory Board, the Office of the Director of National Intelligence, and the Department of Justice. [43] Ostensibly, in addition to these legislative and executive oversight mechanisms, the NSA has also implemented internal controls: the Office of the Inspector General performs audits and investigations while the Office of Compliance operates to ensure that the NSA follows relevant standards.[44] However, despite the appearance of effective controls, these oversight mechanisms have failed to prevent the current public crisis in confidence that the NSA is fulfilling its mission with the least possible adverse impact on the privacy of U.S. citizens.

The authority of the NSA, subject to the above controls, is very limited on paper. Every intelligence activity that the NSA undertakes is purportedly constrained to the purposes of foreign intelligence and counterintelligence.[45] For instance, Executive Order 12,333 provides the authority for the NSA to engage in the "collection of communications by foreign persons that occur wholly outside the United States."[46] Additionally, FISA authorizes the NSA to compel U.S. telecommunications companies to assist the agency in targeting persons who are not U.S. citizens and are reasonably believed to be located outside the United States.[47]

However, despite the appearances of controls, both external and internal, the "communications of U.S. persons are sometimes incidentally acquired in targeting the foreign entities."[48] The varying types of data gathered can produce a "detailed map" of a given person's life based on those persons with whom they are in contact.[49] For instance, metadata can be used to piece together substantial information about relationships; this information includes who introduced two people, when they met, and their

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Committee, U.S. SENATE SELECT COMM. ON INTELLIGENCE, http://www.intelligence.senate.gov/about.html (last visited Feb. 20, 2015) [hereinafter SENATE INTELLIGENCE COMM.]; *History and Juristiction*, U.S. HOUSE OF REPRESENTATIVES PERMANENT SELECT COMM. ON INTELLIGENCE, http://intelligence.house.gov/about/history-jurisdiction (last visited Feb. 20, 2015) [hereinafter HOUSE INTELLIGENCE COMM.]; Lynn Mattice, *Debating the NSA, Espionage and Hackers with Congressman Mike Rogers*, SECURITY MAG. (Oct. 1, 2013), http://www.securitymagazine.com/articles/84782-the-nsa-cyber-espionage-hackers-and-more.

42. *Frequently Asked Questions Oversight*, *supra* note 41; SENATE INTELLIGENCE COMM., *supra* note 41; HOUSE INTELLIGENCE COMM., *supra* note 41; Mattice, *supra* note 41.

43. *Frequently Asked Questions Oversight*, *supra* note 41.

44. *Id.*

45. NSA: Missions, Authorities, Oversight and Partnerships, *supra* note 19, at 2.

46. *Id.* at 3–4 (citing Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981)).

47. *Id.* at 5 (citing FISA § 702, 50 U.S.C. § 1881a) (2012)).

48. *Id.* at 4.

49. Gellman & Soltani, *supra* note 2.

general communication patterns, as well as the nature and the extent of their relationships.[50] The recently disclosed collection of contact lists by the NSA has not been authorized by Congress or FISA.[51] Additionally, while other collection policies that touch upon domestic communications, such as those under Section 702, have authorization, often neither lawmakers nor the public have even a rough estimate of how many communications of U.S. citizens are being acquired.[52]

The NSA is easily able to operate around its apparent lack of authority. One anonymous official has been quoted as saying that the NSA consciously avoids the restrictions placed on it by FISA by collecting this information from access points all over the world.[53] This method means that the NSA is not required to restrict itself to collecting contact lists belonging to specified intelligence targets.[54] The collection mechanism ostensibly operates under the assumption that the bulk of the data collected through the overseas access points is not data from American citizens.[55] However, this is not necessarily true due to the globalized nature of the Internet as a communications infrastructure, as "data crosses boundaries even when its American owners stay at home."[56]

The oversight mechanisms currently applied to this collection program require the NSA only to satisfy its own internal oversight mechanisms or to answer possible inquiries from executive branch that there is a "valid foreign intelligence target" in the data collected. [57] Moreover, congressional oversight is not effective because members of Congress have candidly said they do not know precisely the right questions to ask NSA officials.[58] Often,

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50. TEDx Talks, *The Power of Metadata: Deepak Jagdish and Daniel Smilkov at TEDxCambridge 2013*, YOUTUBE (Sept. 25, 2013), http://www.youtube.com/watch?v=i2a8pDbCabg. The talk encompasses the subject of how metadata can be used to determine the nature, extent, and timeline of a given relationship between two people based on the metadata in their emails. *Id.*

51. Gellman & Soltani, *supra* note 2.

52. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 147 (2014) [hereinafter PCLOB REPORT II], *available at* http://www.pclob.gov/library/702-Report.pdf. In surveillance "[u]nder Section 702, the government acquires the contents of telephone calls and Internet communications from within the United States, without individualized warrants or court orders, so long as the acquisition involves targeting non-U.S. persons reasonably believed to be located outside the United States, for foreign intelligence purposes." *Id.* at 146.

53. Gellman & Soltani, *supra* note 2.

54. *Id.* This is supposing, pending information to the contrary coming to light, that the anonymous official is correct about the NSA's methods and the motives behind them.

55. *Id.*; *see also* PCLOB Report II *supra* note 52, at 141 (discussing foreigness and foreign purpose requirements).

56. *Id.*

57. *Id.*

58. Mike Masnick, *Even Senate Intelligence Committee Admits That NSA Oversight Is Often a Game of 20 Question*s, TECHDIRT (Oct. 15, 2013, 11:58 AM), http://www.techdirt.com/articles/20131014/17191824879/even-dianne-feinstein-admits-that-nsa-oversight-is-often-game-20-questions.shtml. It is important to note, however, that

in congressional hearings, NSA officials and other senior members of the intelligence community are evasive unless directly pressed, and the congressional committees are stymied by their lack of knowledge regarding just which questions need asking.[59]

Given the realities of the NSA overstepping its authority, there is no indication to the public that the agency, even as it has been collecting data from American citizens, has been required to answer to its various oversight mechanisms in an effective manner. In response, President Obama directed the Privacy and Civil Liberties Oversight Board ("PCLOB") to conduct two reports about NSA intelligence gathering methods.[60] The PCLOB is an independent, bipartisan agency within the executive branch tasked with reviewing and analyzing executive branch actions taken in the name of national security to determine whether appropriate consideration has been afforded to civil liberties in the development and implementation of national anti-terrorism policy.[61] The recent PCLOB Report emphasizes that there is a:

> compelling danger . . . that the personal information collected by the government will be misused to harass, blackmail, or intimidate, or to single out for scrutiny particular individuals or groups . . . . while the danger of abuse may seem remote, given historical abuse of personal information by the government during the twentieth century, the risk is more than merely theoretical.[62]

The second report addressed more specifically Internet surveillance activities of the NSA—specifically those undertaken pursuant to Section 702.[63] These reports demonstrate that there is a serious risk of abuse of the data collected by the NSA, as well illustrating the failings of current governmental oversight of NSA data collection policies.

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this is a candid statement by a member of Congress in an interview expressing uncertainty, rather than an official source. This seems to indicate that, despite all the information that members of Congress are privy to, members of the intelligence community are often as closed-lipped as possible unless the exact right question is asked in the exact right manner. *See id*.

59. *See id*.; Gellman & Soltani, *supra* note 2.

60. *See generally* PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (2014) [hereinafter PCLOB REPORT I], *available at* https://www.eff.org/files/2014/01/23/final_report_1-23-14.pdf; PCLOB REPORT II, *supra* note 52.

61. PCLOB REPORT I, *supra* note 60, at 8; *About the Board*, PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., http://www.pclob.gov/about-us.

62. PCLOB REPORT I, *supra* note 60, at 12.

63. PCLOB REPORT II, *supra* note 52, at 2.

Moreover, according to some classified intelligence documents released by *The Washington Post* and other outlets, the NSA appears to be overwhelmed by the sheer amount of data it is has collected, which indicates that the mechanisms in place do not adequately help the NSA to focus its search. For instance, the NSA has begun to implement a program (SCISSORS) in order to focus on the portion of the data that is relevant amongst the mass of data collected.[64] This is because the NSA was collecting broad swaths of data with "little or no [foreign intelligence] information."[65] The first PCLOB report indicates that the NSA metadata collection program does not pass any semblance of relevancy standards to target the data to a specific question of national security; this is because the NSA does not have reason to suspect the owners of the metadata, unlike in other cases where the collection was lawful.[66]

Thus, the current oversight system suffers from some serious failings. First, it does not allow for a focused inquiry by the congressional committees. Additionally, the NSA can get around requirements imposed on it by FISA by conducting Internet surveillance abroad that nonetheless captures U.S. data flows, many of which traverse foreign networks. Moreover, the NSA has over-collected data with little value to the agency's national security mission, and therefore must sift through masses of data involving regular American citizens while fighting a public battle about how much information the agency collects.[67] This all suggests deficiencies in the NSA's oversight structure, as all preventive executive, legislative, and internal controls have not been effective.

B. Stronger oversight is also needed because the courts are ill-equipped to adequately review and oversee the NSA.

Further demonstrating that change in oversight is needed, federal courts, including the FISA Court, have shown themselves inadequately suited to oversee the NSA's activities. As discussed in the previous subsection, existing oversight mechanisms have not stopped the NSA from pursuing these aggressive and intrusive data collection policies.

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64. Barton Gellman & Matt DeLong, *An Excerpt from the NSA's Wikipedia*, WASH. POST, Oct. 14, 2013, at 2 [hereinafter *Intellipedia*], *available at* http://apps.washingtonpost.com/g/page/world/an-excerpt-from-intellipedia/519/#document/p2/a126422. SCISSORS is a NSA system that helps parse electronic communications. *Id.*

65. *Id.* at 3.

66. PCLOB REPORT I, *supra* note 60, at 77–78 (citing Carrillo Huttel, LLP v. SEC, No. 11-65, 2011 WL 601369, at *1-2 (S.D. Cal. Feb. 11, 2011); *In re* Subpoena Duces Tecum, 228 F.3d 341, 345, 350–51 (4th Cir. 2000)). The first PCLOB Report indicates that the government collection of metadata would satisfy the relevancy criteria if the government's request was defined and limited by the concrete facts of a particular investigation, but there is no particularized inquiry in mass collection of data. PCLOB REPORT I, *supra* note 60, at 78.

67. *Intellipedia*, *supra* note 64, at 3.

Additionally, the courts too have a similar gap in reactive oversight. As such, some form of oversight is needed to bridge the gap between preventative oversight by congressional committees and reactive oversight by the FISA Court. This section first shows that the NSA defies judicial control, then discusses how the traditional appellate process is ineffective, before arguing that the FISA Court is ineffective at controlling the NSA's data collection policies.

The NSA is not effectively controlled by judicial mechanisms: the agency violated the orders of the FISA Court that set out the parameters of permissible surveillance. In 2009, the Department of Justice ("DOJ") discovered that the NSA had been operating an automated searching system contrary to FISA Court orders.[68] The NSA acknowledged that the Court's orders did not provide the agency with authority to employ the list of phone records in the manner in which it did.[69] Separately, it was also disclosed to the FISA Court that the NSA had violated the court's orders when thirty-one NSA analysts queried the telephone records database.[70] Moreover, traditional courts without security clearance have limited authority over the NSA.[71]

1. Traditional courts do not provide an adequate avenue of appeal.

The regular avenue of redress through trial and appellate courts does not provide an adequate avenue of appeal for citizens challenging NSA data collection. One primary drawback of the ordinary appellate process is its lack of uniformity. For instance, the U.S. District Court for the District of Columbia and the U.S. District Court for the Southern District of New York have reached wildly different conclusions while dealing with the same basic issue.[72] In particular, the United States District Court for the District of Columbia granted injunctive relief for citizens challenging NSA data collection policies, holding that the public interest weighed in favor of relief on constitutional grounds.[73] However, the District Court for the Southern

68. PCLOB REPORT I, *supra* note 60, at 47 (citing *In Re* Production of Tangible Things, No. BR 08-13 (Foreign Intelligence Surveillance Court Feb. 17, 2009)).

69. *Id*.

70. *Id.* at 50 (citing *In Re* Production of Tangible Things, No. BR 08-13 (Foreign Intelligence Surveillance Court Mar. 2, 2009)).

71. *See* Klayman v. Obama, 957 F. Supp. 2d. 1, 9 (D.D.C. 2013).

72. *Compare Klayman*, 957 F. Supp. 2d., *with* ACLU v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013).

73. *Klayman*, 957 F. Supp.2d at 42 (noting that it "is always in the public interest to prevent the violation of a party's constitutional rights") (quoting Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth., 898 F. Supp. 2d 73, 84 (D.D.C. 2012) (quoting G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir.1994))). The court stayed its injunction in light of the significant national security interest at stake, pending appeal. *Id*. at 43-44.

District of New York found that, while the right to be free from searches and seizures is fundamental, it is not absolute, and thus held that NSA data collection practices were lawful.[74]

Moreover, while courts recently have not shied away from analyzing the constitutional issues involved,[75] these same opinions have indicated a healthy reluctance to overstep into issues where jurisdiction is more questionable due to national security concerns.[76] The regular appeals process generally cannot, or at least is often unable to, consider national security information.[77] Both this limitation and the lack of uniformity show that the courts are not a guaranteed avenue for citizens to seek redress from NSA data collection practices, nor do they provide one national voice to speak on such important topics that necessitate uniform and effective review.[78]

2. The FISA Court is not providing an adequate level of publicly available oversight.

Moreover, the FISA Court, a specialized judicial entity which is intended to provide direct oversight over data collection, is not providing an adequate level of publicly accountable oversight. Unlike regular courts, the FISA Court does not provide a mechanism for non-governmental parties to provide insight into the particulars of any given case via amicus briefs.[79] This characteristic of FISA Court proceedings means that the Court does not take adequate account of positions other than the government's, which in turn undermines the credibility and usefulness of the Court in cases involving

74. *Clapper*, 959 F. Supp. 2d at 756–57.

75. *See, e.g.*, *Klayman*, 957 F. Supp. 2d at 19 (finding that the court had the authority to review the constitutional claim raised); *Clapper*, 959 F. Supp. 2d at 742 (finding that the court had authority to review the constitutional claims raised).

76. *See, e.g.*, *Klayman*, 957 F. Supp. 2d at 19 (holding that the court was barred from reviewing the statutory claims based in the Administrative Procedure Act); *Clapper*, 959 F. Supp. 2d at 742 (noting that the claims based on statutory grounds were precluded and would likely fail even if they were not).

77. *Klayman*, 957 F. Supp. 2d at 19; *Clapper*, 959 F. Supp. 2d at 742. Indeed, the *Klayman* Court expressly noted that the government regused to avail itself of *in camera* review that would allow the Court to view sensitive information. *Klayman*, 957 F. Supp. 2d at 41 n.65.

78. For example, in debating the ultimate creation of the Court of Appeals for the Federal Circuit, the Senate acknowledged that the structure of the federal courts does not facilitate uniformity in circumstances of where a "promt, definitive answer to legal questions of nationwide significance" is required. S. Rep. 97-275 at 14 (noting that "the creation of the Court of Appeals for the Federal Circuit provides such a forum for appeals from throughout the country in areas of the law where Congress determines that there is *special need for national uniformity*." (emphasis added)). The challenge of providing effective oversight of the NSA's domestic surveillance activities is likewise such a circumstance, and triggers a similarly special need for national uniformity regarding the privacy rights and expectations of citizens.

79. PCLOB REPORT I, *supra* note 60, at 13–14. The PCLOB Report does, however, note that in one instance, the court accepted one amicus brief. *Id.*

metadata, as the court must rely solely on the assertions of the NSA.[80] The PCLOB noted that "[i]t is central to the integrity of the process that public has confidence in its impartiality and rigor," and the FISA Court proceedings lack this element by not allowing for outside comment.[81] Indeed, the FISA Court must rely on the assertions of the regulated parties, such as the NSA, and is unable to benefit from expertise of relevant parties, unlike regular courts, where outside parties are able to submit amicus briefs.[82] The public has a significant interest in privacy; this constitutional right is of central importance to the American people, and lack of public input is a serious failing of the process.[83]

Therefore, as the FISA Court must rely solely on the representations of the government, it is susceptible to misrepresentations. The recent declassified decision of the FISA Court revealed that "[c]ontrary to the government's repeated assurances, NSA had been routinely running queries of the metadata using methods and terms that did not meet the standard for querying."[84] This confidential nature of FISA Court proceedings does not foster public confidence, as there has been public backlash to the fact that the primary opinion authorizing bulk metadata collection of U.S. citizens' records has taken this long to produce, even in redacted form.[85] This ruling shows that the FISA Court is not well-equipped to provide effective oversight of NSA operations because of the lack of public input in its proceedings, the possibility of misrepresentation, and the delays involved with providing decisions to the public.[86]

Moreover, while redaction is required to protect national security information, it does not inspire public confidence. The recent decision is necessarily heavily redacted due to the sensitive nature of the national

80. *Id.* at 14. .

81. *Id.*

82. *Id.*

83. *See id*.

84. Charlie Savage & Scott Shane, *Secret Court Rebuked N.S.A. on Surveillance*, N.Y. TIMES, Aug. 21, 2013, at A1, http://www.nytimes.com/2013/08/22/us/2011-ruling-found-an-nsa-program-unconstitutional.html?_r=0. Indeed, the FISA Court was "troubled that the government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program." FISC Memorandum Opinion, *supra* note 23 at *16, n.14. Moreover, the FISA Court noted that "[C]ontrary to the government's repeated assurances, NSA had been routinely running queries of the metadata using querying terms that did not meet the required standard for querying." *Id.*

85. *See id.* (noting that while the opinion promoted openness and was not overly redacted, its delay was troubling).

86. *Id*. (quoting Mark Rumold of the Electronic Frontier Foundation as saying that "[t]his opinion illustrates that the way the court is structured now it cannot serve as an effective check on the N.S.A because it's wholly independent on the representations that the N.S.A makes to it . . . . [I]t has no ability to investigate. And it's clear that the NSA representations have not been entirely candid to the court."); *see* PCLOB REPORT I, *supra* note 60, at 13–14.

security information involved.[87] There is, however, a need for more transparent information proving that the NSA is not intruding too far into the privacy of American citizens with its world-wide programs[88] Moreover, recent judicial inquiries have focused on violations of the privacy of individuals one at a time, rather than large-scale violations, which are unlikely to stem the larger problem of continuing NSA surveillance.[89] Additionally, these judicial decisions, while setting conflicting precedents, are backward-looking, rather than forward-looking; courts cannot enjoin surveillance programs unless injured parties know they exist.[90] Moreover, as the discussion above has shown, the way the FISA Court oversight is structured works against promoting public confidence due to the necessary lack of disclosure and comment opportunities for the public. This illustrates the gap in oversight, as neither the appellate courts nor the FISA Court are able to foster public confidence in the government's ability to react to NSA privacy infringement, just as congressional and executive oversight cannot foster public confidence that the government can prevent privacy violations by intelligence agencies.

C. The FCC mission can be naturally expanded to protect privacy in relation to surveillance.

The FCC has a strong privacy background as well as a strong history of promoting openness and transparency on the Internet. First, this section shows the FCC has been extending many of its regulations to the Internet and adapting to changes in technology as it does so. Second, the FCC has a strong history of protecting the nation's communications infrastructure. The FCC has experience with accounting for the globalized nature of communications.[91] This section next argues that the FCC's background in these areas prepares the agency to step into a new role overseeing the NSA collection of data. Finally, this section discusses the benefits of tasking the FCC with this important oversight role.

87. *See generally* FISC Memorandum Opinion, *supra* note 23.

88. *See* PCLOB REPORT II, *supra* note 52, at 13.

89. *See, e.g.*, Klayman v. Obama, 957 F. Supp. 2d. 1 (D.D.C. 2013); ACLU v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013).

90. *Compare Klayman*, 957 F. Supp. 2d. 1, *with Clapper*, 959 F. Supp. 2d 724. As discussed above, these recent judicial decisions regarding NSA data collection do not set a coherent precedent, and are in clear tension with one another.

91. *See, e.g.*, Comm'n Policies and Procedures Under Section 301(b)(4) of the Commc'ns Act, Foreign Investment in Broadcast Licenses, *Declaratory Ruling*, FCC 13-150, 28 FCC Rcd. 16244, 16247–48, paras. 6–8 (2013) (discussing globalization, growth, and innovation).

1. The FCC has strong a background and significant expertise that will allow the agency to provide oversight of the NSA.

Since the "advent of the Internet," the FCC has been involved in regulating this facet of the nation's communications infrastructure.[92] For instance, as early as 1980, the FCC considered the extent to which information processing (as involved in Internet services) required further or different regulation from other communications networks.[93] In 1980, the FCC began to recognize a distinction between basic and enhanced services, and applied this distinction until its codification in the Telecommunications Act of 1996.[94] Following codification, the FCC continued its use of this framework, but expanded its scope to include elements of Internet infrastructure, such as broadband connectivity.[95] However, the FCC remained willing to consider applying its regulatory framework to new technologies.[96] This flexibility has helped the agency adapt to new and changing technology as it influences the nation's communications infrastructure.

92. Verizon v. FCC, 740 F.3d 623, 629–30 (D.C. Cir. 2014) (noting that "[s]ince the advent of the Internet, the Commission has confronted the questions of whether and how it should regulate this communications network, which, generally speaking, falls comfortably within the Commission's jurisdiction over 'all interstate and foreign communications by wire or radio.'" (citing 47 U.S.C. § 152(a))).

93. *Id*. (discussing the Computer II "regime").

94. *Id*. (noting that the Telecommunications Act of 1996 tracks the Computer II distinction between basic and enhanced services in its distinction between telecommunications carries and information-service providers).

95. *Id.*

96. For instance, the FCC showed a willingness to expand and reinterpret existing regulations in its interpretation of cable broadband in Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs., 545, U.S. 967, 976–77 (2005). In *Brand X*, the FCC had changed its interpretation and concluded that cable broadband providers provide a single, integrated information service and were therefore entirely exempt from Title II regulation. *Id. Brand X* involved a prolonged legal battle regarding a declaratory ruling of the FCC classifying broadband cable modems as an information service rather than a telecommunications service, so as not to be subject to mandatory title II common carrier regulation. *Id.* at 967–68. There were many parties that petitioned for review and it was a long decision process that involved much uncertainty in what the FCC could do moving forward. *Id.* After the case, the FCC continued to "confront[] the challenge of protecting consumers, maintaining universal service and ensuring public safety in uncertain legal terrain." Statement of Comm'r Copps in Response to Supreme Court Decision in Brand X Internet Servs., WL 1523583 (FCC June 27, 2005), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-259623A1.pdf (noting that the *Brand X* decision "makes the climb much steeper. But this country just has to find ways to promote innovation, enhance competition, protect the openness of the Internet, and return the United States to a position of leadership in broadband penetration. The Commission needs to think anew and act anew to meet these challenges, and I look forward to working with my colleagues to do just that.").

Additionally, the FCC acknowledges the impact of privacy on the Internet. The recognition that "[c]onsumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services," has played a large part in FCC policy, as the agency has long supported protecting the privacy of broadband users.[97] The FCC further ensures that consumers have control over how their information is used, and that they are protected from "malicious third parties."[98] Moreover, there is a direct link between consumer confidence and the adoption of new technology, which the agency has taken into account as it formulates new policies. As former Chairman Genachowski explained, in the FCC's view, "[i]f consumers lose trust in the Internet, this will suppress broadband adoption and online commerce and communication, and all the benefits that come with it."[99] Moreover, the FCC has recognized that it can, and should, play a major role in protecting privacy and consumer confidence in the Internet, including working with industry members to provide best practices for security[100] and encouraging broadband adoption.[101] The next logical step is for Congress to authorize the FCC to further develop Internet privacy principles in the context of protecting consumers from NSA monitoring of their Internet communications and access of the Internet providers' infrastructure to do so.

2. FCC oversight of the NSA could confer significant benefits.

The lack of oversight indicates the need for a solution that is publically visible but would not undermine national security: due to its relevant expertise, the FCC is that solution. First, there are benefits specific to the FCC's area of expertise which make it well-suited to provide insight into the data collection regarding the public good and communications infrastructure. Second, the FCC's unique insights into the technological aspects of the Internet put the agency in a position to be uniquely helpful to congressional oversight committees. Moreover, the FCC is also particularly well-suited to

97. Framework For Broadband Internet Serv., *Notice of Inquiry*, FCC 10-114, 25 FCC Rcd. 7866, 7883–84, para. 39 (2010), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-114A1_Rcd.pdf (citing Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150, 20 FCC Rcd. 14853, 14930, para. 148 (2005)).

98. *Consumer Online Privacy: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. 4 (2010) (statement of Hon. Julius Genachowski, Chairman, FCC).

99. *Id.*

100. *Id.* Chairman Genachowski noted that, "[a]s the nation's expert agency on communications, the FCC has a long history of engagement on network reliability and security, working with commercial communications providers, wired and wireless, to develop industry-based, voluntary best practices that improve security and reliability." *Id.*

101. *Id.*

provide oversight consistent with plans advocated by the PCLOB: for instance, specially providing the FISA Court with useful and insightful amicus curiae briefs.[102]

There are significant benefits to the FCC being the agency to provide insight into the NSA's monitoring activities. The NSA gets the information it collects from "major Internet switches" and depending on the type of surveillance, does not have to notify the companies from which it collects data.[103] However, the FCC could, with additional congressional authority, provide insight into basic statistics about the information collected by the NSA: for instance, volume, requiring the NSA to at least show patterns (i.e., the "relationship mapping" aspects).[104] This could be beneficial to the national security mission: by providing a volumetric, technical analysis, based on practices that can be described, the FCC could help focus the NSA's data collection, and thereby contribute to the effort to reduce overcollection, as well as provide a grounds for congressional monitoring and more effective court cases.[105] Moreover, the FCC routinely deals with sensitive information and collecting public comments.[106] For instance, the FCC often makes certain pieces of information confidential in its proceedings. Recently, the agency issued protective orders in its comment-seeking proceeding regarding the Technological Transition of the Nations Communications Infrastructure.[107] This experience would facilitate the FCC acting as a bridge between the NSA and its oversight mechanisms.

Additionally the PCLOB report calls for a similar oversight scheme.[108] The PCLOB, in its first report, calls for the government to work with Internet service providers and other companies that regularly receive FISA

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102. It is important to note that this would not be the same as the FCC pursuing litigation on its own, rather than being overseen by the DOJ. *See* 28 U.S.C. § 516. The FCC would not be pursuing litigation on its own, but rather acting as an independent viewpoint to add context to the NSA's representations to the FISA Court. *See* PCLOB REPORT II, *supra* note 52, at 143.

103. Gellman & Soltani, *supra* note 2.

104. *See also* PCLOB REPORT II, *supra* note 52, at 146-47. Statistics such as those discussed by the PCLOB could be a template for FCC collection.

105. *See* PCLOB REPORT I, *supra* note 60, at 15. The PCLOB notes that "for the executive branch . . . disclosures about key national security programs that involve the collection, storage, dissemination of personal information . . . show that it is possible to describe practices and policies publicly, even those that have not otherwise been leaked, without damage to national security or operational effectiveness." *Id.*

106. *See e.g.*, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, *Second Protective Order*, DA 14-273, 29 FCC Rcd. 2022 (2014) [hereinafter *Second Technology Transitions Order*], *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-14-273A1_Rcd.pdf.

107. *Id.* The agency noted that "we expect to examine information provided by service providers, and others, that may be highly confidential. We anticipate that such information will be necessary to develop a more complete record on which to base the Commission's evaluation of the real-world applications of planned changes in technology that are likely to have tangible effects on consumers." *Id.*

108. PCLOB REPORT I, *supra* note 60, at 19.

production orders to develop rules permitting the companies to voluntarily disclose certain statistical information.[109] Additionally, the PCLOB recommends that the government publicly disclose detailed statistics to provide a more complete picture of government surveillance operations.[110] The PCLOB also recommends that independent experts as well as telecommunications service providers help assess at least one data collection technique.[111] The FCC regularly interacts with these companies in its own rulemaking proceedings, and would therefore be in a position to facilitate independent expertise being utilized in assessing the efficacy of the collection.[112] This is not only because the agency works with the companies and the infrastructure involved already,[113] but also because the FCC's general technical expertise places the agency in a position to consider what types of statistics would be helpful to the public. The need for expertise in determining the technical aspects of whether the data being collected is authorized is not limited to DOJ and NSA efforts, but extends to the FISA Court.

In its first report, the PCLOB calls for Congress to enact legislation enabling the FISA Court to hear independent views.[114] While a federal agency rather than an "independent" entity, the FCC would be particularly well-suited to bolster the outside input and provide the FISA Court with information regarding the impact on telecommunications, particularly the Internet, of NSA surveillance of the American public. The FCC would be a particularly helpful independent view to involve in the FISA Court proceedings because of its technical expertise. Furthermore, the FCC has significant experience dealing with sensitive information, such as trade secrets.[115] Both these traits make the agency particularly well-suited to provide helpful insights to the FISA Court.

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109. *Id.* Indeed, telecommunications and tech companies are actively trying to be allowed to disclose such information. Ryan Gallagher, *Tech Giants Unite in Court Fight Against Government Surveillance Secrecy*, SLATE (Sept. 10, 2013, 5:26 PM), http://www.slate.com/blogs/future_tense/2013/09/10/yahoo_google_facebook_microsoft_fight_for_permission_to_release_data_about.html.

110. PCLOB REPORT I, *supra* note 60.

111. PCLOB REPORT II, *supra* note 52, at 143-44. The PLCOB expressly recognized there is an increased risk that the government will acquire wholly domestic communications during upstream collection. *Id*. at 143. As such, the PCLOB recommends the NSA, and the DOJ should, consult with telecommunications service providers and, when appropriate, utilize independent experts to periodically assess the efficacy of filtering techniques. *Id.*

112. *See Second Technology Transitions Order*, *supra* note 106; *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, § 222, 110 Stat. 56 (codified as amended at 47 U.S.C. § 222) (directing telecommunications carriers to "protect the confidentiality of proprietary information of, and relating to . . . customers").

113. Indeed, the FCC deals both with telecommunications-specific information and companies on a constant basis. *See e.g.*, *Second Technology Transitions Order*, *supra* note 106.

114. PCLOB REPORT I, *supra* note 60, at 17–18.

115. *See e.g.*, *Second Technology Transitions Order*, *supra* note 106.

IV. HOW THE FCC SHOULD ADDRESS THE NSA SURVEILLANCE: IMPLEMENTING THE SOLUTION

Congress is equipped to enact legislation codifying FCC oversight of the NSA by virtue of both current law and the PCLOB's recommendations. First, the Telecommunications Act can serve as the basis for the FCC to take action to further develop its protection of consumers on the Internet, Moreover, there has been some movement in Congress calling on the FCC to take action regarding the NSA phone database, indicating the possibility of the FCC taking up an oversight role.[116] Further, Congress gave the FCC broad investigation, regulatory, and enforcement powers, as well as the privacy-focused directive of implementing Consumer Propriety Network Information protection.[117] Additionally, the first PCLOB Report calls for extensive changes in the NSA and FISA Court regime while the second report calls expressly for industry input and expertise: the FCC could facilitate some of the suggested changes through its subject matter expertise. Even as the FCC is set up to facilitate the PCLOB recommendations, Congress needs to codify the legal authority for the FCC to do this specifically. Granting express legal authority is key, as organic statutes of agencies determine what a given agency can and cannot do. Congressional authorization would be a logical outgrowth of both the FCC's regulatory interests and current legal recommendations regarding NSA oversight.

A. Congress should amend the organic statutes of the FCC and NSA and encourage participation in the FISA Court.

The lack of oversight of NSA data collection practices will continue to be problematic moving forward, as national security is an ongoing concern and technology is a large part of life in a modern society. There is need for effective and transparent oversight of the NSA's data collection. As such, Congress should act by amending the organic statutes of both the NSA and the FCC to provide the FCC with oversight authority over the NSA, and by allowing the FCC to participate as amicus curiae with the FISA Court.

116. *See* Press Release, Congressman Ed Markey, FCC Refuses to Investigate NSA Program, Predicting Likely Administration Road Blocks (May 23, 2006), *available at* http://votesmart.org/public-statement/175053/fcc-refuses-to-investigate-nsa-program-predicting-likely-administration-road-blocks; Chang, *supra* note 33, at 582.

117. *See* 47 U.S.C. § 222 (2012); *see also* Kris Anne Monteith, Chief, Enforcement Bureau, FCC, Written Statement Before the Subcommittee on Consumer Affairs, Product Safety, and Insurance on Protecting Consumers' Phone Records 2 (Sept. 29, 2006), *available at* http://www.commerce.senate.gov/pdf/monteith-020806.pdf.

1. Congress should amend the NSA organic statute to provide for collection of data by the FCC.

The NSA needs transparent and easily understood oversight. While it should not have to disclose national security information, the agency should be required to disclose basic statistics, such as how much information it is gathering, similar to Recommendation 9 in the second PCLOB Report.[118] This would at least illustrate to the public, via the FCC, that the NSA is targeting its surveillance at legitimate threats to national security—rather than performing blanket surveillance of all Internet users. Further, these reforms would comport with the PCLOB's enumerated Recommendations.[119] As of now, "lawmakers and the public do not have even a rough estimate of how many communications of U.S. persons are acquired under section 702."[120] Because the NSA is required to target foreign communications in order for its surveillance to be lawful,[121] an annual snapshot showing the volume of its surveillance will help foster some degree of transparency,[122] helping assure citizens that their privacy is not being intruded upon, without hampering legitimate national security efforts.[123]

This expanded role for the FCC in relation to the NSA should be codified by Congress. First, Congress should amend the NSA's organic statute to require the agency to comply with FCC requests for data. Additionally, while the FCC does not have the security clearance to review the substance of the surveillance, such clearance is not necessary on an agency-wide basis. Instead, Congress should require the NSA to provide targeting statistics that could be reasonably disclosed, or at least preliminary statistics that could focus the FCC's inquiry. This new legislation is all that is necessary to facilitate oversight on the NSA side, as the FCC will require most of the congressional authorization.

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118. *See* PCLOB REPORT II, *supra* note 52, at 146. Recommendation 9, in particular, advocates the use of annual counting procedures to provide insight into the extent to which the NSA collects and utilizes communications of those located within the United States. *Id.*

119. *See* PCLOB REPORT I, *supra* note 60, at 19–20. The PCLOB recommends that the surveillance agencies work to develop rules disclosing statistical information provide a more complete picture of government surveillance operations. *Id.* In addition, the PCLOB does expressly acknowledge the usefulness of statistics to show the scope of NSA collection of communications of persons within the United States and United States citizens. PCLOB REPORT II, *supra* note 52, at 146.

120. PCLOB REPORT II, *supra* note 52, at 147.

121. *See* Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,947–48 (Dec. 4, 1981); PCLOB REPORT I, *supra* note 60, at 10.

122. *See* PCLOB REPORT I, *supra* note 60, at 19-20.

123. PCLOB REPORT I, *supra* note 60, at 15 (noting that "for the executive branch . . . disclosures about key national security programs that involve the collection, storage, dissemination of personal information . . . show that it is possible to describe practices and policies publicly, even those that have not otherwise been leaked, without damage to national security or operational effectiveness.").

2. The FCC's organic statute should be amended to allow the FCC authority over NSA data collection and participation in the FISA Court.

To enact a solution based on FCC oversight of NSA data collection, Congress should pass legislation allowing the FCC to collect information from the NSA, and to allow the FCC to submit its findings about this data to congressional oversight committees as well as the FISA Court. While novel, this solution is in keeping with the PCLOB recommendations, particularly the recommendation emphasizing the need for the NSA to publicly disclose the scope of its surveillance.[124] Moreover, it is not uncommon for agencies to have oversight authority over other agencies.[125] Thus, this type of inter-agency accountability could be codified to provide the FCC with oversight authority over NSA data collection.

Congress should first authorize the FCC to request certain types of data from the NSA. Similar to the PCLOB's recommendation,[126] this data, rather than being substantive, would be statistical; for instance, it might include data and the basic context surrounding how many communications providers from which the NSA is collecting metadata, or how many email contact lists the NSA is gathering.[127] This would thereby provide oversight over the relevancy problem, wherein the NSA collects information in such wide swaths so as not to be tied to any particularized inquiry.[128] The FCC would therefore be in a position to review the volume of information, while keeping it confidential.

The legislation should also include authorization for the FCC to interact with the other oversight bodies. Congress should give the FCC the authority to send any of the statistics that the agency finds problematic to the FISA Court and the relevant congressional committees, and should provide for the FCC to be informed of proceedings implicating data collection over which the FCC would be granted authority. Additionally, Congress should

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124. *See id.* (noting that "for the executive branch…disclosures about key national security programs that involve the collection, storage, dissemination of personal information . . . show that it is possible to describe practices and policies publicly, even those that have not otherwise been leaked, without damage to national security or operational effectiveness.").

125. For instance, the EPA administers the National Environmental Policy Act ("NEPA") through which it requires federal agencies to incorporate environmental considerations in their planning and decision-making. *National Environmental Policy Act (NEPA)*, ENVTL. PROT. AGENCY, http://www.epa.gov/compliance/basics/nepa.html. Additionally, employment standards such as anti-discrimination policies and merit selection apply to all federal agencies. *See About EEOC*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/; *Merit Systems Principles*, MERIT SYS. PROT. BD., http://www.mspb.gov/meritsystemsprinciples.htm.

126. *See* PCLOB REPORT II, *supra* note 52, at 146.

127. PCLOB REPORT II, *supra* note 52, at 146-47.

128. PCLOB REPORT I, *supra* note 60, at 77–78. The benefit may indeed also be in the fact that the NSA would have to think about the relevence of the large swaths of data collected.

provide a mechanism for the FCC to liaise with Congress on a regular basis *specifically* about the NSA data collection since it involves sensitive information: for instance, setting out regular reports or allowing Congress to send inquiries to the FCC as needed on the technical aspects of the NSA's methods of data collection. The language could also allow for public comment on NSA collection to some extent, modeled on the current FCC notice and comment procedures. The FCC could thereby ask for generalized comments without disclosing the exact nature of its inquiry. Thus, the FCC could solicit public comment on the underlying idea of NSA surveillance as it relates to the communications infrastructure and incorporate valid comments in its representations to the relevant oversight mechanisms. This would enable the FCC to incorporate comments by carriers and consumer interest groups into the oversight process and allow some degree of public participation without sacrificing national security.

Moreover, the legislation must include a mechanism for protecting national security information. The FCC has knowledge about the underlying infrastructure where the data is coming from as well as experience dealing with sensitive information.[129] However, there are valid concerns in disclosing *any* sort of information implicating national security. To that end, Congress may wish to consider adding a position in the FCC for an intelligence officer with clearance who can look into relevance when the amounts of data raise a red flag in the FCC's internal process for reviewing the data. Moreover, placement of a member of an NSA staffer in the FCC would facilitate inter-agency cooperation and dialogue about data collection.

For enforcement, in order to preserve national security, Congress should avoid providing the FCC any mechanism to call the NSA before it via hearing. However, the FCC would be able to report specially to the House and Senate committees, as well as petition the FISA Court as amicus curae. Additionally, if the PCLOB wants to stay involved and keep developing oversight, Congress should provide an avenue for the FCC to call forth another PCLOB investigation should the need arise.

3. Congress should allow outside parties to petition the FISA Court.

Congress should follow the PCLOB Recommendation to allow outside parties, to petition the FISA Court to put forth independent views. The PCLOB recommendation about FISA Court operations would allow for public comment.[130] While there are logistical problems with allowing other parties before the court, the PCLOB suggests that a Special Advocate could advise the FISA Court whether amicus participation would be helpful in a

129. *See Second Technology Transitions Order*, *supra* note 106.
130. *See* PCLOB REPORT I, *supra* note 60, at 17, 182.

given case.[131] Input from outside sources[132]—and, in particular, the FCC—would be useful in terms of providing technical insights into the impact of NSA surveillance on telecommunications. In particular, the FCC could be among the independent viewpoints incorporated in the continuing process of evaluating upstream and "about" collection.[133] Moreover, even if Congress decides to provide limited amicus participation, the FCC, providing volumetric data or technical expertise, could help act as a bridge between the public, parties in the communications field, and the court.

The FISA Court itself considers each and every surveillance application fastidiously, but the public needs to have the same confidence in the court's impartiality and rigor as those government actors who interact with or serve on the court.[134] While there is need for secrecy due to national security concerns, there is also the need for the court to take into account a greater range of views and legal arguments, as well as receive technical assistance and legal input from outside parties.[135] The PCLOB report indicates that, while there are difficulties in inviting amicus participation by parties lacking national security clearance, such as the FCC, the fact that it has been done in one instance indicates that it is possible to invite participation from outside parties without infringing upon national security.[136]

Moreover, as mentioned above, it may be useful for Congress to create a position at the FCC in which national security clearance is granted. Not only would this create a safeguard for the integrity of national security information, but this would provide for a person who can be called before the FISA Court who could be exposed to the facts of a given case, and using

131. *Id.* at 189.

132. *See id.*; PCLOB REPORT II, *supra* note 52, at 143-44. The PCLOB discusses the usefulness of outside experts; the FCC would be in a particular position to provide independent, industry-specific insights.

133. *See* PCLOB REPORT II, *supra* note 52, at 143-44. Upstream collection occurs with the compelled assitance of the owners of the "backbone" of telecommunications (in the words of the PCLOB, the owners of backbone over which telephone and Internet communications transit, rather than with the compelled assistance of ISPs or similar companies supplying particular modes of communication). *Id*. at 7. Upstream collection includes "about" communications, where the piece of data that marks a person as a target for collection (such as their email address) is present within the communication at issue, but that person is not a party to that particular communication; rather the communication is "about" the given targeted data. *Id*. Because upstream collection includes "about" communications, the two are often referred to together. *Id.* at 143 (using the phrase "[u]pstream and '[a]bout' [c]ollection").

134. *Id*. at 182. The PCLOB notes that it interviewed three judges who served on FISA Court, and that the Board had confidence that the judges, their staff, and the government lawyers who appear before the court all "operate with integrity and give fastidious attention and review to surveillance applications," but that this needs to be shown to the public as well. *Id.*

135. *Id.*

136. PCLOB REPORT I, *supra* note 60, at 189 (citing In Re Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things, No. BR 13-185 (Foreign Intelligence Surveillance Court Dec. 18, 2013)).

the data that has been collected and/or analyzed by the FCC, could provide insight into a particular instance.

Therefore, Congress should encourage the FISA Court to use its ability to appoint technical experts as well as passing legislation to allow for more amicus participation by outside parties.[137] Congress should enact legislation following the PCLOB recommendations with an eye towards focusing on the FCC as an expert by enacting legislation for the FCC to participate as amicus curiae before the FISA Court.

V. CONCLUSION

The FCC is in a position to provide oversight and transparency to the NSA Internet monitoring scandal. As an agency tasked with regulating the technology and communications sectors, the FCC has been keeping up with the infrastructure and development of technology vis-à-vis the Internet as it pertains to its congressional mandate and its own regulations. Moreover, there would not be an intrusion onto national security efforts because only the volume of information collected would be disclosed. The current crisis in public confidence shows that there is a place for the FCC to be an integral part of the oversight process. The FCC would focus the inquiry of the congressional oversight committees and provide the FISA Court with much-needed outside perspective and technical assistance, while simultaneously giving the public some comfort and adding transparency to the process. This inter-agency monitoring could increase accountability and public confidence in a way that traditional oversight mechanisms cannot: thus, the FCC is in a unique position to add value to the oversight of the NSA and Congress should pursue codifying this solution.

137. PCLOB REPORT I, *supra* note 60, at 13–14.

Hello, Congress? The Phone's For You: Facilitating the IP Transition While Moving Toward a Layers-Based Regulatory Model

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I. INTRODUCTION

We tend to take technology for granted these days. We expect the power to be on by default, we expect water to come out of the faucet when we want it, and we expect to hear a dial tone when we pick up a phone. Little thought is given to the intricate systems that support these services, and that's not unreasonable—one of the chief benefits of such services is that we can focus our energies on other things, instead of having to provide water, heat, or communications services for ourselves. At times, however, these systems do require attention. Now is one of those times, as the technology which underlies our wireline communications system must be replaced. This process is referred to as the IP Transition, and it is already well underway.[1]

Technology transitions have happened before, and bring with them many benefits.[2] As noted by FCC Chairman Tom Wheeler, "[H]istory has shown that new networks catalyze innovation, investment, ideas, and ingenuity."[3] This transition will bring many such benefits— these new networks will provide increased functionality and capacity, for both wired and wireless users.[4] This transition will not be simple, however—the wired phone system has not seen change of this magnitude in decades, and the regulatory framework which governs these systems are in some cases nearly 80 years old. While many of these regulations continue to serve necessary functions, they were created in a world in which network and service were inseparable. Today's technology works differently, and it is a constant struggle for regulators and service providers to adapt these new networks to the existing regulatory models. Packet-based networks, which support Voice over Internet Protocol (VoIP) services, also support services of other types, and are not regulated in the same manner as circuit-switched systems.

In accordance with deregulatory policies intended to permit the free growth and development of new technologies and services, the FCC has largely refrained from substantially regulating VoIP providers, and has to an extent preempted state regulators from managing these services, as well. Separately, a majority of states have partially or completely prevented their Public Utility Commissions (PUCs) from regulating these services.[5] On their

1. *See* Tom Wheeler, *The IP Transition: Starting Now*, FCC BLOG (Nov. 19, 2013, 12:05 PM), http://www.fcc.gov/blog/ip-transition-starting-now.

2. *See id.*

3. *Id.*

4. *See* DAVID GABEL & STEVEN BURNS, NAT'L REGULATORY RESEARCH INST., THE TRANSITION FROM THE LEGACY PUBLIC SWITCHED TELEPHONE NETWORK TO MODERN TECHNOLOGIES 1 (2012), *available at* https://prodnet.www.neca.org/publicationsdocs/wwpdf/111212nrri.pdf.

5. *See* SHERRY LICHTENBURG, NAT'L REGULATORY RESEARCH INST., TELECOMMUNICATIONS DEREGULATION: UPDATING THE SCORECARD FOR 2013 iv (2013), *available at* http://www.nrri.org/documents/317330/0e3a5988-6f57-492d-8ce5-70926cfe68f4.

own, these deregulatory actions pose no major issues for the phone system as a whole, as the system remains built around legacy, circuit-switched infrastructure. They act as intended, giving new technologies and new businesses the freedom they need to innovate and evolve, to provide new services to consumers, and to increase competition in the marketplace. One of the major challenges presented by the IP transition will be reconciling new technology and service models (specifically, an environment in which services are divorced from the network that carries them, rather than intertwined, as has traditionally been the case) with the rigid, legacy-network-based regulatory framework currently in effect.[6] In particular, the transition presents a strong challenge to the joint jurisdiction over voice communications shared by state and federal regulators. The FCC has acted to keep its hands off VoIP in most ways,[7] while a majority of states have similarly prohibited their PUCs from regulating VoIP.[8]

Unlike past transitions, the IP transition reflects a fundamental shift in the means by which the bulk of our telecommunications services are delivered. We are moving away from packet-switched systems whose attributes shaped the Communications Act of 1934, and which continue to define the regulatory framework applied to these services. New networks treat all traffic equally, regardless of whether it is voice, data, or video traffic. Services can be defined independently from the networks consumers use to reach those services. As technology continues to evolve, criticism of the latest major update, the 1996 Telecommunications Act, continues to mount, and the time has arrived to move forward with a revision of the regulatory framework that governs telecommunications generally. The FCC, the telecommunications sector, and even Congress have come to recognize the need for reform.[9]

The IP transition will not wait, however. Technology moves faster than policy, and the transition is already well underway. The FCC has the opportunity to act with an eye toward a new regulatory model which eliminates the vertical silos which dominate the current law, and which identifies for Congress, as it has in the past, the FCC's preferred regulatory direction. Given the need for action to address the grossly outdated framework, which is being distorted to fit new technologies, the FCC should use its preemptive powers to move toward a horizontal regulatory model. Action of this type can, as it has in the past, serve as guidance for Congress

6. Frank Simone, *A Turning Point*, AT&T PUBLIC POLICY BLOG (Dec. 19, 2012, 2:17 PM), http://www.attpublicpolicy.com/broadband-policy/a-turning-point/.

7. Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n, *Memorandum Opinion and Order*, FCC 04-267, 19 FCC Rcd. 22404, para. 1 (2004) [hereinafter *Vonage Order*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-267A1.pdf.

8. *See* LICHTENBURG, *supra* note 5, at iv.

9. Marguerite Reardon, *Congressional Leaders Call for Communications Act Makeover*, CNET (Dec. 3, 2013, 4:00 PM), http://www.cnet.com/news/congressional-leaders-call-for-communications-act-makeover/.

to craft, in the near future, a complete overhaul of the Telecommunications Act.

In order to explain why such sweeping action is necessary, this note first examines the history of telecommunication regulation, including the technology behind the PSTN and the federalism analysis that led in part to the framework that remains in place today. It also examines the transition already underway, and identifies the need for regulatory revision that modern technology has created. It then addresses the means by which changing network technology, coupled with existing regulatory actions, will effectively deprive the states of their long-held ability to regulate voice service. After identifying the need for a regulatory overhaul due to outdated applications of federalism analysis, technological shifts, and changing state interests, the note turns to a study of preferable, horizontal regulatory models and the reasons the FCC cannot simply shift to such a model on its own. Finally, the note examines the FCC's history of telegraphing its wishes to Congress through strong regulatory action, and Congress' history of responding positively to such FCC action. The FCC should move to preempt state regulation of the services aspects of telecommunications, while removing some connectivity-related common carrier obligations, to develop a model that is as "horizontal" as possible under current law and provides a starting point for Congressional action.

II. BACKGROUND

A. Circuits to Packets: The IP Transition's Technology Change, and the Reasons It Is Needed

When a person picks up a phone, their conversation takes place over the public switched telephone network, or PSTN.[10] On the whole, the PSTN today bears little resemblance to the phone networks originally built following the 1876 invention of the telephone. Today's PSTN provides not only voice service, but also data and video services, through physical wires and over the air.[11] When a user places a call, that signal is passed first to a local switch, then to a regional switch, and then to a different regional switch, down to a local switch, and then to its recipient.[12] The network is arranged

10. The term PSTN is used here to refer to the circuit-switched voice elements of the nation's telecommunications infrastructure. While the PSTN as a whole integrates packet-switched technologies in some areas, its fundamental design is based on circuit-switching. The removal of circuit-switching is the core objective of the IP transition.

11. JOSEPH GILLAN & DAVID MALFARA, NAT'L REGULATORY RESEARCH INST., THE TRANSITION TO AN ALL-IP NETWORK: A PRIMER ON THE ARCHITECTURAL COMPONENTS OF IP INTERCONNECTION 1 (2012), *available at* https://www.dora.state.co.us/pls/efi/efi.show_document?p_dms_document_id=177500&p_session_id=.

12. *Id.*

in tiers—a call only goes as high as it needs to.[13] A call to a neighbor, for example, will only move to the local switch before being routed to its destination, while a long-distance call will be routed through several switches, across a trunk connection, and then back down through several more switches to its destination.[14]

The need for this direct-path routing model arises because wireline phone calls are "circuit-switched"—that is, a direct physical circuit between endpoints must be established for a call to go through.[15] This circuit-switched nature, paired with the reliance on time-division multiplexing technology, combine to characterize the fundamental architecture of the PSTN. It is this architecture that the IP transition will change. The current system has its advantages, to be sure. Circuit-switched networks are centrally powered and thus largely resilient in the face of power outages, and the past century's worth of infrastructure expansion ensures that circuit switching (which primarily runs on copper loops) enjoys market penetration that cable and fiber cannot yet match.[16] Furthermore, consumers enjoy a certain degree of familiarity with the aging elements of the PSTN.

Circuit switching is not without its downsides, however. While circuit-switched networks can provide video and data services, they are primarily designed around voice services, and the provision of these services is heavily bound up in the design of the network.[17] Furthermore, the number of available circuits limits providers' ability to efficiently route traffic, manage their networks, or accommodate ever-increasing demands for video and data connectivity.[18] Packet-switched networks address this last issue particularly well, as they treat all data equally, breaking it down into packets, which can be sent over one or more routes simultaneously, only to be reassembled at the endpoint.[19] Packet switching eliminates the need for direct, persistent circuits, and allows networks to dynamically adjust service quality to meet demand.[20] Furthermore, packet-switched networks separate the physical network layer from the data being carried over the network—in other words, voice, because it is simply another service riding over a common network.[21] While copper loops can accommodate packet-switching services, the

13. HENK BRANDS & EVAN T. LEO, THE LAW AND REGULATION OF TELECOMMUNICATIONS CARRIERS 35 (1998).

14. *Id.*

15. JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 40-42 (2007).

16. *Id.* at 43.

17. *Id.*

18. *See* GILLAN & MALFARA, *supra* note 11, at 1.

19. *Id.* at iii.

20. NUECHTERLEIN & WEISER, *supra* note 15, at 42-44.

21. *Id.* at 38-39.

capacity of copper is significantly lower than that of cable or fiber, reducing the capabilities of copper-based IP networks.[22]

The improvements and broader services permitted by packet-switched networks are only one factor necessitating the transition. Another significant factor is the declining utilization of the circuit-switched elements of the PSTN by American consumers. As indicated by the FCC Local Competition Report, the number of wired, circuit-switched phone lines in the US is declining rapidly due to the growth of IP telephony and the widespread adoption of mobile phones.[23] According to data published by the Centers for Disease Control in 2012, 34% of American adults did not have a landline telephone.[24] Furthermore, stiff competition from VoIP providers (due in part to the lower costs of packet-based services, as well as differing regulatory and tax obligations) is reducing Incumbent Local Exchange Carrier (ILEC)[25] revenue even as the ILECs' costs in maintaining the copper networks rise.[26] Consumers and businesses are responding to the shift in technology, but regulatory structures have been slow to follow suit.

While ILECs have seen their revenues decrease, their costs have remained fixed, or even risen.[27] Equipment manufacturers have reduced or ceased their production of necessary components of the wireline PSTN, increasing the costs of facilities maintenance.[28] The labor pool has aged, with younger entrants to the field often focusing on newer technologies which show great potential for growth, rather than specializing in technologies which are near their peak, or have already entered decline. However, the regulatory obligations imposed on the ILECs as telecommunications providers remain in full force. ILECs are obligated to maintain their networks to facilitate public safety,[29] and to continue building the network to reach new customers in their communities, despite the rapidly decreasing

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22. *Id.*

23. INDUS. ANALYSIS & TECH. DIV., FCC, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 31, 2012 (2013) [FCC LOCAL TELEPHONE COMPETITION], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-324413A1.pdf.

24. STEPHEN J. BLUMBERG & JULIAN V. LUKE, DIV. OF HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JANUARY-JUNE 2012 at 1 (2012) [hereinafter CDC REPORT], *available at* http://gigaom2.files.wordpress.com/2012/12/wireless201212.pdf.

25. ILECs were first defined in the 1996 Act as those companies providing telephone service prior to the 1996 Act. ILECs are the now-consolidated companies which were created in the dissolution of AT&T into the Regional Bell Operating Companies. ILECs are the primary owners of the physical networks which make up the PSTN. 47 U.S.C. § 251(h) (2006).

26. GABEL & BURNS, *supra* note 4, at 3-6.

27. *Id.*

28. Ana Pesovic & Luis Alberto Martin Santiago, *The Time is Right for PSTN Migration*, ALCATEL-LUCENT TECHZINE (Oct. 8, 2013), http://www2.alcatel-lucent.com/techzine/the-time-is-right-for-pstn-migration/.

29. GABEL & BURNS, *supra* note 4, at 3-6.

potential for the companies to be able to recoup the costs of their investments.[30] Faced with increasing costs and stiff competition, the ILECs are pushing hard for the IP transition to move forward.[31] ILECs see Title II regulatory burdens as a barrier to the deployment of new technologies to take the place of the circuit-switched setups. They believe that Title II obligates them to maintain the circuit-switched PSTN until the FCC and other governmental authorities permit them to retire it, regardless of its utilization in the marketplace.[32] The IP transition will give ILECs the ability to replace that aging and expensive infrastructure, and, they hope, escape some of their obligations under Title II as a result.[33]

B. Telecommunications Regulation: A Brief History

As the telephone gained a significant place in American society throughout the first two decades of the 1900s, networks tended to develop on a state-by-state basis, and were largely governed by state law.[34] This was because the primary function of phone networks was to serve local calling needs; the overwhelming majority of traffic was therefore intrastate in nature and outside the scope of the federal government's authority under the Commerce Clause.[35] The language of the Commerce Clause echoed Alexander Hamilton's writing in Federalist No. 22, in which he wrote that "there is no object . . . that more strongly demands a Federal superintendence" than the conduct of interstate commerce.[36] The need to regulate commerce between the states, and reconcile the need for national cohesion while maintaining state sovereignty was "at once the principal concern that animated creation of the federal Union and the power that the states most unequivocally surrendered."[37]

The United States is fairly unique in its approach to regulating telecommunications services. While most countries regulate from a central authority, with states and provinces having little to no role,[38] the 1934 Act

30. *See id.*

31. *See* Petition of AT&T at 10-11, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, FCC WC Docket No. 12-353 (rel. Nov. 7, 2012) [hereinafter AT&T Petition], *available at* http://apps.fcc.gov/ecfs/document/view?id=7022086087.

32. *Id.*

33. *Id.* at 2-3.

34. Charles J. Cooper & Brian Stuart Koukoutchos, *Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition*, 6 J. TELECOMM. & HIGH TECH. L. 293, 315 (2008).

35. "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.

36. THE FEDERALIST NO. 22, at 135-36 (Alexander Hamilton).

37. Cooper & Koukoutchos, *supra* note 34, at 303.

38. In Canada, for example, the provinces have little to no role in the regulation of telecommunications, while the national government's regulatory body enjoys a far broader

lays out a very clear joint jurisdictional model.[39] This model was put in place due in large part to the design of the copper network itself, and the source of the federal government's power to regulate. Federal authority to regulate telecommunications stems from the Commerce Clause,[40] as communications routinely cross state lines and have a substantial impact on interstate commerce.[41]

The Communications Act of 1934 was implemented in part to counteract Interstate Commerce Commission decisions that had largely excluded the state governments from regulating telecommunications, based on the Supreme Court's holding in the *Shreveport Rate* case.[42] In that case, the Supreme Court expanded the scope of the Commerce Clause to permit federal regulation of wholly intrastate commerce under certain circumstances.[43] The Court reasoned that intrastate matters that demonstrated a "close and substantial relation to interstate traffic" must be subject to Congressional authority for the greater good, in order to avoid the intrastate nature of one aspect of an issue frustrating any federal attempt to regulate it.[44] Following the guidance of this decision, the ICC granted broad power to the federal government to regulate telephone systems, much to the chagrin of the states. The states argued, however, that not all traffic was interstate—only long distance traffic—and therefore that federal authorities could only regulate long-distance traffic.[45] This view won out, owing to the structure of the networks, which were essentially self-contained within each state, and only crossed state lines (in most cases) for purposes of long-distance traffic.[46]

When Congress drafted the Communications Act of 1934, telephone traffic was nearly ninety-eight percent intrastate in nature.[47] In outlining the federal government's role in the regulation of telecommunications (at that time largely focusing on spectrum concerns rather than wireline voice service), Congress established the FCC with a broad mandate to regulate interstate traffic.[48] Congress went further, making sure that it "nullified Shreveport and explicitly denied the FCC 'any jurisdiction with respect to .

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mandate than the FCC's. *See* IAN WALDEN, TELECOMMUNICATIONS LAW AND REGULATION 226 (3d ed. 2009).

39. *See* BRANDS & LEO, *supra* note 13, at 39-40. *See also* 47 U.S.C. § 152(a) (2006).

40. U.S. CONST. art. I, § 8, cl. 3.

41. Daniel A. Lyons, *Technology Convergence and Federalism: Who Should Decide the Future of Telecommunications Regulation?*, 43 U. MICH. J.L. REFORM 383, 388-90 (2010).

42. *See* BRANDS & LEO, *supra* note 13, at 39-40.

43. Houston E. & W. T. Ry. Co. v. United States (*Shreveport Rate*), 234 U.S. 342 (1914).

44. *Id.*

45. WALDEN, *supra* note 38, at 222.

46. Lyons, *supra* note 41, at 394-95.

47. *Id.* at 316.

48. 47 U.S.C. § 152(b) (2006).

. . intrastate communication service.'"[49] While this model adhered to the Supreme Court's view of the Commerce Clause at the time, and mirrored accurately the marketplace's structure, it also established the basis for the dual-jurisdiction model, which in many ways plagues today's telecommunications industry.[50] The states' 80-year-old position persists to this day, in the form of the joint regulatory model, which gives states the power to regulate telecommunications services within their state, alongside the FCC.[51]

Following the breakup of AT&T in 1984, the telecommunications industry's next major change came in 1989, when the New York Public Service Commission for the first time permitted competition in local exchange markets.[52] This marked a substantial departure from the natural monopoly model and echoed the policies that drove divestiture in attempting to promote competition in the industry.[53] This was a trend that grew rapidly; between 1989 and the implementation of the 1996 Act, "at least 29 states, including New York, approved measures to end telephone monopolies."[54] These state laws served substantially as the basis for the Title II CLEC policies.[55] They provided the inspiration for the idea of unbundling network elements, which represented one of the most substantial reforms present in the 1996 Act.[56]

The 1996 Act's competition provisions represented the first significant step toward what could now be described as a "layers model" for network design and regulation, in that it envisioned competition occurring at multiple points within the telecommunications industry.[57] In particular, Congress sought to introduce competition in "building facility-based networks, contracting for the use of unbundled network elements ("UNEs") from the ILECs, and providing resale."[58] Facilities-based network construction is hampered by immense capital costs and, today, decreasing potential for investment recovery, and thus has struggled to find footing to directly create

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49. Cooper & Koukoutchos, *supra* note 34, at 316.
50. *Id.* at 317.
51. *Id.*
52. Thomas W. Bonnett, *Is ISP-Bound Traffic Local or Interstate?*, 53 FED. COMM. L.J. 239, 244-45 (2001).
53. *Id.* at 246.
54. Jonathan Rabinovitz, *Competition to Begin for Local Phone Calls, Ending a Monopoly*, N.Y. TIMES, Jan. 6, 1996, http://www.nytimes.com/1996/01/06/nyregion/competition-to-begin-for-local-phone-calls-ending-a-monopoly.html?pagewanted=1.
55. Bonnett, *supra* note 52, at 246.
56. *Id.*
57. Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L.J. 207, 233 (2003).
58. Bonnett, *supra* note 52, at 246.

competition with legacy technologies.[59] Policies impacting construction have been successful in new technology areas, however; build out of residential fiber and wireless networks have exploded over the past fifteen years.[60]

The second area of competition, the use of UNEs, has been more successful.[61] In conjunction with obligations to resell UNEs to competitive carriers, sections 251 and 252 of the 1996 Act require ILECs to negotiate interconnection agreements with competitive carriers on reasonable terms, and include provisions to minimize facilities-based barriers to entry for potential competitors.[62] This has spurred growth in two areas: interexchange carriers who solely provide backhaul service have found a place in the market, and CLECs have to a limited extent been able to grow and compete.[63] The third type of competition, reselling, has found substantial success, particularly in the area of long distance. Following the introduction of the 1996 Act, hundreds of competitive long distance providers have been able to purchase and resell blocks of long distance service, producing substantial competition in the marketplace.[64] All in all, however, the competition-based provisions of the 1996 Act that apply to ILECs have had mixed success. While some goals have been achieved—CLECs do exist and are competitive in providing resale services, for example—the incredible costs associated with constructing facilities-based networks and providing connectivity to end users has significantly limited the success of Congressional attempts to promote the construction of new facilities-based systems.[65]

The 1996 Act also gave broad preemptive power to the FCC, allowing it to preempt any state regulation that was deemed detrimental to a legitimate federal purpose, or to competition in the marketplace.[66] This power is limited somewhat to preserve the states' legitimate interests in public safety, universal service, and consumer protection.[67] This power can be extended further through the exercise of ancillary jurisdiction, which permits the FCC to regulate conduct outside the express language of the Act when the subject is within the Act's scope, and the regulation in question is ancillary to the FCC's ability to address its statutory responsibilities.[68]

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59. *Id.*
60. *Id.* at 219 n.35.
61. *Id.*
62. 47 U.S.C. §§ 251-252 (2006).
63. *See* Bonnett, *supra* note 52, at 246.
64. *Id.*
65. *Id.* at 247-48.
66. 47 U.S.C. § 253(a) (2006).
67. 47 U.S.C. § 253(b) (2006).
68. Am. Library Ass'n v. FCC, 460 F.3d 689, 691-92 (D.C. Cir. 2005).

C. *Growing Pains: The Joint Jurisdictional Model Conflicts with Modern Network Designs, Leading To Absurdity*

One of the iconic images of earlier periods of telephone service is the image of the local operator, connecting calls and providing directory assistance. At first these operators were located in each community, and knew their customers by name, serving the overwhelmingly local use of the system.[69] Today, when we dial for an operator, or call 411, however, we are effectively routed to a single call center, regardless of our location, while powerful computers trace the call, identify our location, and then provide us with the phone number of the pizza place across town.[70] This call remains classified as intrastate for regulatory purposes, despite decades of innovation and technological development that have made it more efficient to maintain no more than a handful of call centers nationwide.[71]

Over time, the legal description and classification of new technologies has been distorted and manipulated to fit this dual-jurisdiction system. A great deal of traffic classified as intrastate for regulatory purposes is in fact inherently interstate.[72] To carry out the breakup of the Bell system, for example, 196 Local Access and Transport Areas were created and grouped together to form to service areas for each of the Regional Bell Operating Companies (RBOCs), which became what we now classify as Incumbent Local Exchange Carriers, or ILECs.[73] These Local Access and Transport areas do not follow state lines, though—they instead "were primarily drawn along the lines of the Standard Metropolitan Statistical Areas delineated by the Census Bureau . . . in economic terms."[74] This means that a single metropolitan area, such as that around New York or Washington, D.C., is contained within a single Local Access and Transport Area, regardless of state lines.[75] Calls in Washington, D.C., therefore routinely cross into Virginia and Maryland, but remain classified as intrastate calls and subject to the discrete regulation of each of those states.[76] In other words, a single local call can quite easily find itself subject to two or three regulatory regimes, including additional taxes and fees, yet remain "intrastate" under the law, and thus remain outside federal jurisdiction.[77] This classification is crucial in determining whether state or federal authorities retain the power to regulate an activity; because although the FCC has broad preemptive powers

69. *See* Bonnett, *supra* note 52, at 320-21.
70. *Id.*
71. *Id.*
72. Cooper & Koukoutchos, *supra* note 34, at 317.
73. *Id.*
74. *Id.*
75. *Id.* at 318.
76. *Id.*
77. *Id.*

under the 1996 Act, the original construction preserving state regulatory authority for intrastate traffic remains intact.

The geographic locations of modern network switches provide additional examples of the absurdity presented by applying the 1934 Act's principles to modern networks. Switches don't need to be in every town anymore; they can be more centralized as technology has advanced.[78] Verizon's switch that serves all local calls in New York City, for instance, is located in Connecticut.[79] Every single local call made in the most populous city in the country, the city that never sleeps, is inherently interstate, yet remains classified intrastate for regulatory purposes due to the dual jurisdiction established by the 1934 Act.[80] As enhanced services such as voicemail, call waiting, and call forwarding have been delivered to consumers, the regulatory model has remained unchanged.[81] This goes against the very nature of these technologies, as they permit the consolidation of facilities able to serve multiple states, making all traffic inherently interstate rather than intrastate.

D. State Regulatory Issues and Remaining Interests

While there are some striking issues raised by the IP transition at a federal regulatory level, the transition presents a very different threat to state regulation: its complete preemption. The *Vonage* order preempted state regulation of VoIP, though the actual scope of that preemption remains a subject of intense debate.[82] The FCC has, however, imposed some Title II-esque obligations on VoIP providers (911 interconnection[83] and USF contributions[84] are most notable) while refraining from imposing other obligations, such as those arising under the truth-in-billing, cramming, and slamming rules.[85] The states, for their part, have been somewhat active in addressing VoIP as well, with a majority of states either wholly or partially

78. *See* BRANDS & LEO, *supra* note 13, at 34-35.
79. Cooper & Koukoutchos, *supra* note 34, at 318.
80. *Id.* at 319-20.
81. *Id.*
82. *See Vonage Order*, *supra* note 7, at para. 1.
83. E911 Requirements for IP-Enabled Serv. Providers, *First Report and Order and Notice of Proposed Rulemaking*, FCC 05-116, 20 FCC Rcd. 10245, para. 1, 26 (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-116A1.pdf.
84. Universal Serv. Contribution Methodology, *Report and Order and Notice of Proposed Rulemaking*, FCC 06-94, 21 FCC Rcd. 7518, para. 1 (2006) [hereinafter *USF Contribution Order*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-94A1.pdf, *vacated in part sub nom.* Vonage Holding Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007).
85. *See generally* Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"), *Report and Order and Further Notice of Proposed Rulemaking*, FCC 12-42, 27 FCC Rcd. 4436 (2012), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-42A1_Rcd.pdf.

deregulating or preempting any regulation of VoIP, according to NRRI data from 2013.[86]

While state and federal actions have reduced or eliminated the ability of states to regulate IP telephony, the states do maintain a healthy interest in the regulation of telecommunications services generally. Emergency services and 911 systems are primarily funded, managed, and regulated at the local and state level, and states have a long history of involvement in consumer protection activities.[87] Additionally, the states are responsible for granting rights of way to facilitate the construction of new infrastructure.[88] More generally, the economic and societal benefits of access to modern communications technologies, particularly the Internet, play an increasing role in driving state interest in telecommunications regulation. Throughout the IP transition, and particularly as a new regulatory framework is developed, balancing economic efficiency against these important interests, some of which are best handled at the state level, will be crucial. The bulk of these interests are explicitly protected by the 1996 Act and are immune from FCC preemption.[89]

E. The IP Transition Thus Far

The transition is well underway, as Chairman Wheeler noted in his first blog post as Chairman in November 2013.[90] Cable providers have been using IP technology for voice, video, and data services for years—the rapid growth of bundled services that are made possible by IP networks is proof of this.[91] Furthermore, wireless providers make extensive use of IP technology, and nearly 30% of home phone lines are categorized as interconnected VoIP by the FCC.[92] In January 2014, the FCC gave AT&T permission to submit a proposal to conduct transition trials in two of its wire centers.[93] In February,

86. *See generally* LICHTENBERG, *supra* note 5.

87. James E. Holloway, Elaine Seeman, & Margaret O'Hara, *State, Agency and Local Next Generation (NG) 911 Planning and Coordination to Implement State NG911 and Internet Protocol (IP) Enabled Network Policies*, 11 J. TECH. L. & POL'Y 3, 3 (2010).

88. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1866 (2013) (quoting Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005)) (discussing the 1996 Act's limitations on "the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities.").

89. 47 U.S.C. § 256(b)-(c) (2006).

90. Wheeler, *supra* note 1.

91. NUECHTERLEIN & WEISER, *supra* note 15, at 16. While it is of course possible, and common, to bundle circuit-switched services alongside those delivered over packet-switched networks, bundling in this manner requires the provider to maintain multiple protocols for connection to the user. An all-IP system reduces the infrastructure and upkeep costs by providing all services through one connection.

92. *See* FCC LOCAL TELEPHONE COMPETITION, *supra* note 23.

93. AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, *Order, Report and Order, and Further Notice of Proposed Rulemaking*, FCC 14-5, 29 FCC

AT&T filed its plan to conduct those trials, which involve converting all telephony in a designated area over to IP, and then studying the deployment, adoption, and effectiveness of the systems.[94] With the FCC's approval, the trials will take place in Alabama and Florida, and represent the biggest step yet toward widespread replacement of aging elements of the PSTN with packet-switched systems.[95] The FCC will accept proposals for a full year from the date of the January order, and one competing proposal has already been submitted by Iowa Network Services, Inc..[96]

F. Government and the IP Transition

Congress has picked up on the importance of the IP transition, starting with a Senate Subcommittee hearing on the subject in June of 2013,[97] followed by a House Subcommittee hearing in October 2013.[98] Both hearings sought to examine issues that may arise during the transition, and heard testimony from industry groups, ILECs, and public interest organizations.[99] More recently, the House Energy and Commerce Committee has started publishing white papers as it begins the process of building an overhaul of the 1996 Act.[100] In announcing the commencement of this process, Chairman Fred Upton stated that "[t]oday we are launching a multi-year effort to examine our nation's communications laws and update them for the Internet era."[101] The first of these whitepapers examines the history of communications regulation, and its current state.[102] It also solicits comments from stakeholders regarding whether a new act should be structured "around particular services," as is the case today, as well as

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Rcd. 1433, para. 1 (2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0131/FCC-14-5A1.pdf.

94. Proposal of AT&T for Wire Center Trials at 1-2, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, FCC GN Docket No. 12-353, 1-2 (rel. Feb. 27, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521084110.

95. *Id.* at 13.

96. Comm'n Seeks Comment on Proposal of Iowa Network Servs., Inc. for Serv.-Based Tech. Transitions Experiment, *Public Notice*, DA 14-238, GN Docket No. 12-353 (2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-14-238A1.pdf.

97. *State of Wireline Communications: Hearing Before the Subcomm. on Sci., Tech., & Innovation, of the Senate Comm. on Commerce, Sci., & Transp.*, 113th Cong. (2013), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-113shrg87817/pdf/CHRG-113shrg87817.pdf.

98. *The Evolution of Wired Communications Networks: Hearing Before the Subcomm. on Commc'ns & Tech of the Comm. on Energy & Commerce*, 113th Cong. (2013).

99. *See generally id.; State of Wireline Communications*, *supra* note 97.

100. Press Release, Energy & Commerce Comm., Upton and Walden Announce Plans to Update the Communications Act (Dec. 3, 2013), *available at* http://energycommerce.house.gov/press-release/upton-and-walden-announce-plans-update-communications-act.

101. *Id.*

102. *Id.*

whether "the distinction between information and telecommunications services" remains relevant and useful.[103]

On the FCC's end, they had established a Technology Transitions Policy Task Force. Recently, however, it has been disbanded.[104] The FCC's primary engagement in the transition is taking place through the proceeding opened in response to AT&T's Petition.[105]

More recently, the Commission has continued reviewing AT&T's proposal for trials, and has opened new proceedings to examine issues concerning transparency, consumer protection, and 911 reliability.[106]

At the state level, less has been done to address the transition, though some state PUCs have participated in IP-related FCC proceedings.[107] Local governments are aware of the issue, and are beginning to communicate with industry and public interest groups as well.[108] States are particularly interested in the public safety implications of the transition, and Alabama has even gone so far as to begin rolling out IP services to all its PSAPs.[109] Further state action will be required, however, as most states have backed themselves into a corner on the IP issue. As previously discussed, widespread deregulation of IP services at the state level has drastically limited the potential scope of state regulatory action as compared to the scope of action available when regulating packet-switched services.

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103. COMM. ON ENERGY & COMMERCE, MODERNIZING THE COMMUNICATIONS ACT 3-4 (Jan. 8, 2014) [hereinafter MODERNIZING THE COMMUNICATIONS ACT], *available at* https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf.

104. Statement of Comm'r Ajit Pai on the Conclusion of the Tech. Transitions Policy Task Force (FCC Jan. 31, 2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0131/DOC-325378A1.pdf.

105. *See generally* FCC Docket No. GN 12-353.

106. *See, e.g.*, Pub. Safety & Homeland Sec. Bureau Seeks Comment in the E911 Location Accuracy Proceeding, *Public Notice*, DA 14-1680, FCC PS Docket No. 07-114, 1 (2014) *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1680A1.pdf.

107. *See, e.g.*, Comments of the Indiana Util. Regulatory Comm'n at 1, Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, FCC GN Docket No. 12-353 (rel. Jan. 28, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7022113494.

108. *See, e.g.*, Comments of the Nat'l Ass'n of Telecomms. Officers & Advisors at 2, Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, FCC GN Docket No. 12-353 (rel. Jan. 28, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7022113577.

109. William Jackson, *Alabama Begins Rolling Out IP Network for 911 Calling*, GCN (Nov. 14, 2013), http://www.gcn.com/articles/2013/11/14/Alabama-911-IP-network.aspx.

III. ANALYSIS

A. The Old Ways are Failing: Federalism and Packet-Switched Networks

The split between state and federal jurisdiction over telecommunications stands on unstable ground these days. While this division was originally built on a combination of constitutional law and practical considerations arising from network design, the advent of IP-enabled services has shown the limitations of this model.[110] IP networks function very differently from circuit-switched networks, which primarily run on copper wire. While traditionally the service and the network were essentially inseparable, that is no longer the case. Voice is but one of many services that a fiber network can provide—a high-priority service, to be sure, but still one of many. As the Internet grows and services shift into the cloud, this separation between network and service becomes even more significant. Whereas traditionally the provision of voice services required the service provider (and network provider) to locate equipment at all junction points in the network, this is no longer the case.[111] Skype, for example, can serve every broadband-connected location in the country with only a handful of data centers where they actually locate their equipment.[112] They do not own the network they use to provide service, and conversely, the network owner no longer necessarily provides the voice service consumers seek.[113]

This shift to technology that no longer requires highly localized infrastructure calls into question one of the key bases for state jurisdiction over telecommunications service. The 1934 Act, which established the FCC, explicitly forbade the newly created agency from regulating intrastate communications.[114] This was done to eliminate the Interstate Commerce Commission's application of the *Shreveport Rate* policies to phone providers.[115] This language "embodied the tension between the fundamental unifying impulse of the Commerce Clause and the legacy of state-by-state regulation with which we still contend today."[116] Over time, this rule became increasingly convoluted, however. The creation of the Regional Bell Operating Companies (RBOCs)[117] by necessity included provisions defining "intrastate" calls as any call that did not have to pass between RBOCs.[118]

110. WALDEN, *supra* note 38, at 290-91.
111. *See* Bonnett, *supra* note 52, at 250-51.
112. *See id.* at 252.
113. *See id.* at 280.
114. Cooper & Koukoutchos, *supra* note 34, at 316 (citing 47 U.S.C. § 152(b) (2006)).
115. *Id.*
116. *Id.* at 316-17.
117. The RBOCs were created during the dissolution of AT&T, were later reclassified as ILECs, and have consolidated somewhat in the decades since.
118. Cooper & Koukoutchos, *supra* note 34, at 317-18.

This meant, for example, that a switch in New York City handled local calls from western Connecticut, and they were treated as intrastate calls despite geography plainly indicating otherwise.[119] When voicemail was introduced, things got worse. Data storage is most efficient if it's largely centralized, meaning that subscribers from multiple states would actually leave voicemails for local numbers on servers located several states away.[120] Regulators still treat voicemail traffic as intrastate in nature, however, despite a clear technological indication to the contrary.[121]

Applying this regulatory model to packet-switched networks is an exercise in absurdity. Modern network design long ago exceeded so simple a regulatory scheme. A Comcast customer in Washington, D.C., for example, who has IP telephone service in addition to his high-speed service, receives all his connectivity through datacenters in northern Virginia.[122] The simple act of calling his neighbor crosses state lines. Any person using a Charter connection in South Carolina to connect to Skype to place a call, whether local or long distance, will have that call routed through Charter's datacenter before moving to one of Skype's datacenters elsewhere in the country. A call to one's neighbor, then, likely spends more time outside the state than it does inside. While Skype does offer its service in each of those states, it has physical facilities in no more than a handful.[123] The intrastate element of IP services is, in most circumstances, confined exclusively to the provision of connectivity, not to the provision of any particular service.[124]

Connectivity, on the other hand, remains much more substantially intrastate. While the servers most users access to connect to services and the Internet as a whole are unlikely to be located in one's state, there is certainly a cable or fiber endpoint on most every street, and a cable modem termination system ("CMTS") providing data connectivity at each local headend.[125] There is certainly cable in the ground, and buildings to house all this hardware, and employees to serve customers within the borders of each state. In a very real sense, the provision of basic network connectivity is the most significantly intrastate element of modern telecommunications systems.

In effect, the Commerce Clause was applied to the network structure of the PSTN to divide up jurisdiction between federal and state authorities.[126] The legal principles applied at the time remain sound, but the result of that

119. *Id.* at 318.
120. *Id.* at 319-20.
121. *Id.* at 318.
122. *Id.* at 318.
123. *See* Salman A. Baset & Henning Schulzrinne, *An Analysis of the Skype Peer-to-Peer Internet Telephony Protocol* 11 (Columbia Univ., 2004), *available at* http://arxiv.org/ftp/cs/papers/0412/0412017.pdf.
124. NUECHTERLEIN & WEISER, *supra* note 15, at 43-44.
125. *Id.* at 134-35.
126. Lyons, *supra* note 41, at 434.

analysis no longer matches reality. Despite revisions in the 1996 Act, notably the addition of federal preemptive power regardless of intrastate concerns, the current structure is ill-equipped to address the technology of today and tomorrow.[127] As the IP Transition moves forward, the inadequacy of this jurisdictional divide will be illustrated quite clearly as Title II-governed PSTN elements begin to be phased out.[128] While Title II was written to be technology-agnostic, its language was based on a set of presumptions about the underlying network architecture, which have partially been outstripped by innovation. In a very real sense, the federalism analysis applied to telecommunications services in the early part of the 1900s would, if revisited today, lead to a vastly different conclusion. The shift away from strictly tree-style copper networks undermines the geographic distinctions that supported the original implementation of the joint jurisdictional model.

Modern network design supports instead a conclusion similar to that reached by the FCC in examining ISP traffic. In that situation, the FCC found that such traffic was inherently interstate, and thus within the jurisdiction of the federal government under the Commerce Clause.[129] As communications increasingly resemble ISP traffic, and even become a significant portion of ISP traffic, it will be increasingly hard to justify treating voice service traffic differently.[130] An analysis of modern networks through the lens of federalism will likely no longer yield the same results which led to the dual-jurisdiction model.

B. Change Is Needed, but What Should It Look Like?

It is evident over the course of the past decade that the fundamental divisions drawn by the 1934 and 1996 Acts must be replaced to address changes in technology. It took nearly a decade after the divestiture of AT&T before the 1996 Act had a meaningful impact on telephone competition. The IP transition is moving forward rapidly, and may not be able to wait a decade. Such a timeframe may even be optimistic, considering the deeply divided political environment of the United States. One third of homes in the country no longer have a wired telephone at all, relying entirely on wireless services that utilize IP technology.[131] Of those homes which do have wired phones, nearly thirty percent connect using VoIP technology instead of traditional

127. *See id.* at 395.

128. While no plans yet exist to phase out the legacy elements of the PSTN, it will become an economic necessity as soon as 2018 by some estimates, and can therefore be presumed as something that will happen sooner rather than later. *See* GABEL & BURNS, *supra* note 4, at 3. It is difficult to envision a situation in which copper wire and 1930s regulatory models will remain the standard in 20 years.

129. Intercarrier Compensation for ISP-Bound Traffic, *Order on Remand and Report and Order*, FCC 01-131, 16 FCC Rcd. 9151, para. 1 (2001), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-01-131A1.pdf.

130. *See* Lyons, *supra* note 41, at 395.

131. *See* CDC REPORT, *supra* note 24.

wireline services.[132] AT&T is planning to move forward with IP trials, working with the FCC to examine and understand how a full transition will play out.[133] These efforts, driven largely by industry and consumer demand, are already well on their way to transforming the telecommunications industry, yet meaningful progress remains hindered by archaic law. Given that the constitutional principles which governed the creation of the 1934 Act may yield a different or less useful result today, it may be preferable to look to the networks themselves for guidance in developing a new framework.

While commenters generally agree that an overhaul is necessary, they differ as to the means of achieving reform. Cooper and Koukoutchos suggest, for example, that that widespread, preemptive deregulation of voice providers is a necessary and prudent first step toward meaningful reform.[134] Citing the Commerce Clause and applying federalism analysis to developing technologies, they reach the conclusion that, rather than attempting to implement a regulatory model that is tailored to existing technology, broad deregulation represents a more appropriate approach.[135] This strategy will permit industry to redefine services and communications technology as the market dictates, a process that would not be nearly so open-ended if restricted by substantial regulation.[136] They further argue that intermodal competition— that is, competition between different types of wired and wireless services—necessitates such a change, as no single set of regulations can equitably apply to all market participants without artificially distorting the impact of market forces.[137] The concern with this approach is that the regulations in place today are the result of decades of work to mold and shape an industry that grew out of a consumer-unfriendly monopoly. Broad-sweeping deregulation would reset the score, so to speak, and runs the risk of forcing consumers and regulators to re-learn painful lessons from decades past.

Other commenters favor the construction of a new model from the ground up. Richard Whitt,[138] for example, supports the creation of a regulatory framework, which is based on the "layers model" that describes the design of modern networks.[139] He explains that existing and past regulation can be described as vertical, in that it regulates a service from top to bottom, including not only the service that consumers receive, but also the

132. *See* FCC LOCAL TELEPHONE COMPETITION, *supra* note 23.
133. *See generally* AT&T Petition, *supra* note 31.
134. Cooper & Koukoutchos, *supra* note 34, at 344-45.
135. *Id.*
136. *Id.*
137. *Id.* at 347.
138. Richard S. Whitt is head of Public Policy and Government Relations for Motorola Mobility, and was formerly Google's Senior Policy Director, as well as an employee of MCI for 12 years. LINKEDIN, http://www.linkedin.com/pub/richard-whitt/1/337/760.
139. Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587, 590 (2004).

underlying infrastructure and connectivity that supports it.[140] As technology has evolved, however, network design has become more horizontal, as different providers serve different connectivity roles, combining their "layers" in the modern network stack. Networks can be described as "horizontal," in that a service rides across a modern network alongside other services—horizontally, or side by side, in other words. Older networks required separate networks for separate services, or could only be utilized for one service at a time. Dial-up internet required use of a phone line, for example. Modern IP networks permit voice, data, and video services to ride side-by-side over a single copper or fiber line. One provider may connect multiple last-mile carriers, who in turn each carry third-party services to their customers.[141] The services consumers utilize ride on top of network connectivity provided by companies that also directly interface with consumers, while those companies in turn are connected through backbone companies that provide underlying connectivity.[142] Attempting to force a vertical model subjects multiple businesses to regulations that could be tailored to the layer of the network each provider serves, rather than to the end service that the consumer receives.[143]

A layers-based regulatory approach would seek to address this by dividing the industry into regulatory groups based on the function their company serves, rather than the particular consumer service their service supports.[144] Backbone providers' connectivity-related activities could be regulated without saddling them with consumer-directed regulations, and all voice services could be regulated as a whole, regardless of the technology the service provider chooses to use.[145] While a layers model approach may seem desirable, it does have its flaws. It is subject to market power abuse when one or more companies are dominant in a particular layer, for example.[146] It also struggles to reconcile its strict division of layers with legitimate state interests in communications regulation, such as consumer protection and public safety, and is ill-equipped to address matters that must, by their nature, remain local, such as rights-of-way.[147]

Similarly, Rob Frieden[148] advocates for the application of a more horizontal model, writing that current policies "do not fully segregate content from the conduit used to deliver the content, with the result of applying

140. *Id.*
141. *Id.*
142. *Id.* at 591-92.
143. *Id.* at 625.
144. *Id.*
145. *Id.* at 636-37.
146. *Id.* at 632.
147. *Id.* at 649-50.
148. Rob Frieden is a Professor of Telecommunications and Law at Pennsylvania State University. His industry experience includes time spent with Motorola Satellite Communications, Private Trans-Atlantic Telecommunications Systems, and the National Telecommunications and Information Administration.

different degrees of government oversight based on the method for delivering possibly the same content."[149] While he supports an application of layers principles, he is less revolutionary in his proposal, suggesting instead that the layers model be used as a starting point, with exceptions carved out where common sense or policy objectives indicate it would be wise to do so.[150] He notes that the FCC is already moving in this direction, as "the FCC believes the identical designation for services transmitted via different technological architectures represents a functional approach that supports ubiquitous deployment of advanced services, harmonized regulation of multiple technical platforms, minimum necessary regulation, and a consistent analytical framework."[151] Frieden's proposal serves as a solid middle ground, balancing the need for reform with the realities of industries that are already developed and flourishing under a very different model.

Common amongst all commenters, however, is the sentiment that the current legislation that governs the FCC and dictates the powers it holds does not permit it to conduct so widespread a redesign of our nation's communications regulations.[152] As the FCC is an administrative agency governed by the mandates of Congress, it cannot act outside its granted authority—we must wait, in other words, for Congress to provide us with some solution to these myriad issues. With the transition well underway and Congress only just starting to get engaged, perhaps there are options that policymakers can pursue in the interim while they wait for a major overhaul. These actions might indicate to Congress the direction the FCC wishes to go, based on its expert analysis of markets and technology, while also serving to provide substantive improvements for businesses and consumers in the interim. The question, then, is what sort of end result is desirable.

C. What Should the Next Act Look Like?

With the need for regulatory overhaul firmly established, the next challenge comes in determining the final situation that is most desirable to serve as an objective. A new model is needed, resting as others have suggested on a more contemporary evaluation of both the legal principles that underlie federal authority in this field, as well as the practicalities of modern technology. This model will need to account for increased public interest in communications issues including privacy and consumer protection, and address fundamental shifts in technology, while preserving the role of the states in regulating those aspects of communications where their participation is necessary and desirable.

149. Frieden, *supra* note 57, at 210.
150. *Id.* at 248-49.
151. *Id.* at 230.
152. *See id.* at 229-30.

One of the fundamental bases for this new model should be, as suggested by Frieden, a separation between a particular type of service or content, and the connection which delivers it.[153] Dividing services up in this manner adheres also to the layers model proposed by Whitt, in that it would permit services to be regulated based on the customer they serve and the type of service they are, rather than the means by which that service is delivered.[154] Companies that provide voice services to end users, for example, should be regulated equally regardless of the means they choose to provide this service. Companies that provide trunk bandwidth and network backhaul should be regulated the same, regardless of the services for which they provide backhaul. Video service providers should bear equal regulatory obligations, regardless of the means they choose to use in delivering video to consumers. This would go against the current Act's structure, in which Title II is built to regulate telecommunications providers as common carriers and considers the service to be integrated with the network that provides it, regulating the two elements as one. As Frieden notes, actions of this type have already been taken pursuant to the 1996 Act, as "the FCC largely eliminated the vertical link between a service definition and the applicable regulatory model."[155] This would also satisfy a refreshed federalism analysis, echoing the FCC's findings regarding ISP traffic—namely that traffic over IP networks, due to the design of such networks and the centralization of routing facilities, is inherently interstate and thus subject exclusively to federal jurisdiction.[156]

Another important priority must be preservation of remaining state interests in communications regulation. While the state interest has significantly diminished over time, or has been removed as was the case with tariff requirements, there remain aspects of the communications system which directly require a state role. 911 services, for example, are primarily overseen at the local and state level, rather than federally.[157] While the precise governance of public safety answering points ("PSAPs") varies from state to state, they are generally closely tied to the first responder services maintained by the states. It would make little sense, and arguably usurp states' police powers, to preempt these functions and regulate them federally. Even if such preemption were permissible, the FCC is ill-equipped to address issues arising on so localized a scale, and it would serve little purpose to reshuffle responsibility in this area.[158] States also have obligations and

153. *Id.* at 231.
154. *See* Whitt, *supra* note 139, at 590.
155. Frieden, *supra* note 57, at 223.
156. Bonnett, *supra* note 52, at 280-81.
157. Holloway, Seeman, & O'Hara, *supra* note 87, at 4.
158. Victoria A. Ramundo, *The Convergence of Telecommunications Technology and Providers: The Evolving State Role in Telecommunications Regulation*, 6 ALB. L.J. SCI. & TECH. 35, 57-59 (1996).

interests in rights-of-way determinations.[159] Furthermore, there remain aspects of telecommunications service regulation, particularly as pertains to consumer protection and service quality, which the states may be better-equipped to address.[160] It would make little sense, for example, for consumer complaints about local service quality to require review at the federal level, or for states to be unable to act to protect their consumers from unfair business practices.[161] If services were separated from the connectivity on which they rely, network reliability would "become of increasing concern," as responsibility for public safety connectivity would rest with two parties—a service provider and a connectivity provider—rather than one, as is usually the case today.[162] Complaints by consumers about issues affecting "service quality, price, installation, consumer fraud, and billing practices" would continue to deserve attention, and may best be handled at the state level.[163] Such issues are at least partially local in scope, and in many ways could be more adequately addressed locally; the states have an interest in protecting their citizens, and a new regulatory model should preserve a place for the states at the table.[164]

D. Congress Is on the Job, but Can We Afford to Wait?

Congress has at last recognized the need for an update to the 1996 Act, potentially at a fundamental level. In its first whitepaper on the topic, released in January of 2014, the House Energy and Commerce Committee staff noted that "while there were historic reasons for separating the Act into service-based titles, the Act and subsequent changes to it did not envision the intermodal competition that exists today."[165] They are correct to note that these historical reasons, as previously discussed, do not necessarily hold true today. Congress has been faced with the challenge of updating the Act to address new technologies in the past, however, so this situation is by no means unique. In the 1970s, cable systems developed at a rapid pace and the FCC did its best to regulate them, but was stymied by court decisions that reversed its efforts citing a lack of statutory authority.[166] It took Congress five years to develop the Cable Communications Act of 1984, which finally granted the FCC the authority to regulate cable systems and video providers.[167]

Congress today stands more divided than ever before, and a complete redesign of our country's regulatory framework is a substantially

159. *Id.* at 57.
160. *Id.*
161. *Id.*
162. *Id.* at 61.
163. *Id.*
164. *Id.* at 61-62.
165. MODERNIZING THE COMMUNICATIONS ACT, *supra* note 103, at 3.
166. FCC v. Midwest Video Corp., 440 U.S. 689, 708-09 (1979).
167. 47 U.S.C. § 521 (2006).

larger task, with many more stakeholders, than the task of determining the best way to add a new technology to an existing framework. It is rare for Congress to be able to even pass a budget, let alone a major bipartisan regulatory rewrite. Furthermore, any potential legislative solution will likely need to wait at least until the 2016 elections, as Congress now sits in Republican hands. A rewrite of the Act would need to address a number of deeply divisive issues, including tax policy, privacy, consumer protection, antitrust concerns, and net neutrality. Without a strong Democratic presence in Congress, it is unlikely President Obama will be presented with a telecom act rewrite he would feel comfortable signing during the remainder of his presidency.

Given the scale of this challenge, the political realities of the next two years, and the pace at which the IP transition is already moving, it is doubtful that industries, consumers, or regulators will have either the desire or the ability to push "Pause" and wait for Congress to provide an updated regulatory framework in which the IP transition can take place. The FCC may not need to sit still for so long, however, as it has a sizeable toolbox even under the current Act.

E. The FCC Can Lead the Way

With basic objectives established to inform future choices, the FCC has the opportunity to act in a way that will drive the regulatory environment toward those goals while remaining within the scope of current law. The separation of services from the networks that provide them would be one strong step forward. The current structure of the Act leads naturally to the "'siloed' sector-based nature of the law and resulting regulation."[168] If we could move away from siloed or vertical regulatory models, and toward horizontal regulation now, without waiting for new legislation, the benefits would be immense.

Under current law, a service which provides voice communications can be classified either as an information service, and thus exempt from most types of regulation including universal service obligations, or classified as a telecommunications service under Title II, and subject to common carrier regulations pursuant to the 1996 Act.[169] In the interests of promoting competition in the marketplace and allowing new business models to develop, the FCC has made a point of avoiding the classification of new voice services into either category.[170] It has classified some types of VoIP as information services to avoid common carrier obligations, while most types remain entirely unclassified.[171] It has imposed some common carrier obligations on VoIP providers, however, particularly universal service and

168. *See* MODERNIZING THE COMMUNICATIONS ACT, *supra* note 103, at 3.
169. 47 U.S.C. § 153(24), (53) (2006).
170. *See Vonage Order*, *supra* note 7, at para. 1.
171. *Id.*

911 interconnection requirements.[172] The ability of the FCC to selectively adopt regulations in this manner, however, has been significantly curtailed by the recent decision regarding the Open Internet Order. The DC Circuit held that the FCC could not apply broad common carrier rules to a service without actually classifying that service as a common carrier.[173] To do one without the other would subvert Congress' intent expressed in the structure of the act.[174]

The Commission appears stuck, then, with this forced choice between two less-than-ideal classifications. Fortunately, the FCC has some tools at its disposal that might allow it to improve the situation while awaiting Congressional guidance regarding the Hill's desired path for the future of communications regulation. First and foremost among these tools is the FCC's preemption power. The FCC enjoys broad preemptive powers under section 253 of the 1996 Act.[175] The FCC may preempt any state regulation which it reasonably believes may have a negative impact on the promotion of competition in the telecommunications industry.[176] It could, if it desired, functionally eliminate the role of the states in the regulation of telecommunications services by exercising its authority under this section, as it did with the *Vonage Order's* preemption of the regulation of VoIP.[177] The FCC could argue that the states' differing treatment of services that are, in the modern age, inherently interstate, negatively impacts the ability of companies with a physical presence in more than one state to compete in the national marketplace.

Another of the powers the FCC enjoys that might be of use here is its ability to release Title II providers from certain provisions of the Act,[178] "if enforcement is unnecessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; enforcement is unnecessary to protect consumers; and forbearance is consistent with the public interest, in that it 'will promote competitive market conditions' and 'enhance competition among providers of telecommunications services.'"[179] The FCC has used this power to release providers from various Title II obligations before, notably when it eliminated the longstanding requirement that voice service providers file tariffs.[180] However, the FCC has also gotten

172. *USF Contribution Order*, *supra* note 84, at paras. 1, 15.
173. *See* Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).
174. *See Id*.
175. *See* 47 U.S.C. § 253 (2006).
176. *See Id*.
177. *See Vonage Order*, *supra* note 7, at para. 1.
178. *See* Telecommunications Act of 1996 § 401(a), Pub. L. No. 104-104, 110 Stat. 56, 128-129 (codified at 47 U.S.C. § 160(a) (2006)).
179. Ad Hoc Telecom. Users Comm. v. FCC, 572 F.3d 903, 907 (D.C. Cir. 2009) (quoting Telecommunications Act § 401).
180. *See* Frieden, *supra* note 57, at 242 & n.106.

in trouble with its forbearance power.[181] A significant portion of the reason why new regulation is necessary is because broad forbearance from Title II has already been granted by the Commission for providers of fiber Ethernet services, which form the backbone of most IP networks. The FCC's forbearance authority is limited, however, and a section 401 decision is subject to judicial review to ensure it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[182] This power may be helpful to an extent to permit pursuit of a layers model by removing regulations that distinguish between services on the basis of their means of provision, as is currently the case with the vertical model.

One tool the FCC unfortunately does not possess is the ability to delegate its authority in any manner it sees fit. While it has the power to delegate within itself, the D.C. Circuit held in 2004 that, absent an express legislative mandate, the FCC cannot delegate its authority to a state public utility commission.[183] The FCC does have the authority to delegate in some areas, such as numbering administration, but the court found that the FCC failed to recognize "an important distinction between subdelegation to a *subordinate* and subdelegation to an *outside party*."[184] Existing law only permits administrative authorities, by presumption, to delegate their authority to direct subordinates within their agencies, and "there is no such presumption covering subdelegations to outside parties. Indeed, if anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization."[185] The Court reasoned that delegation to outside authorities would create the potential for parties to act in a manner inconsistent with Congress' stated purpose or intent.[186]

Were the FCC to possess this power, it would be a relatively straightforward task to apply its preemption power to redefine what areas are regulated by states or by the FCC, by preempting areas in which the states should not have a role, and delegating back areas in which they should. This could be justified by citing the aforementioned competition concerns, while leaving intact those elements of regulation in which the states have an interest. The FCC could further appease the states by delegating portions of its Title II authority pertaining to connectivity back to the states, to enable them to pursue their interests in consumer protection, public safety, and improved access to communications services.

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181. Christopher S. Yoo, Wickard *for the Internet? Network Neutrality After* Verizon v. FCC, 66 FED. COMM. L.J. 415, 445 (2014) ("In practice, however, the agency's experience with forbearance has not been a happy one.").

182. Ad Hoc Telecomm. Users Comm., 572 F.3d at 908 (quoting 5 U.S.C. § 706(2)(A)).

183. *See* U.S. Telecomm. Ass'n v FCC, 359 F.3d 554, 566 (D.C. Cir. 2004).

184. *Id.*

185. *Id.* at 565.

186. *Id.*

In the absence of such broad authority, however, the FCC should move the ball forward as far as it can. An exercise of the FCC's preemptive authority under section 253 of the Act, coupled with, where appropriate, elimination of some Title II common carrier obligations pertaining exclusively to the service aspect of telecommunications, may start things down the path toward separating services from the networks that carry them. This would only be a first step, showing the FCC's intent to pursue a form of layers model regulation in the future, and support efforts to improve and expand the scope and efficacy of federal telecommunications regulation going forward. This path would mirror the FCC's actions in the 1970s regarding cable services, and its work in the late 1980s to promote competition in the telephone markets.

IV. CONCLUSION

Telecommunications regulation has come far in the 80 years since the creation of the FCC and the first major regulation of the PSTN. The regulatory models we employ, however, have struggled mightily to cope with the rapid pace of technological innovation. We find ourselves today able to hold a phone in our hand which can connect us wirelessly to anyone else, anywhere in the world, in seconds, and has orders of magnitude more processing power than the computers we used to send men to the moon, and bring them safely home. Our regulations, however, are based on a model that originated at a time when most cars were started by hand-crank. While old does not necessarily mean bad, older regulations are not always equipped to deal with things beyond the imaginations of their creators. It will be important to keep key policy objectives in mind while designing a new framework.

While the states retain some legitimate interests in regulating telecommunications, the continued adherence to the vertical and joint-jurisdictional regulatory model is hampering further innovation. Change is coming, as Congress has begun to move toward a redesign of the regulatory model which governs telecommunications. Congressional action takes time, however, and the IP transition waits for no one.

While stakeholders wait for a new Act to address these concerns, the FCC can and should act with its preemption and forbearance powers to move as much as it can toward a layers-inspired, more horizontal regulatory model. The FCC can separate the provision of a service from the provision of connectivity, and work to minimize regulatory overhead while continuing to promote competition and the public good through the health of the next generation of the PSTN. By acting in this way, it can also show Congress the direction it believes should be taken in a new Act, and begin to address the challenges it may face if given the ability to move in that direction. By carrying out such actions, the FCC can serve as a guiding force for the redesign of our regulatory framework, rather than continuing to struggle

under an outdated framework until a new one is presented for it to apply instead.