

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

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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 1934² 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.

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 radio⁸⁵—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 decision⁹⁰—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

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.

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

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,

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

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 the 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.