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# ESSAY

## COMMON CARRIER ESSENTIALISM AND THE EMERGING COMMON LAW OF INTERNET REGULATION

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INTRODUCTION

Today, whether the Federal Communications Commission (FCC or the Commission) may regulate a provider of Internet-based services depends in large part on whether the regulation in question treats the provider similarly to an eighteenth century innkeeper or ferryman. That surprising proposition is the result of two recent decisions by the United States Court of Appeals for the D.C. Circuit. Those decisions have provided FCC with a malleable and potentially broad jurisdiction over Internet Protocol-based networks and services. They also hold, however, that the Commission may not treat providers of such services as “common carriers.” What does it mean to “treat” someone as a “common carrier,” a category that has historically included railroads and traditional telephone companies, in addition to the local innkeeper? The future of Internet regulation, including on such hot button issues as “network neutrality,” may well depend on the answer. But it is far from clear what comprises the essence of a common carrier—the search for which I label “common carrier essentialism”—and that lack of clarity, I argue, will itself shape communications policy in important ways.

FCC’s new basis for jurisdiction over Internet-based networks and services—located in § 706 of the Telecommunications Act of 1996 (§ 706)—now sits alongside FCC’s other tools for achieving some measure of regulatory control over the Internet, including its legacy Title II authority and its Title I “ancillary jurisdiction.” FCC has, at points in the past, used these other sources of authority to regulate Internet players. However, for reasons laid out in Part I of this Essay, the Commission’s § 706 jurisdiction is likely to play an increasingly important role as the Commission struggles with next-generation regulatory issues. It is thus particularly valuable, at this moment in time, to examine the legal contours of that jurisdiction and assess the benefits and drawbacks of the new regime.

This Essay makes two claims before turning to a tentative assessment of the merits of the emerging FCC approach to questions of Internet regulation. The first claim is that common carrier essentialism provides a fundamentally unstable framework for the Commission to develop Internet policy. The lack of clear guidance regarding whether a given rule treats

providers as common carriers will cause difficulty for the courts, resulting in significant legal uncertainty surrounding any regime relying primarily on prescriptive regulation.<sup>1</sup> The second claim—a predictive one—is that, partially because of that uncertainty, FCC will largely turn away from prescriptive regulation of Internet-based services, at least with regard to access-type rules. In its place, the Commission will increasingly embrace an approach the D.C. Circuit has already signaled does not represent common carrier-style regulation. That approach involves the Commission articulating a flexible standard applied through case-by-case adjudication. The result is a common law type approach to Internet regulation in which legal content evolves through application of the announced standard to specific facts.<sup>2</sup>

Indeed, we are already beginning to see the emergence of a new FCC regime, animated by a desire to steer wide of the common carrier line, a regime that rejects prescriptive rules and relies heavily on *ex post*, case-by-case enforcement of broad standards. In the May 2014 net neutrality Notice of Proposed Rulemaking (NPRM), for example, the Commission proposed a broad “commercial reasonableness” standard to judge arrangements between broadband Internet access providers and providers of Internet content and services for the prioritization of traffic on the access providers’ networks.<sup>3</sup> That proposal would reserve many difficult questions for later resolution through case-specific adjudication under a “totality of the circumstances” test.

A full analysis of the merits of the emerging regime will have to await its further development. However, several points can be preliminarily stated. First, increased reliance on *ex post* enforcement of vaguely worded standards in lieu of *ex ante* regulation will entail tradeoffs well-known to the literature on rules versus standards. Perhaps most importantly, reliance on standards

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1. I am concerned here primarily with the regulation of economic arrangements among Internet players, and, in particular, with “access” rules, which regulate the terms on which competitors are able to obtain inputs or platforms through which to provide service. See Christopher S. Yoo, *The Economics of Network Access*, ADMIN. & REG. L. NEWS, Summer 2003, at 5, 5. Access regulation has become one of—if not the—primary means through which to regulate network industries. See *id.*; see also Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of Trinko*, 107 COLUM. L. REV. 1822, 1878–1907 (2007) (explaining different types of access regulation).

2. I use “common law” throughout as shorthand for a system of regulation that relies heavily on case-specific adjudication and in which the adjudicators stick “close to the facts” in resolving disputes. See *infra* Part II.A. Of course, this is a simplification of common law legal systems as they have operated in England and elsewhere, which also may incorporate rules that are binding on future adjudicators through a system of precedent.

3. See generally Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, GN Docket No. 14-28 (May 15, 2014) [hereinafter *2014 Net Neutrality NPRM*].

will allow greater flexibility at the expense of a potentially significant amount of regulatory uncertainty. Second, the use of an *ex post* enforcement regime may, at least in some circumstances, lead to underenforcement of the announced norm. The prospect of underenforcement may be particularly severe where the interests seeking protection are those of small competitors or the public at large. Of course, whether such underenforcement is ultimately good or bad largely depends on one's assessment of the need for regulation in the first place, an issue that is outside the scope of this Essay. Finally, there are significant institutional questions concerning FCC's capacity to administer a case-by-case enforcement regime involving heavy use of adjudication.

The balance of this Essay proceeds as follows. Part I briefly surveys the development of the law governing FCC's authority to regulate Internet-based services, including broadband Internet access. Part I.A introduces some basic concepts from the Communications Act. Part I.B describes FCC's historically light-touch approach to issues of Internet regulation, including its decision in the early 2000s to classify some of the Internet's largest players—broadband providers such as Comcast and Verizon—as “information service” providers outside the scope of Title II of the Communications Act. Part I.C then describes FCC's attempt to nevertheless preserve partial authority over Internet-based services under its so-called ancillary jurisdiction. Part I ends, in Part I.D, by describing FCC's recent exercise of its § 706 jurisdiction, under which FCC's authority to regulate Internet-based services depends largely on whether the regulation in question treats providers of those services as common carriers. Part II then turns to the shortcomings of the new legal regime. Part II.A argues that, largely due to the nature of review at issue, the Commission's initial exercise of jurisdiction under § 706 is unlikely to be disturbed on appeal. However, as Part II.B explains, courts will struggle to determine the subsequent question of whether the regulation at issue is a prohibited common carrier regulation, owing to the significant ambiguity, under the evolving case law concerning what it means to “treat” someone as a common carrier. Finally, Part III.A traces the emergence of the new common law of Internet regulation, which depends heavily on the *ex post* enforcement of vaguely worded standards. Part III.B then exposes some potential costs and benefits of the new regime.

One note: As of this writing, FCC is still considering whether to reclassify broadband Internet access providers as common carriers under Title II of the Communications Act. Although there has been a groundswell of popular support for that option, it remains unclear what the Commission will do. Chairman Tom Wheeler, who holds the deciding vote, is believed to be skeptical of reclassification, which would generate political backlash

and additional litigation. And the last time FCC considered reclassification, it ultimately demurred in the face of uniform opposition from access providers and their political allies.<sup>4</sup> If FCC does pursue reclassification—and that decision survives judicial review—it would have substantially more freedom to adopt a rule-like regime within the domain captured by the reclassification. The important point, however, is this: as explained below, the potential scope of FCC’s § 706 jurisdiction is much broader than any reclassification proposal. Thus, what I identify as the emerging common law of Internet regulation is likely to play an increasingly important role, regardless of whether the Commission ultimately goes the Title II route with respect to broadband access providers in particular.

### I. A SHORT HISTORY OF FCC’S AUTHORITY OVER THE INTERNET

As the D.C. Circuit explained in its most recent decision regarding FCC’s authority over the Internet, understanding the issues at play “requires an understanding of the Internet, the Internet marketplace, and the history of the Commission’s regulation of that marketplace.”<sup>5</sup> This Part provides that background, beginning with an introduction to some of the key concepts under the Communications Act.

#### *A. Some Background on the Communications Act*

FCC has broad general jurisdiction over “interstate and foreign communication by wire or radio.”<sup>6</sup> Although this general grant of authority has been held to bestow FCC with some independent regulatory authority, as will be discussed further below,<sup>7</sup> the Commission has a much wider range of powers under the various substantive “Titles” of the Communications Act, which correspond to different categories of communications. Title II of the Act gives FCC jurisdiction over “common carriers” (traditionally, telephone companies),<sup>8</sup> Title III over “radio communication[s]” (broadcasters, for example),<sup>9</sup> and Title VI over “cable communications” (cable television providers).<sup>10</sup>

For present purposes, FCC’s authority under Title II of the Communications Act is of greatest importance. As noted, that authority

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4. See *infra* notes 88–95 and accompanying text.

5. *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

6. 47 U.S.C. § 152(a) (2012).

7. See *infra* Part I.C.

8. Communications Act of 1934 tit. II, 47 U.S.C. §§ 201–221 (2012).

9. *Id.* tit. III, 47 U.S.C. §§ 301–329.

10. Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521–573.

extends to common carriers, which the Communications Act defines, rather circularly, as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio.”<sup>11</sup> Title II accordingly places a number of traditional common carrier obligations on entities subject to its reach. These duties, originally enacted by Congress to control the railroads and later extended to other industries,<sup>12</sup> include the obligation to charge “just and reasonable” rates,<sup>13</sup> to file detailed rate tariffs,<sup>14</sup> and to refrain from “unjust or unreasonable discrimination.”<sup>15</sup> Historically, such common carrier duties applied to telephone companies, including the AT&T monopoly, that provided traditional, interstate telephony services, both local and long-distance.<sup>16</sup>

FCC’s generally hands-off approach toward Internet-based services ultimately traces to a series of decisions it made in the 1970s and 1980s concerning a new category of services that used computers hooked up to the telephone network to provide “data processing” services to end users.<sup>17</sup> In its *Computer II* order, the Commission decided that these data processing services would be treated as what it termed “enhanced services.”<sup>18</sup> Such enhanced services, the Commission made clear, would not be subject to common carrier regulation under Title II.<sup>19</sup> The Commission contrasted enhanced services, which provided users the ability to manipulate information, with so-called “basic services,” pure transmission services with no data processing capability (such as traditional telephony), which continued to be regulated under principles of common carriage.<sup>20</sup> The

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11. 47 U.S.C. § 153(11); see also Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOUS. L. REV. 545, 552 (2013) (noting that “[t]he circular nature of this definition inevitably leads those seeking to determine what a common carrier is to look to other sources”).

12. See, e.g., SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE 22–23 (2013); James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 258–64 (2002).

13. 47 U.S.C. § 201(b).

14. *Id.* § 203.

15. *Id.* § 202(a).

16. See Speta, *A Common Carrier Approach*, *supra* note 12, at 263–64.

17. See James B. Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063, 1083–84 (2004).

18. See generally Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384 (1980).

19. For a comprehensive history of the Computer Inquiries orders, see generally Robert Cannon, *The Legacy of the Federal Communications Commission’s Computer Inquiries*, 55 FED. COMM. L.J. 167 (2003). See also Speta, *Deregulating Telecommunications*, *supra* note 17, at 1083–84; JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE* 190 (2d ed. 2013).

20. See Cannon, *supra* note 19, at 183–88; Susan P. Crawford, *Transporting*

Commission also placed a number of restrictions and obligations on providers of telephony services—then largely monopolists in their markets—designed to ensure that they did not use their control over the telephone network to impede independent providers of enhanced services that required use of that network in order to reach their customers.<sup>21</sup>

In the Telecommunications Act of 1996, Congress largely codified the distinction between enhanced and basic services, albeit using different nomenclature. Corresponding to the old “basic services” category was a new term, “telecommunications service,” which Congress defined as “the offering of telecommunications for a fee directly to the public.”<sup>22</sup> “Telecommunications” was further defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”<sup>23</sup> In contrast with telecommunications service, Congress introduced the term “information service,” which corresponded to the old regulatory category of enhanced service and was defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”<sup>24</sup>

Crucially, Congress also preserved the differing regulatory treatment of basic and advanced services, now recast as telecommunications and information services. Specifically, 47 U.S.C. § 153(51) defines “telecommunications carrier” as a “provider of telecommunications services.” It goes on to state that “[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.”<sup>25</sup> This language will become crucial later. For the moment, it is enough to observe that the 1996 Act thus exempts non-telecommunications carriers—i.e., entities that do not provide “telecommunications service”—from regulation under Title II of the Communications Act. And because the Commission has long defined telecommunications service and information service as mutually exclusive categories, such that a single service cannot simultaneously be both,<sup>26</sup> whether a given service is classified as one or the other has

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*Communications*, 89 B.U. L. REV. 871, 892–94 (2009); see generally Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384 (1980).

21. See NÜECHTERLEIN & WEISER, *supra* note 19, at 190–92.

22. 47 U.S.C. § 153(53) (2012).

23. *Id.* § 153(50).

24. *Id.* § 153(24).

25. *Id.* § 153(51).

26. See, e.g., Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC

significant regulatory consequences.

*B. FCC's Deregulatory Attitude Toward Internet-based Services in the Early 2000s*

Around the same time FCC was crafting the distinction between basic and enhanced services, the Internet was experiencing its birth and first growth. The Internet is often defined as a “network of networks,” whose constituent parts communicate with each other using a common protocol (TCP/IP).<sup>27</sup> For regulatory purposes, Internet players are commonly divided (somewhat crudely) into three broad categories. First, *Internet access providers*, such as Comcast or Verizon, allow their customers—ordinary consumers and businesses—to connect to the broader Internet.<sup>28</sup> For fixed, as opposed to mobile, broadband Internet access,<sup>29</sup> these providers today include digital subscriber line (DSL) and “fiber to the home” providers, who use elements of the legacy telephone network to provide service, and cable providers, who use infrastructure first developed for cable television.<sup>30</sup> Second, *backbone networks*, like Level 3, provide long-distance links among various networks (including other backbone networks and access providers), usually via fiber optic cable.<sup>31</sup> Finally, *edge providers*, such as Facebook or Google, supply “content, services, and applications over the Internet.”<sup>32</sup> Many of the disputes around Internet policy today concern the regulation of the relationships among these three categories of providers.<sup>33</sup>

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Rcd. 11,501, 11,507–08 ¶ 13 (1998) [hereinafter *Universal Service Report*] (“We conclude, as the Commission did in the *Universal Service Order*, that the categories of ‘telecommunications service’ and ‘information service’ in the 1996 Act are mutually exclusive.”).

27. See, e.g., Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 821 (2004) (“The Internet is a global network of interconnected computer networks, and TCP/IP is the network communication protocol that enables the Internet to function as a network of networks.”).

28. *Verizon v. FCC*, 740 F.3d 623, 628–29 (D.C. Cir. 2014).

29. For purposes of measuring deployment, the Federal Communications Commission (FCC or the Commission) currently defines broadband as Internet access service providing speeds of four megabits per second download and one megabit per second upload. See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, *Tenth Broadband Progress Notice of Inquiry*, GN Docket No. 14-126, at 2–3 ¶ 3 (Aug. 5, 2014).

30. See NUCHESTERLEIN & WEISER, *supra* note 19, at 27–28.

31. *Verizon*, 740 F.3d at 628.

32. *Id.* at 629.

33. Further complicating the picture, the categories described above are not mutually exclusive. For example, Internet access providers like Comcast might also operate their own backbone networks and/or supply some of their own Internet content. Indeed, that Internet access providers increasingly supply content through subsidiaries or partners has played an

The first major debate—and one that continues to rage in policy circles—concerned how to classify broadband Internet access providers. In the early days of the consumer Internet, end users typically connected to the Internet through a “dial-up” Internet service provider (ISP) providing narrowband (low-speed) service. These dial-up ISPs, companies like AOL or Earthlink, generally did not own the underlying facilities used to provide the last-mile connection between end-users and the broader Internet. Instead, customers of a dial-up ISP would “call” the ISP using the legacy telephone network, and the ISP “would transform the analog signals into digital and Internet-ready form.”<sup>34</sup> The ISP “would then pass on the packets of data to [a] . . . Backbone Provider, which would carry the data at high speeds toward its destination.”<sup>35</sup> This bifurcated model generally minimized controversy regarding the classification of different services: the telephone company was providing normal telecommunications service subject to common carrier regulation, and the ISP was offering an information service largely falling outside the reach of the Communications Act.<sup>36</sup>

The advent of broadband Internet undermined this neat division. The issue first arose when cable providers began to offer high-speed Internet service using their own facilities.<sup>37</sup> These companies, like dial-up ISPs, offered their customers access to the broader Internet, but they did so using their own last-mile transmission networks. Were these providers largely unregulated “information service” providers, or were they instead “telecommunications carriers” subject to the full panoply of common carrier regulation under Title II?<sup>38</sup> A coalition of different interests urged the Commission to conclude the latter, ultimately hoping to force cable providers to share their broadband facilities with unaffiliated ISPs.<sup>39</sup> The Commission’s first response was to attempt to evade answering the

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important role in the net neutrality debate. *See infra* notes 257–258 and accompanying text; *see generally* CRAWFORD, *supra* note 12 (detailing opposition to Comcast–NBC Universal merger). Moreover, as described further below, the categories are being further blurred by large content providers that have chosen to bypass the Internet backbone through the use of content delivery networks and other methods of distributing content locally. *See infra* note 73 and accompanying text.

34. Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 47 (2003).

35. *Id.*

36. *See Universal Service Report*, *supra* note 26, at 11,507–08 ¶ 13; Weiser, *supra* note 34, at 47–48.

37. NUECHTERLEIN & WEISER, *supra* note 19, at 192.

38. A third option would have held cable broadband as a “cable service” under Title VI. *See id.* at 194.

39. *Id.* at 193–94.

question.<sup>40</sup> When the issue arrived in the courts, the United States Court of Appeals for the Ninth Circuit, without the benefit of an authoritative Commission interpretation, concluded that cable Internet access providers were supplying a telecommunications service.<sup>41</sup>

In 2002, the Commission, finally speaking on the issue, disagreed with the Ninth Circuit, ruling in the *Cable Broadband Order* that cable broadband Internet access service was an information service falling outside of Title II.<sup>42</sup> The precise details of FCC's reasoning are unimportant for present purposes. Very briefly, after explaining that the classification question turns on the type of service "offered" to customers,<sup>43</sup> the Commission concluded that broadband Internet access providers who offer their customers a variety of functions are best thought of as "information service[s]."<sup>44</sup> Moreover, the Commission found that such providers do *not* offer customers a standalone "telecommunications service."<sup>45</sup> Rather, the transmission component of broadband Internet access service is inseparable "from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities."<sup>46</sup> The bottom line was that, in the Commission's view, broadband Internet access providers supply an integrated information service and are not subject to regulation under Title II of the Communications Act.

After suffering a temporary setback when the Ninth Circuit vacated the *Cable Broadband Order* on the basis of its prior decision in *City of Portland*,<sup>47</sup> FCC's decision to classify broadband Internet access as an information service was affirmed by the Supreme Court in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.<sup>48</sup> There, over a vigorous dissent by Justice Scalia,<sup>49</sup> the Court held that FCC's classification decision represented a reasonable exercise of its statutory authority.<sup>50</sup> Following its victory in the courts, FCC extended the same deregulatory approach it had taken with regard to cable to broadband Internet service offered via DSL—

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40. *Id.* at 194.

41. *See* AT&T Corp. v. City of Portland, 216 F.3d 871, 879–80 (9th Cir. 2000).

42. *See* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al., *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, 4819 ¶ 33 (2002) [hereinafter *Cable Broadband Order*].

43. *Id.* at 4822 ¶ 38.

44. *Id.*

45. *Id.* at 4823 ¶ 39.

46. *Id.*

47. *See* Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1132 (9th Cir. 2003).

48. 545 U.S. 967, 974 (2005).

49. *See id.* at 1005–20 (Scalia, J., dissenting).

50. *See id.* at 986 (majority opinion).

which was still subject to various legacy regulatory requirements—as well as to other types of broadband Internet access.<sup>51</sup>

FCC has also pursued a deliberate policy of “unregulation” regarding other Internet players.<sup>52</sup> Backbone providers supply long-haul fiber-optic links between different ISPs, between ISPs and other backbone providers, and between backbone providers themselves.<sup>53</sup> Thus, “[t]hese backbone providers help unite the Internet by interconnecting with one another and the Internet’s other major constituent IP [internet protocol] networks, ensuring that each computer or smart device on the Internet can talk to any other.”<sup>54</sup> These and other interconnection arrangements have developed through market processes and take several forms. First, in a “peering” arrangement, two networks—which could be a backbone provider and an ISP, two backbone providers, or two ISPs interconnecting directly—connect their networks directly for the exchange of traffic between customers of their respective networks.<sup>55</sup> Second, in a “transit” arrangement, one network pays another to connect customers of the former network to other, third-party networks.<sup>56</sup> Finally, in an increasingly important form of interconnection, and one that has provoked recent regulatory controversy, content providers, such as Netflix, or their delivery networks, may enter paid peering arrangements whereby they pay to connect directly with an ISP serving end-user customers.<sup>57</sup>

For present purposes, the important point is that FCC has declined to regulate these network interconnection arrangements, either under Title II or any other part of the Communications Act. That decision was based on the opinion that the backbone market was working well without regulation, with several different companies competing effectively and safeguarding

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51. See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd. 5901, 5909–11 ¶¶ 19–28 (2007); United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, *Memorandum Opinion and Order*, 21 FCC Rcd. 13,281, 13,285–87 ¶¶ 8–10 (2006); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 14,853, 14,862–65, 14909–12 ¶¶ 12–17, 102–107 (2005).

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

53. NUECHTERLEIN & WEISER, *supra* note 19, at 180.

54. *Id.*

55. *Id.* at 180–81.

56. *Id.* at 181. See generally Michael Kende, *The Digital Handshake: Connecting Internet Backbones 1* (FCC, Office of Plans and Policy, Working Paper No. 32, 2000), available at [http://transition.fcc.gov/Bureaus/OPP/working\\_papers/oppwp32.pdf](http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf).

57. See *infra* notes 195–198 and accompanying text.

against abuse.<sup>58</sup> The consequence is that, in order to reverse course and intercede in Internet interconnection, FCC would have to classify the relevant players as “telecommunications carriers” under Title II of the Act, which it has never done, or invoke one of its other bases of authority (discussed below).

FCC has also consistently declined to regulate edge providers, which supply the Internet’s content, applications, and services. Edge providers take many different forms, from small start-ups (or even individuals) to giant multinational corporations such as Google.<sup>59</sup> With the exception of interconnected Voice over Internet Protocol (VoIP) services, which allow their users to utilize the Internet to make regular voice calls to customers of the traditional telephone network,<sup>60</sup> the Commission has not regulated edge providers under the Communications Act. To the extent their economic relationships have been subject to scrutiny, it has thus far been by the general antitrust enforcement agencies.<sup>61</sup>

### C. The Ancillary Jurisdiction Option

Almost as soon as it decided to classify broadband Internet access providers as information service providers, FCC began to look for alternative legal avenues through which to regulate such providers. The first option the FCC considered was its so-called “ancillary” jurisdiction. Indeed, the 2002 *Cable Broadband Order* itself asked for comment on regulating Internet access providers under the Commission’s ancillary jurisdiction,<sup>62</sup> and the Supreme Court noted the option when it upheld the

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58. See STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 731 (3d ed. 2012) (citing Kende, *supra* note 56).

59. See Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. ON TELECOMM. & HIGH TECH. L. 19, 23 (2009).

60. The Commission has placed a number of obligations on interconnected Voice over Internet Protocol (VoIP) providers, generally under its Title I “ancillary” authority, discussed below, as well as a hodgepodge of other sources of authority. See, e.g., The Proposed Extension of Part 4 of the Commission’s Rules Regarding Outage Reporting to Interconnected Voice over Internet Protocol Service Providers & Broadband Internet Service Providers, *Report and Order*, 27 FCC Rcd. 2650, 2678–79 ¶¶ 66–67 (2012). Notably, FCC has consistently declined to decide whether VoIP providers are “telecommunications service” subject to full regulation under Title II. See generally Marc Elzweig, *D, None of the Above: On the FCC Approach to VoIP Regulation*, 2008 U. CHI. LEGAL F. 489.

61. Google, for example, has been subject to multiple antitrust investigations by the Department of Justice, among other agencies. See Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J.L. & PUB. POL’Y 171, 189–90 (2011).

62. See *Cable Broadband Order*, *supra* note 42, at 4841–42 ¶¶ 76–79.

Commission's decision to move those providers outside of Title II.<sup>63</sup>

The Commission's ancillary jurisdiction derives from two provisions of Title I of the Communications Act. First, as noted, Title I grants the Commission a broad jurisdiction over "interstate and foreign communication by wire or radio."<sup>64</sup> Second, Title I provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."<sup>65</sup> The FCC first invoked these provisions as the basis for what became known as its ancillary jurisdiction in the 1960s, when it faced the question how to regulate the nascent cable industry, which at that time was not subject to regulation under the substantive Titles of the Communications Act.<sup>66</sup> Without a clear statutory mandate, the FCC adopted a number of rules governing cable operators, largely out of concern that the growth of cable would harm broadcasters, whom the Communications Act did regulate.<sup>67</sup> The Supreme Court upheld those rules in *United States v. Southwestern Cable Co.*, finding that Title I granted the FCC authority to adopt rules "reasonably ancillary to the effective performance of the Commission's various responsibilities."<sup>68</sup> Subsequent cases have affirmed and clarified the scope of the FCC's ancillary jurisdiction using a two-part test. To wit, the FCC may adopt regulations under its ancillary authority when "(1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."<sup>69</sup>

Following the FCC's decision, described above, to categorize broadband Internet access providers as unregulated information service providers, commentators, as well as the Commission, looked to ancillary authority as a way to nevertheless place certain requirements on those providers.<sup>70</sup> Much

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63. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 996 (2005).

64. 47 U.S.C. § 152(a) (2012).

65. *Id.* § 154(i).

66. Congress added Title VI, dealing with cable services, in 1984. Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521–573 (2012).

67. See generally Amendment of Subpart L, Part 91, To Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems et al., *Second Report and Order*, 2 F.C.C.2d 725 (1966).

68. 392 U.S. 157, 178 (1968); see also, e.g., John Blevins, *Jurisdiction as Competition Promotion: A Unified Theory of the FCC's Ancillary Jurisdiction*, 36 FLA. ST. U. L. REV. 585, 595–96 (2009).

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

70. See generally Weiser, *supra* note 34.

of the debate during this period was shaped by the controversy over “net neutrality” rules.<sup>71</sup> Briefly, proponents of net neutrality seek to regulate the relationship between Internet access providers (such as Comcast or Verizon) and edge providers (such as Netflix, Facebook, or Google). More specifically, net neutrality proponents would generally place two requirements on Internet access providers: “(1) a ban on ‘blocking’ or ‘degrading’ lawful content over an Internet access platform and (2) a ban on, or at least close regulation of, contractual deals between broadband networks and Internet content providers for favored treatment over that platform.”<sup>72</sup> They fear that, absent these requirements, broadband Internet access providers will favor certain edge providers—most prominently, perhaps, those affiliated with the access provider itself—and disfavor others, to the long-term detriment of Internet innovation and consumer welfare.<sup>73</sup>

Matters regarding net neutrality—and the FCC’s ability to require Internet access providers adhere to it—reached a head when it was alleged that Comcast “was interfering with its customers’ use of peer-to-peer applications,” including, in particular, the application BitTorrent.<sup>74</sup> At the time, the FCC had no rules governing such behavior by Internet access providers, although it had issued a nonbinding Policy Statement including several net-neutrality-like principles.<sup>75</sup> Nevertheless, responding to a complaint by the public interest groups Free Press and Public Knowledge, the Commission condemned Comcast’s practices.<sup>76</sup> As authority for its action, the Commission pointed toward its ancillary jurisdiction, arguing that punishing the conduct at issue was reasonably ancillary to a number of statutory policies and provisions.<sup>77</sup>

In a blow to the FCC’s ancillary jurisdiction, the D.C. Circuit disagreed.<sup>78</sup> The court first made clear that the Commission could not rely

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71. See generally Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003).

72. NUCHTERLEIN & WEISER, *supra* note 19, at 198.

73. See, e.g., BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 270–73 (2010); Wu, *supra* note 71, at 145–46; Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. ON TELECOMM. & HIGH TECH. L. 329, 378–80 (2007).

74. Formal Complaints of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications et al., *Memorandum Opinion and Order*, 23 FCC Rcd. 13,028, 13,031 ¶ 7 (2008) [hereinafter *Comcast Order*].

75. See generally Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al., *Policy Statement*, 20 FCC Rcd. 14,986 (2005).

76. *Comcast Order*, *supra* note 74, at 13,028 ¶ 1.

77. See *id.* at 13,035–44 ¶¶ 15–27.

78. *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

on vaguely worded policy pronouncements contained in the Communications Act when proceeding under Title I, as it had done repeatedly in the *Comcast Order*.<sup>79</sup> Rather, the FCC must point to a specific “statutory delegation of regulatory authority” to which the regulations in question were reasonably ancillary.<sup>80</sup> Second, the court found that, for various reasons sounding in administrative law, the specific provisions the Commission pointed to that arguably did constitute such a delegation were nevertheless unavailable to it for purposes of the litigation.<sup>81</sup> The court thus vacated the *Comcast Order*.<sup>82</sup>

More important perhaps than the D.C. Circuit’s specific reasoning was the parsimonious tone it struck with regard to the Commission’s ancillary authority. The court wrote that the FCC’s approach to its Title I jurisdiction would “shatter” the limits the courts had placed on that authority,<sup>83</sup> and it gave a rather narrow reading to a number of prior cases.<sup>84</sup> In short, the D.C. Circuit cast considerable uncertainty over the Commission’s ability to flexibly regulate Internet players under Title I, as then-FCC General Counsel Austin Schlick argued in a 2010 blog post surveying the current state of FCC jurisdiction over broadband.<sup>85</sup> More fundamentally, as Schlick also pointed out, by tying the FCC’s jurisdiction to regulate information-service providers to its historic powers, *Comcast Corp.* made it so that “[p]aradoxically, the FCC would be on safe legal ground only to the extent its actions regarding emerging broadband services were intended to affect traditional services like telephone and television.”<sup>86</sup> But those traditional services provide, at best, a time-limited footing for the exercise of Commission jurisdiction. As the FCC has itself recognized, as communications converge on IP-based platforms, legacy networks and services will increasingly face extinction.<sup>87</sup> Thus, any jurisdiction that

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79. *See id.* at 651–58.

80. *Id.* at 658.

81. *See id.* at 658–61. Most importantly, the court found that several of the Commission’s legal arguments had not appeared in the *Comcast Order* itself, and thus FCC’s lawyers were barred from relying on those arguments under the *Chenery* doctrine. *See id.* at 660 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943)).

82. *Comcast Corp.*, 600 F.3d at 661.

83. *Id.* at 655.

84. *Id.* at 652–58.

85. *See* Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, BLOGBAND (May 6, 2010), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-297945A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf).

86. *Id.*

87. *See* Technology Transitions et al., *Order, Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd. 1433, 1439 ¶ 14 n.23 (2014). *See generally* Kevin Werbach, *No Dialtone: The End of the Public Switched Telephone Network*, 66 FED. COMM. L.J. 203 (2014).

depends on their continuing presence is likely to prove ephemeral.

*D. Section 706*

After the Commission's defeat in *Comcast Corp.*, it sought another basis to regulate Internet access providers, and to impose a net neutrality regime in particular. The Commission first considered reclassifying broadband Internet access as (at least in part) a Title II telecommunications service.<sup>88</sup> At the same time, the FCC announced that, if it were to reclassify broadband Internet access as a Title II service, it would "forbear from"—i.e., choose not to apply—many of the statutory requirements that would be triggered by that decision.<sup>89</sup> That path, the Commission hoped, would allow it to pursue basic net neutrality rules (including the no-blocking and non-favoritism rules described above), while avoiding obligations, such as tariffed rates, that no one seriously argued should be applied to broadband Internet access providers.

The Commission's reclassification proposal proved short-lived. Facing pressure from access providers and their congressional allies, then-Chairman Julius Genachowski announced in late 2010 that he was tabling the proposal.<sup>90</sup> Around the same time, the Commission issued the *Open Internet Order*, which (once again) relied on non-Title II grounds to impose net neutrality regulations on broadband Internet access providers.<sup>91</sup> The core substantive provisions of the *Open Internet Order* were three-fold. First, the Commission imposed a transparency obligation on fixed and mobile (wireless) broadband access providers, requiring them to "disclose the network management practices, performance characteristics, and terms and conditions of their broadband services."<sup>92</sup> Second, it applied a "[n]o blocking" rule to fixed broadband access providers and (in a slightly watered down form) to mobile providers as well.<sup>93</sup> Finally, the Commission placed a nondiscrimination rule on fixed broadband access providers alone,

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88. See Framework for Broadband Internet Service, *Notice of Inquiry*, 25 FCC Rcd. 7866, 7867 ¶ 2 (2010).

89. *Id.* at 7895–909 ¶¶ 69–105. Section 10 of the Communications Act allows the Commission to "forbear" from applying provisions of the Communications Act "to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets," provided that the Commission makes certain public-interest determinations. 47 U.S.C. § 160(a) (2012).

90. NUECHTERLEIN & WEISER, *supra* note 19, at 238.

91. See Preserving the Open Internet, *Report and Order*, 25 FCC Rcd. 17,905, 17,906 ¶ 1 (2010) [hereinafter *Open Internet Order*].

92. *Id.*

93. *Id.*

stating that such providers “may not unreasonably discriminate in transmitting lawful network traffic.”<sup>94</sup> In the body of the *Open Internet Order*, the Commission stated, in the abstract, that arrangements resulting in the prioritization of certain edge provider traffic over the broadband provider’s network were likely to violate this nondiscrimination rule.<sup>95</sup>

As authority for the new rules, the Commission pointed primarily to § 706 of the Telecommunications Act of 1996.<sup>96</sup> Section 706(a) of the Act directs the Commission to

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 investment.<sup>97</sup>

Section 706(b) similarly requires FCC to conduct a yearly inquiry “concerning the availability of advanced telecommunications capability to all Americans,” and, if it finds such availability lacking, to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>98</sup> The Commission had, prior to the *Open Internet Order*, made the requisite § 706(b) finding.<sup>99</sup>

The *Open Internet Order* explained that its net neutrality rules promoted the policies outlined in § 706 by supporting the “virtuous cycle of innovation,”<sup>100</sup> under which “new uses of the [broadband] network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses.”<sup>101</sup> According to the Commission, Internet access providers’ ability to block or differentiate among edge providers undermines that cycle by raising barriers to entry by edge providers, some of which consequently may not be able to reach end users: “Restricting edge providers’ ability to reach end users, and limiting end users’ ability to choose which edge providers to patronize, would reduce the rate of innovation at the edge and, in turn, the

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94. *Id.*

95. *Id.* at 17,947 ¶ 76.

96. Section 706 is codified at 47 U.S.C. § 1302 (2012).

97. *Id.* § 1302(a).

98. *Id.* § 1302(b).

99. *Open Internet Order*, *supra* note 91, at 17,972 ¶ 123.

100. *Id.* at 17,910 ¶ 14.

101. *Id.* at 17,910–11 ¶ 14.

likely rate of improvements to network infrastructure.”<sup>102</sup> Ergo, the net neutrality rules would enable infrastructure investment by broadband providers—the policy goal of § 706—by prohibiting those providers from acting in ways that ultimately harmed Internet innovation. In addition to its § 706 argument, the *Open Internet Order* invoked a number of additional theories based on its ancillary authority, some of which the *Comcast Corp.* court had declined to address for procedural reasons.<sup>103</sup>

This time, the D.C. Circuit upheld FCC’s core jurisdictional bases, while finding that a substantial portion of those rules exceeded limits placed on that authority. As to § 706(a), the court first determined that FCC’s conclusion that the section “constitutes an affirmative grant of regulatory authority”—a conclusion the Commission had disavowed in prior orders—was a reasonable one.<sup>104</sup> The court likewise upheld FCC’s determination that § 706(b) “empower[ed] it to take steps to accelerate broadband deployment if and when it determines that such deployment is not ‘reasonable and timely.’”<sup>105</sup> And both sections, the court went on, allowed the Commission to directly regulate broadband providers and not merely to promote infrastructure deployment through other means (providing subsidies, for example).<sup>106</sup> Finally, the court found that the “Commission’s prediction that the *Open Internet Order* regulations will encourage broadband deployment”—by promoting the “virtuous cycle” described above—“both rational and supported by substantial evidence.”<sup>107</sup>

The Commission’s victory was decidedly partial, however. After agreeing with FCC’s jurisdictional arguments, the D.C. Circuit went on to vacate the no-blocking and nondiscrimination rules that comprised the core of the *Open Internet Order*. It did so based on the statutory prohibition, mentioned above, on treating “information services” providers—including broadband Internet access providers—as “common carriers.”<sup>108</sup> This aspect of the court’s decision will be discussed in greater detail below.<sup>109</sup> Briefly, the court found that the *Open Internet Order*’s nondiscrimination rule—which prevented access providers from distinguishing among edge providers in providing service—constituted a classic “compelled carriage obligation” that the Commission is statutorily prohibited from placing on

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102. *Id.*

103. *Id.* at 17,972–78 ¶¶ 124–32.

104. *Verizon v. FCC*, 740 F.3d 623, 637–40 (D.C. Cir. 2014).

105. *Id.* at 641.

106. *See id.* at 643.

107. *Id.* at 644–49.

108. *Id.* at 650.

109. *See infra* Part II.B.

non-telecommunications carriers.<sup>110</sup> As for the no-blocking rule, the court held that (at least in its current form) it too ran afoul of the common carrier prohibition by denying access providers' discretion over what traffic to carry and on what terms.<sup>111</sup>

## II. THE INSTABILITY OF THE CURRENT LEGAL FRAMEWORK

This Part critiques the current legal framework for assessing FCC's authority over the Internet. In Part II.A, I argue that the nature of the internal limit on the Commission's authority under § 706 makes meaningful judicial enforcement of that limitation difficult if not impossible. The consequence is that FCC's ability to regulate Internet players in a certain way will largely turn on whether the regulation at issue treats the entities it regulates as common carriers. This places great pressure on determining what it means to treat someone as a common carrier. Unfortunately, as I argue in Part II.B, the answer to that question is far from clear. Indeed, the current test developed by the D.C. Circuit is both conceptually confused and subject to manipulation. The only thing certain under the D.C. Circuit's current approach is that a regulation is less likely to be prohibited if it affords the Commission considerable upfront flexibility and leaves difficult details to later adjudication. In other words, the court is much more likely to uphold vaguely worded, factor-based standards than *ex ante* rules. The natural result will be to push FCC in the direction of a common law-type system of Internet regulation. The merits of that system will be taken up in Part III, below.

### A. *The Lack of Meaningful Judicial Review Over the Section 706 Determination*

After determining that the Commission has independent authority under § 706(a) and (b) to regulate information service providers, *Verizon v. FCC* stressed three limits on that authority. First, the court reiterated that the Commission's authority could extend no further than allowed by its general jurisdiction over "interstate and foreign communication by wire and radio."<sup>112</sup> For present purposes, we can assume this requirement will normally be satisfied. Second, the court held that FCC may not use its § 706 jurisdiction in violation of the *external* limits placed on that authority—i.e., in a way prohibited by a different part of the Communications Act (or, in theory, by a different source of law, such as the

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110. *Verizon*, 740 F.3d at 656.

111. *Id.* at 657–59.

112. *Id.* at 640 (quoting 47 U.S.C. § 152(a) (2012)).

Constitution).<sup>113</sup> The most important such limitation is the prohibition on treating information service providers as common carriers, which is discussed below. Third, the court found that § 706 placed certain *internal* limits on the Commission's authority under that section. Namely, FCC may only use its authority under § 706 to further the policies specified by that section—i.e., “promot[ing] broadband deployment.”<sup>114</sup> This section argues that this internal limit, while requiring FCC to develop a record through notice-and-comment rulemaking on the effects of its regulations, is not amenable to meaningful judicial enforcement.

The facts at issue in *Verizon* illustrate why FCC's determination that a certain regulation will promote broadband deployment is unlikely to be disturbed by a court, at least provided that the Commission has developed some evidentiary support for its conclusions. Recall that the *Open Internet Order* had explained why its no-blocking and nondiscrimination rules further broadband deployment by reference to the “virtuous cycle” of innovation, under which low barriers to entry for edge providers promote greater consumer demand for broadband, which in turn stimulates investment in broadband infrastructure.<sup>115</sup> In support of that theory, the Commission largely relied on comments submitted by parties supportive of net neutrality regulation, as well as on academic writings.<sup>116</sup> At the same time, the Commission was faced with competing claims by broadband access providers, who argued that net neutrality regulation would in fact depress incentives to deploy broadband facilities.<sup>117</sup> FCC did not perform independent studies of its own.

The panel majority in *Verizon* sided with the Commission against a challenge that FCC lacked adequate evidentiary support for its virtuous cycle theory, which would have rendered the final regulations arbitrary and capricious under the Administrative Procedure Act (APA).<sup>118</sup> Dissenting, Judge Silberman disagreed with the majority on this point.<sup>119</sup> In his view, the Commission had not adequately documented the factual findings underlying its virtuous cycle theory.<sup>120</sup> In particular, he faulted the Commission for failing to demonstrate how broadband providers could negatively undermine Internet innovation without first concluding that

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113. *Id.* at 649–50.

114. *Id.* at 643.

115. *See supra* note 94 and accompanying text.

116. *See Open Internet Order, supra* note 91, at 17,927–28 ¶ 38.

117. *See id.* at 17,928 ¶ 39.

118. *Verizon*, 740 F.3d at 637.

119. *Id.* at 662 (Silberman, J., concurring in part and dissenting in part).

120. *Id.* at 665.

those providers exercised market power.<sup>121</sup> Moreover, the majority's analysis had, in Silberman's view, revealed that the internal limits placed on FCC's § 706 authority were "almost meaningless": "[A]ny regulation that, in the FCC's judgment might arguably make the Internet 'better,' could increase demand [for broadband]. I do not see how this 'limitation' prevents § 706 from being *carte blanche* to issue any regulation that the Commission might believe to be in the public interest."<sup>122</sup>

I do not mean to suggest that the *Verizon* majority was wrong in sanctioning FCC's exercise of authority under § 706 to promulgate the *Open Internet Order*. Courts do not exist to flyspeck administrative decisions, especially when the agency is confronted with conflicting record evidence, as the Commission was in the *Open Internet Order*. And the nature of the particular inquiry in question—whether a certain regulation will promote broadband deployment—is simply not amenable to judicial second-guessing, except (perhaps) in extreme cases where the Commission simply has not compiled any factual record at all. Indeed, the form of judicial review available under the APA largely precludes a very searching analysis by the reviewing court.<sup>123</sup> As the *Verizon* majority explained, "[w]hen assessing the reasonableness of the Commission's conclusions, we must be careful not to simply 'substitute [our] judgment for that of the agency,' especially when the 'agency's predictive judgments about the likely economic effects of a rule' are at issue."<sup>124</sup> As the leading Supreme Court case puts it: "It is not infrequent that the available data do[es] not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion."<sup>125</sup> As long as the Commission has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," its decision will be upheld.<sup>126</sup> In practice, therefore, the internal limit placed on FCC's authority under § 706 is likely to be largely procedural, at least if *Verizon* is the relevant template:<sup>127</sup> as long as the Commission is not negligent in

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121. *Id.* at 664.

122. *Id.* at 662.

123. See 5 U.S.C. § 706(2)(A) (2012) (authorizing a court to set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

124. *Verizon*, 740 F.3d at 644 (quoting *Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

125. *State Farm*, 463 U.S. at 52.

126. *Id.* at 43 (quotations omitted) (quoting *Burlington Truck Lines, Inc. v. United States* 371 U.S. 156, 168 (1962)).

127. In other contexts, the courts of appeals have more carefully scrutinized the

compiling a record, its predictive judgment regarding a given regulation's effect on broadband deployment is very likely to survive judicial review.

### *B. The Limits of Common Carrier Essentialism*

Because the internal limits on FCC's § 706 jurisdiction are weak, those resisting regulation are likely to stress the external limits placed on that jurisdiction—most importantly, the prohibition on treating information-service providers as common carriers—to both the Commission and to reviewing courts. But what does it mean to “treat” someone as a “common carrier”? This section takes up that question, while arguing that the courts have yet to develop a satisfying conceptual framework for analyzing the issue. Indeed, about the only thing that is clear is that courts are less likely to find a given regulation imposes a prohibited common carriage requirement when the regulation is worded as a flexible standard as opposed to a more rule-like prohibition.

#### *1. What Does it Mean to “Treat” Someone as a “Common Carrier”?*

There are two potential ways courts might determine whether a regulation treats an information-service provider (or anyone else) as a common carrier. First, courts might identify the definition or essence of a common carrier, and then determine whether the regulation in question forces the provider to conform to that definition. This is what I label “common carrier essentialism.” Second, courts might identify a set of obligations, derived from positive law, that are traditionally applied to entities the law deems common carriers. Application of any or all of these obligations would, under this approach, automatically treat the regulated entity as a common carrier. This might be called a positivist theory of common carrier status. In this section, I argue that the courts have purported to follow the first (“essentialist”) approach to the question, but they have not done so consistently. Indeed, despite over three decades of case law, the courts have yet to develop a satisfying account of what it means to treat someone as a common carrier. Furthermore, common carrier essentialism risks even greater incoherence because there is no one definition of common carrier. The definition on which the courts have fixated (that a common carrier is one who holds himself out to serve the public indiscriminately) is instead one of several competing historical

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Commission's economic theories. *See, e.g.*, *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 568–71 (D.C. Cir. 2004) (vacating FCC's determination that competitive Local Exchange Carriers would be competitively “impaired” without nationwide access to mass market switches provided by incumbent carriers).

definitions, and not a particularly satisfying one at that. The upshot is that, as a limiting principle on FCC's authority over the Internet, common carrier essentialism is an unstable regulatory framework.

The formative early case concerning what it means to treat someone as a common carrier is *FCC v. Midwest Video Corp.*,<sup>128</sup> commonly referred to as *Midwest Video II*. That case involved rules promulgated by FCC requiring certain cable providers to make some of their channels available for "public access" programming, and to provide equipment to facilitate that use.<sup>129</sup> Recall that the Commission had asserted jurisdiction over cable providers using its ancillary authority. As the Court explained in *Midwest Video II*, however, that authority could not be used to impose common carrier status on cable providers.<sup>130</sup> And, the Court held, the rules in question did just that: "With its access rules, . . . the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, *pro tanto*, to common-carrier status."<sup>131</sup> The Court thus struck down the rules.

*Midwest Video II* embraced what I have termed the essentialist view of what it means to treat someone as a common carrier, under which it is first necessary to identify the core essence of a common carrier and then ask whether the regulation at issue forces regulated entities to conform to that definition. In doing so, it relied on earlier case law that had defined the term common carrier in other settings. Most important was Judge Wilkey's decision for the D.C. Circuit in *National Ass'n of Regulatory Utility Commissioners v. FCC (NARUC I)*,<sup>132</sup> *NARUC I* dealt with, in relevant part, whether the Commission had correctly classified certain mobile providers as non-common carriers.<sup>133</sup> It thus dealt with a slightly different question than that at issue in *Midwest Video II*—not with whether a regulation necessarily treats someone as a common carrier, but rather with the core classification issue of what distinguishes a common carrier from its traditional counterpart, the "private carrier."

In answering that question, Judge Wilkey turned to "the common law of carriers."<sup>134</sup> Under the common law, Wilkey explained, the common carrier concept originally "was used to impose a greater standard of care upon carriers who held themselves out as offering to serve the public in

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128. 440 U.S. 689 (1979).

129. *Id.* at 691–92.

130. *Id.* at 702–03.

131. *Id.* at 700–01.

132. 525 F.2d 630 (D.C. Cir. 1976).

133. *Id.*

134. *Id.* at 640.

general.”<sup>135</sup> Later, in the nineteenth century, additional price and service obligations were imposed on those the law deemed common carriers (such as railroads), obligations that were later extended to industries such as trucking and, of course, telecommunications.<sup>136</sup> But in all cases, Wilkey found, the essence of a common carrier was the same. Namely, the court held that the “critical point” was the “quasi-public character of the activity involved.”<sup>137</sup> The court went on, explaining that “[t]o create this quasi-public character, it is not enough that a carrier offer his services for a profit . . . . What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier ‘undertakes to carry for all people indifferently.’”<sup>138</sup> Finally, in language that would be highly influential in later decisions, Wilkey stated that “a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”<sup>139</sup>

In *Midwest Video II*, the Supreme Court emphasized this language in holding that the regulations at issue were forbidden “common-carrier obligations.”<sup>140</sup> Essentially, the Court explained, the access rules required cable providers to provide certain channels to the public on a “nondiscriminatory” basis—i.e., without allowing discretion by the cable provider regarding with whom to deal and on what terms.<sup>141</sup> They thus forced those providers to conform their behavior to the definition of a common carrier identified in cases like *NARUC I*. This was not the only way to approach the issue. The Court could have instead examined the particular regulations at issue and asked if they were functionally similar to obligations placed on common carriers under Title II of the Communications Act, for example. Alternatively, it could have sought to identify certain core common carrier obligations (whether derived from Title II or not) that the Commission was flatly prohibited from placing on non-common carriers. Doing so would not necessarily have led to a different result. Serving the public indiscriminately is, after all, not only a potential attribute of a common carrier, but also an obligation placed on those the law deems common carriers. Section 201 of the Communications Act requires telecommunications common carriers to provide “service upon reasonable request therefor,”<sup>142</sup> and § 202 forbids any common carrier

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135. *Id.*

136. *Id.* at 640–41.

137. *Id.* at 641.

138. *Id.*

139. *Id.*

140. *Midwest Video Corp. v. FCC (Midwest Video II)*, 440 U.S. 689, 701 (1979).

141. *Id.* at 701–02.

142. 47 U.S.C. § 201(a) (2012).

from “mak[ing] any unjust or unreasonable discrimination” in the provision of such service.<sup>143</sup> This alternative approach would have, however, tied the question of whether a given regulation treats someone as a common carrier more closely to an analysis of the positive law’s treatment of common carriers.<sup>144</sup>

The more recent cases, beginning with *Cellco Partnership v. FCC*, further muddy the waters concerning what it means to treat someone as a common carrier. They do so, I shall argue, by appearing to run together the two approaches I have been describing. *Cellco* involved FCC’s regulation of certain “roaming” agreements between mobile-data providers.<sup>145</sup> The Commission had previously held that such providers were non-common carriers offering information and not telecommunications services for purposes of the Communications Act.<sup>146</sup> They were thus “statutorily immune, perhaps twice over, from treatment as common carriers.”<sup>147</sup> The question in *Cellco* was whether FCC had transgressed that prohibition in its *Data Roaming Order*, which, as the court explained, “require[d] providers to ‘offer data roaming arrangements on commercially reasonable terms and conditions,’ but . . . permit[ted] them to ‘negotiate the terms of their roaming arrangements on an individualized basis.’”<sup>148</sup>

The *Cellco* court’s answer to that question involved a lengthy discussion of the prior case law concerning what it means to treat someone as a common carrier, drawing heavily on the *NARUC I* and *Midwest Video II* cases. As the court explained in an opinion authored by Judge Tatel, those cases “implicate the evolving meaning of common carriage and courts’ efforts to pin down the essence of common carriage in the midst of changing technology and the evolving regulatory landscape.”<sup>149</sup> With that introduction, *Cellco* laid down “several basic principles” to guide courts’

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143. *Id.* § 202(a).

144. The D.C. Circuit reaffirmed *NARUC I*’s approach in two subsequent cases. See Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC, 533 F.2d 601, 620 (D.C. Cir. 1976); Sw. Bell Tel. Co. v. FCC, 19 F.3d 1475, 1484 (D.C. Cir. 1994).

145. *Cellco P’ship v. FCC*, 700 F.3d 534, 537 (D.C. Cir. 2012). As *Cellco* explained, roaming “occurs when wireless subscribers travel outside the range of their own carrier’s network and use another carrier’s network infrastructure to make a call.” *Id.*

146. *Id.* at 538.

147. *Id.*

148. *Id.* at 540 (quoting Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Second Report and Order*, 26 FCC Rcd. 5411, 5432 ¶ 43 (2011)). A preliminary question in *Cellco* was whether FCC had authority to regulate mobile data providers in the first place. On that question, the court upheld FCC’s jurisdictional theory under Title III of the Communications Act, which deals with radio communications. *Cellco*, 700 F.3d at 544.

149. *Id.* at 546.

determinations of whether a given regulation treats someone as a common carrier.<sup>150</sup> As an initial matter, the court reiterated the *NARUC I/Midwest Video II* teaching that “[i]f a carrier is forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status.”<sup>151</sup> Furthermore, and “perhaps more importantly,” the court explained that

there is an important distinction between the question whether a given regulatory regime is *consistent* with common carrier or private carrier status, and the *Midwest Video II* question whether that regime *necessarily confers* common carrier status. Accordingly, even if a regulatory regime is not so distinct from common carriage as to render it inconsistent with common carrier status, that hardly means it is so fundamentally common carriage as to render it inconsistent with private carrier status. In other words, 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*. It is in this realm—the space between *per se* common carriage and *per se* private carriage—that the Commission’s determination that a regulation does or does not confer common carrier status warrants deference.<sup>152</sup>

*Cellco* thus purported to embrace what I have called an essentialist approach to common carrier status. Under that approach, what matters is whether a given regulation “necessarily confers common carrier status”—i.e., whether it forces someone to conform to the definition or “essence” of a common carrier. Where it does not, FCC has discretion to apply the regulation to the provider in question, even if the Commission might also lawfully apply the same or similar regulation on common carriers.

At the same time, however, *Cellco* indicates that certain obligations are so “fundamentally common carriage” that application of them necessarily confers common carrier status.<sup>153</sup> It thus runs together, in an ambiguous way, the two potential approaches to determining common carrier status. What might these core common carrier obligations be? We know from *NARUC I/Midwest Video II* and *Cellco* itself that they include a kind of “all comers” obligation “to offer service indiscriminately and on general terms,” similar to that contained in §§ 201 and 202 of the Communications Act.<sup>154</sup>

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150. *Id.* at 547.

151. *Id.*

152. *Id.* (citations omitted).

153. *Id.* at 545.

154. Recall that § 201 places an obligation on communications common carriers “to furnish [interstate or foreign communication by wire or radio] upon reasonable request therefor.” 47 U.S.C. § 201(a) (2012). Such service must be provided on “general terms” pursuant to the tariffing and nondiscrimination obligations applied under §§ 202 and 203. *See Cellco*, 700 F.3d at 547; 47 U.S.C. §§ 201–203.

But how many more obligations constitute “per se” common carriage (or how precisely to determine those that do), *Cellco* does not say. Later in the opinion, the court contrasts the treatment of roaming agreements under the *Data Roaming Order* on review with the § 201(b) obligation to charge “just and reasonable” rates, indicating (perhaps) that a too-close regulation of provider charges might constitute common carriage per se.<sup>155</sup> But whether detailed rate regulation alone is sufficient to trigger the prohibition on treating someone as a common carrier—and what other obligations might serve as such a trigger—is left unclear. In the end, the court found simply that the roaming regulation was sufficiently flexible that it did not constitute a prohibited common carrier regulation,<sup>156</sup> an aspect of the opinion that will be discussed in more detail below.

Indeed, a 2003 D.C. Circuit case involving mobile wireless providers casts doubt even on whether indiscriminate service offering is an obligation necessarily linked with common carrier status. *Orloff v. FCC* involved a practice by Verizon Wireless of offering “special deals” to customers in the Cleveland, Ohio area.<sup>157</sup> Providers of commercial mobile voice services such as Verizon are technically classified as “common carriers” under the Communications Act, but the Commission has forbore from many of the obligations—such as tariffed rates—that have historically accompanied that classification.<sup>158</sup> The petitioner in *Orloff* claimed that Verizon’s policy, which involved granting concessions to certain customers that were not generally available to the public at large, violated the core nondiscrimination obligation contained in § 202 of the Act, which the Commission continued to apply to mobile voice providers.<sup>159</sup> She also claimed that Verizon’s actions were fundamentally inconsistent with its statutory classification as a common carrier.<sup>160</sup> The Commission disagreed, and the court affirmed. In the Commission’s view, endorsed by the D.C. Circuit, Verizon’s practice did not constitute “unreasonable” discrimination under § 202 of the Communications Act because of the competitive market conditions in the wireless industry and the absence of legally enforceable tariffs governing Verizon’s rates.<sup>161</sup> In short, although deemed common carriers by law, mobile voice providers had been transformed into something very different, having the power even to make individualized deals with particular customers.

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155. *Cellco*, 700 F.3d at 548.

156. *Id.* at 548–49.

157. *See Orloff v. FCC*, 352 F.3d 415, 417 (D.C. Cir. 2003).

158. *See id.* at 418–19.

159. *Id.* at 419.

160. *Id.*

161. *See id.* at 420–21.

*Verizon*, decided a year after *Cellco* and also authored by Judge Tatel, offered a similarly ambivalent account of what it means to treat someone as a common carrier. Recall that the *Open Internet Order* had imposed a nondiscrimination rule on fixed broadband access providers, preventing them from “unreasonably discriminat[ing] in transmitting lawful network traffic.”<sup>162</sup> The *Open Internet Order* had also stated that so-called “paid prioritization” agreements, in which an access provider receives payment from an edge provider to prioritize the latter’s traffic, would likely constitute unreasonable discrimination.<sup>163</sup> In *Verizon*, the D.C. Circuit struck down the nondiscrimination rule—and, with it, much of the rest of the *Open Internet Order*—as a prohibited “common carrier” regulation.<sup>164</sup> The court began its analysis, after briefly recounting the history of common carriage regulation, by distinguishing between “the nature and scope of the duties imposed on common carriers,” which had “evolved over the last century,” and “the core of the common law concept of common carriage,” which had “remained intact.”<sup>165</sup> The court then largely reprised its discussion of the essence of common carriage from *Cellco*, including both the emphasis on indiscriminate offering and the distinction between per se and non-per se common carriage.<sup>166</sup> In the court’s view, the nondiscrimination rule constituted a prohibited form of common carriage per se by “relegat[ing] [broadband access providers], *pro tanto*, to common carrier status.”<sup>167</sup> It did so, the court explained, by compelling “those providers to hold themselves out ‘to serve the public’ or some subset of the public—e.g., edge providers—‘indiscriminately.’”<sup>168</sup>

*Verizon*, like *Cellco*, on its face embraces an essentialist approach to the common carrier question. What mattered, the court announced, was not the changing “duties” applied to common carriers through history, but rather the unchanging “core” of the common carrier “concept.” And, as in prior cases, that core was closely identified with the offering of service indiscriminately to the public (or to the subcategory of the public actually interested in using the service). At the same time, however, and also as in *Cellco*, the *Verizon* court lapsed into a discussion of the particular duties imposed by the Communications Act and on common carriers historically.

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162. See *supra* notes 85–95 and accompanying text.

163. See *supra* note 95 and accompanying text.

164. See generally *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

165. *Id.* at 651.

166. See *id.* at 651–52.

167. *Id.* at 655 (quoting *FCC v. Midwest Video Corp. (Midwest Video II)*, 440 U.S. 689, 700–01 (1979)).

168. *Verizon*, 740 F.3d at 655–56 (quoting *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC (NARUC I)*, 525 F.2d 630, 642 (D.C. Cir. 1976)).

What struck the court in particular was the resemblance of the *Open Internet Order's* nondiscrimination rule to § 202's prohibition on "unjust or unreasonable discrimination."<sup>169</sup> As the court stated: "Significantly for our purposes, the Commission never argues that the *Open Internet Order's* 'no unreasonable discrimination' standard somehow differs from the nondiscrimination standard applied to common carriers generally—the argument that salvaged the data roaming requirements in *Cellco*."<sup>170</sup> The court then went on to compare and contrast the operation of the *Open Internet Order's* nondiscrimination rule with that historically imposed on railroads and telephone companies, among others.<sup>171</sup> That the two rules appeared more similar than different appeared to motivate much of the court's ultimate determination that the *Open Internet Order's* nondiscrimination rule constituted a per se common carrier obligation.

How, then, can we summarize the current state of the law concerning what it means to treat someone as a common carrier? We know, first, that what ultimately matters is whether a given regulation forces the regulated entity to conform to the definition or essence of a common carrier. That definition or essence includes, most importantly, the offering of service indiscriminately to the public. We also know that there are certain duties that amount to common carriage per se, such that they can never be applied to entities immune from treatment as common carriers. In addition, there is another set of obligations that, although they might be applied to common carriers, may nevertheless also be applied to non-common carriers in FCC's discretion. Finally, we know that distinguishing the two categories has something to do with the similarity of the rule in question with those duties historically applied to entities the law deems common carriers.

In a nutshell, my thesis is that this is not a very coherent foundation upon which to base Internet regulation. As an initial matter, what constitutes the definition or essence of a "common carrier" is itself subject to debate. As we saw, the *NARUC I* court seized upon a definition of common carrier holding that the term refers to one who "undertakes to carry for all people indifferently" or "h[olds] themselves out as offering to serve the public in general."<sup>172</sup> This "holding out" theory of common carrier status is frequently invoked, but it is hardly the only historical definition of a common carrier.<sup>173</sup> Moreover, on policy grounds, it is a

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169. *Verizon*, 740 F.3d at 657; 47 U.S.C. § 202(a) (2012).

170. *Verizon*, 740 F.3d at 656.

171. *Id.* at 656–57.

172. *NARUC I*, 525 F.2d at 640–41.

173. See Yoo, *supra* note 11, at 553–69 (surveying the "holding out" theory among other definitions of common carrier).

questionable test for determining common carrier status. For one, as Christopher Yoo has pointed out, the “holding out” theory is “subject to manipulation” by regulated entities.<sup>174</sup> If what matters is whether a carrier holds itself out to serve the public indiscriminately, companies could escape common carrier status (and the regulation that goes along with it) by offering their services on a private carriage basis.<sup>175</sup> The test is thus potentially underinclusive. It is also potentially overinclusive. Many firms in the modern economy offer their services indiscriminately and according to publicly available terms (if not legally enforceable tariffs). But no one would suggest that all large companies should be subject to treatment as common carriers.

Perhaps because of these concerns, various other tests have developed for what constitutes the definition or essence of a common carrier. For example, in 1981, seeking to relieve non-dominant communications carriers of tariffing obligations, FCC identified the common carrier concept with market power considerations, in the process specifically rejecting the “holding out” theory as the exclusive test for what determines common carrier status.<sup>176</sup> An older test for determining whether a company operated as a common carrier asked whether its operations were “affected with the public interest.”<sup>177</sup> This test, articulated in canonical form by the English jurist Sir Matthew Hale in the 1670s, eventually found its way into *Lochner*-era American constitutional law as a way to justify various forms of economic regulation on certain firms deemed common carriers.<sup>178</sup>

A final test has focused on the transport functions provided by historic common carriers. Under this test, a common carrier is one who provides the public function of transporting the goods (or information) of third parties. The outline of such a test can be seen in the post-1996 Communications Act treatment of communications common carriers,

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174. *Id.* at 553.

175. *Id.* (stating that, under the “holding out” theory, “[a] provider could avoid common carriage obligations simply by limiting its offers to a subset of the overall customer base instead of making them available to the public at large” and that “[t]he result would place control over whether a firm is a common carrier under the control and discretion of the firm potentially subject to regulation”).

176. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, 467–69 ¶¶ 61–62 (1981); see also Crawford, *supra* note 20, at 881 (“The Commission in its 1981 proceeding took the approach that market power was the essential element that had driven the adoption of common carriage regulation . . . .”); Yoo, *supra* note 11, at 559–60.

177. Yoo, *supra* note 11, at 554.

178. See, e.g., *Munn v. Illinois*, 94 U.S. 113, 125–26 (1876); see also Daniel A. Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L. REV. 1029, 1043–44 (2012).

which, as we have seen, restrict those carriers to persons transporting communications without change in form.<sup>179</sup> And Susan Crawford has argued that common carrier-like nondiscrimination obligations in particular are rooted in a concept of common carriage that stresses the public character of “operators of physical transportation networks.”<sup>180</sup> Close state regulation of those engaged in transport is justified under this view because of the key role played by transportation (and communication) in successful modern societies.<sup>181</sup>

Whichever test represents the truest approximation of what it means to be a common carrier, the point is simply that the concept itself is a contested one, and depends more on context and the purpose served by the designation than on any unchanging “essence” of common carrier status. It should not be surprising, then, that a legal framework that depends on identifying that status should yield uncertainty.

Indeed, the problem runs considerably deeper, for it is no easier to determine which duties constitute core common carriage obligations, and thus fall within the category of common carriage *per se*, than it is to identify the essence of common carrier status itself. The D.C. Circuit has all but acknowledged this point in describing the “evolving” set of duties placed on common carriers.<sup>182</sup> As the *NARUC I* court stated, those duties began as a special common law “standard of care” that applied to a class of entities engaged in certain occupations.<sup>183</sup> Thomas Nachbar has further explained that the English law regarding common carriers was concerned more with procedural pleading requirements than with the substantive standard of care; essentially, one who dealt with a common carrier could plead a breach of contract action against such a carrier without having to allege a specific promise made to them individually.<sup>184</sup>

Eventually, the concept of common carrier was fitted to post-industrial revolution ventures such as the railroads, along with a set of familiar obligations that were also imposed on public utilities. As Joseph Kearney and Thomas Merrill have summarized it, beginning in the last half of the nineteenth century, “public utility companies and common carriers had one common characteristic: All were required to offer their customers service under rates and practices that were just, reasonable, and non-

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179. *See supra* notes 22–24 and accompanying text.

180. Crawford, *supra* note 20, at 882.

181. *See id.* at 884.

182. *Cellco P’ship v. FCC*, 700 F.3d 534, 546 (D.C. Cir. 2012).

183. 525 F.2d 630, 640 (D.C. Cir. 1976).

184. *See* Thomas B. Nachbar, *The Public Network*, 17 *COMMLAW CONSPPECTUS* 67, 86–87 (2008).

discriminatory.”<sup>185</sup> Similar duties were placed on communications common carriers in the 1934 Communications Act (and predecessor acts): a duty to obtain government permission before initiating (or discontinuing) service; a duty to charge “just and reasonable” rates; and a duty to refrain from “unjust and unreasonable” discrimination.<sup>186</sup> These duties were enforced through tariff filing requirements and, increasingly, structural separation regimes designed to prevent rate-regulated entities from evading their obligations through unregulated subsidiaries.<sup>187</sup>

When the D.C. Circuit speaks of “per se” common-carriage obligations, it very well may have had in mind these core common-carriage principles that are embodied in the 1934 Communications Act and that stretch back, in various other contexts, for over a century. But even that is not so simple. After all, the D.C. Circuit has stated that imposing a “just and reasonable” rate obligation only “might” constitute common carriage per se.<sup>188</sup> Moreover, there is a vast sea of requirements that have been applied to common carriers, either through statute or regulation, in order to implement and enforce these core obligations.<sup>189</sup> Are all of these requirements also common carriage per se? None of them? Only some? And how can we tell? The opinions to date do not say.

As will be discussed below in the context of interconnection, moreover, a further problem arises regarding how to deal with statutory obligations imposed on common carriers subsequent to the 1934 Act. Some of these obligations are more onerous, from the standpoint of regulated entities, than the nineteenth-century duties. For example, the 1996 Telecommunications Act imposed a facilities unbundling requirement on “incumbent local exchange carriers”—essentially, the historic local telephone monopolies.<sup>190</sup> That provision, which proved enormously controversial to implement, required those companies to lease capacity on their facilities to new entrants at closely regulated rates in order to enable those entrants to compete.<sup>191</sup> As discussed in the background section, there have been calls to impose similar unbundling obligations on incumbent

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185. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1330–31 (1998).

186. See 47 U.S.C. §§ 201–202, 214 (2012); Yoo, *supra* note 11, at 570–71.

187. 47 U.S.C. § 203; Yoo, *supra* note 11, at 572.

188. *Verizon v. FCC*, 740 F.3d 623, 652 (D.C. Cir. 2014).

189. For proof, one need only peruse the chapters of a popular telecommunications law treatise concerning the obligations set forth by the 1934 Communications Act. See generally PETER W. HUBER ET AL., *FEDERAL TELECOMMUNICATIONS LAW* (2d rev. ed. 2011).

190. See 47 U.S.C. § 251(c)(3).

191. See NUCHESTERLEIN & WEISER, *supra* note 19, at 58–66 (describing the unbundling obligation imposed by the 1996 Act and FCC’s early efforts to implement it).

broadband Internet access providers, as has been done in many parts of Europe.<sup>192</sup> Would that amount to common carriage per se? There is no easy answer.

As I have attempted to show, there are many such unanswered questions. And those unanswered questions will create considerable uncertainty for the FCC as it uses § 706 to extend regulations to the Internet space. The next section highlights that uncertainty with a concrete example: a hypothetical FCC requirement placing physical interconnection obligations on Internet access providers and other network owners.

## 2. *An Example of the Confusion: Interconnection*

Interconnection involves the physical linking of two different networks and differs from both the net neutrality-style nondiscrimination obligations and the facilities unbundling requirements discussed above. Those latter duties impose obligations related to traffic “on” a provider’s network. The *Open Internet Order’s* nondiscrimination rule, for example, would limit a broadband Internet access provider’s ability to give preferential treatment to edge provider traffic as it travels over the broadband provider’s network en route to the end-user who has requested it. And a facilities unbundling requirement would, in most forms, require a network owner to lease capacity on its network to others, again in order to reach end-users. Interconnection, by contrast, is in some ways simpler: it deals only with the hand-off of traffic between two different networks, and not (in theory, at least) with the treatment of that traffic after the hand-off occurs.

To illustrate, take the example of a regular voice call placed by a customer of Network A to someone subscribing to Network B. There are a variety of regulatory possibilities that might influence whether and how the call is connected. On one extreme, the networks might be under an obligation to connect directly with one another. In that case, the call would most likely travel through a physical point of interconnection between the two networks, with no involvement by a third party carrier (Network A → Network B). On the other extreme, one might imagine there being no applicable interconnection obligation between the two networks. In that case, Network A and Network B would only interconnect with each other if they so choose. And if they do not (and if there was no third-party network linking the two), the call might never get through at all. Occupying the middle ground, an indirect interconnection obligation would require

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192. See HARV. UNIV., BERKMAN CTR. FOR INTERNET & SOC’Y, NEXT GENERATION CONNECTIVITY: A REVIEW OF BROADBAND INTERNET TRANSITIONS AND POLICY FROM AROUND THE WORLD 85–88 (2010), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman\\_Center\\_Broadband\\_Final\\_Report\\_15Feb2010.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman_Center_Broadband_Final_Report_15Feb2010.pdf).

Network B to receive calls originated by customers of Network A *somehow*, but Network B would not have to establish a direct physical connection with Network A. In this scenario, Network B could fulfill its interconnection obligation by receiving calls from customers of Network A that are first routed through a third-party intermediary, call it Network C, that is in turn connected to Network B (Network A → Network C → Network B). In practice, such an indirect interconnection obligation may amount to little more than a no-blocking-type obligation—i.e., Network B may not block calls (or traffic) originated by other networks, though it need not necessarily accept calls from them directly.

As described in Part I, FCC has never regulated interconnection arrangements among Internet backbone networks, Internet access providers, or networks operated by edge providers, preferring to leave the terms of those arrangements to market forces. That hands-off policy has proved relatively durable, though there have been several high-profile breakdowns, in some cases leading to users of various networks being unable to communicate with each other.<sup>193</sup> In addition, there have been occasional calls for FCC to act more aggressively to police Internet interconnection disputes.<sup>194</sup> Most recently, Netflix, along with the Internet backbone provider Level 3, has urged the Commission to regulate interconnection arrangements with broadband Internet access providers.<sup>195</sup> Netflix's advocacy came in the wake of it agreeing with Comcast and Verizon to pay for the right to connect Netflix's servers directly to those providers' networks, resulting in Netflix customers receiving better quality video than (as had been the case) if Netflix had to route its traffic through an intermediary network.<sup>196</sup> Netflix has argued to the Commission that the terms of those contracts, which have yet to be disclosed, represent extortion by broadband Internet access providers, who are said to exercise market

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193. See NUECHTERLEIN & WEISER, *supra* note 19, at 291–93.

194. See generally Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535 (2010) (defending an “open interconnection” regime to govern the Internet); James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 32 (2003) (calling for an Internet interconnection “default rule,” under which “Internet carriers would be required to interconnect, directly or indirectly, with other Internet carriers when the FCC found, by rule or adjudication, that a carrier’s market power threatened competition”); Speta, *A Common Carrier Approach*, *supra* note 12 (similar).

195. See, e.g., Protecting and Promoting the Open Internet et al., *Comments of Level 3 Communications, LLC*, GN Docket. No. 14-28 (July 15, 2014); Protecting and Promoting the Open Internet et al., *Comments of Netflix, Inc.*, GN Docket. No. 14-28 (July 15, 2014) [hereinafter *Netflix Comments*].

196. See Jon Brodtkin, *FCC Gets Comcast, Verizon to Reveal Netflix’s Paid Peering Deals*, ARS TECHNICA (June 13, 2014, 1:15 PM), <http://arstechnica.com/tech-policy/2014/06/fcc-gets-comcast-verizon-to-reveal-netflixs-paid-peering-deals/>.

power in the transmission of Internet traffic to their customers.<sup>197</sup> In response, FCC Chairman Tom Wheeler announced that the Commission has begun to collect information regarding such arrangements.<sup>198</sup>

Suppose that the Commission did apply an interconnection obligation to Internet networks. Would such an obligation constitute a prohibited common carrier regulation under the current framework? The answer, not surprisingly, is far from clear. Imagine, for sake of ease, a seemingly simple requirement that broadband Internet access providers provide for direct interconnection with their networks on closely regulated terms. If adopted under § 706, the Commission would have to demonstrate that such an obligation furthered the goals of that section. Its arguments on that score would likely closely track those it offered in the *Open Internet Order*—namely, that the rule prevents broadband providers from imposing burdensome entry barriers on edge providers, thereby promoting innovation and stimulating demand for broadband Internet access services. Provided it produced some evidence of such an effect, the Commission’s judgment would most likely be upheld by a court.

The question, then, would be whether such a direct interconnection obligation involves a requirement that broadband Internet access providers conform to the definition or essence of a common carrier or otherwise amounts to a “per se” common carrier obligation. On this score, one might be tempted to conclude that a direct interconnection obligation forces a provider to “undertake[] to carry for all people indifferently,”<sup>199</sup> in a manner similar to the rules struck down by the courts in prior cases.<sup>199</sup> After all, an interconnection obligation is a kind of access mandate, requiring carriers to open their facilities to competitors and others for the mutual exchange of traffic. That analysis turns out to be too simple, however. At least if one is looking for the unchanging “core” of common carrier status,<sup>200</sup> it must be acknowledged that the common law concept of common carriage did *not* include an interconnection-type obligation as one of its marks. That is, even a carrier that otherwise undertook to serve the public indifferently could legally avoid physical interconnection with other networks if it so chose; the two concepts were seen as distinct.<sup>201</sup> To be sure, a common

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197. See *Netflix Comments*, *supra* note 195, at 3.

198. See Press Release, FCC, Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion (June 13, 2014), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-327634A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-327634A1.pdf).

199. Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC (*NARUC I*), 525 F.2d 630, 641 (D.C. Cir. 1976).

200. *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014).

201. See Speta, *A Common Carrier Approach*, *supra* note 12, at 258; see also *Atchison, Topeka & Santa Fe R.R. Co. v. Denver & New Orleans R.R. Co.*, 110 U.S. 667, 680–82 (1884).

carrier may have had a duty to receive the traffic delivered to it by a competitor if that traffic was delivered in the same manner as the public at large (e.g., at a public depot), a situation in which the competitor resembles a customer.<sup>202</sup> But the carrier did not have the obligation to create a physical interconnection point with the competitor where none existed before.<sup>203</sup> Thus, at least for purposes of the common law, physical interconnection with a competitor was distinguished from the obligation to serve the public indifferently. And if that is so, it is difficult to see how imposing such an interconnection obligation would force a provider to conform with the definition or essence of a common carrier, at least as understood by the D.C. Circuit.

A similar uncertainty plagues the analysis of whether a duty of direct interconnection amounts to a per se common-carriage obligation under the statutory law of common carriers as it developed from the nineteenth century onward. Borrowing from the common law, the Interstate Commerce Act of 1887 imposed no physical interconnection obligation on railroads, though early-twentieth century amendments to the 1887 Act added one.<sup>204</sup> With regard to telecommunications regulation in particular, the Mann-Elkins Act of 1910, which applied the common carrier concept to telephony, did not contain an interconnection provision, though telegraph systems were subject to interconnection duties as early as 1886.<sup>205</sup> Indeed, the early telephone system—which included the Bell System as well as a host of independent competitors—was plagued with interconnection problems, and customers of the independent companies were often unable to reach Bell customers and vice versa.<sup>206</sup> An interconnection right in the telephone context first emerged as a result of the so-called “Kingsbury Commitment” of 1914, which settled the United States’ first antitrust suit against the Bell System and included an agreement by Bell to interconnect its long-distance (but not local) network to the independents.<sup>207</sup> A broader interconnection obligation came in the 1934 Communications Act, which requires telephone carriers to “to establish physical connections with other carriers,” but only if “the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest.”<sup>208</sup>

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202. See Adam Candeub, *Network Interconnection and Takings*, 54 SYRACUSE L. REV. 369, 385–86 (2004).

203. Speta, *A Common Carrier Approach*, *supra* note 12, at 258.

204. *Id.* at 258–59.

205. See BENJAMIN ET AL., *supra* note 58, at 333.

206. See *id.* at 332–33.

207. *Id.* at 335.

208. 47 U.S.C. § 201(a) (2012); Speta, *A Common Carrier Approach*, *supra* note 12, at 263–64.

The modern statutory framework governing telephone interconnection dates only to the 1996 Telecommunications Act. That Act, while retaining § 201(a)'s interconnection language, added two other relevant provisions. First, § 251(a)(1) places an obligation on every telecommunications carrier “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”<sup>209</sup> Second, § 251(c)(2) requires incumbent Local Exchange Carriers, then monopolists in the local market, to directly interconnect with competitors on regulated terms.<sup>210</sup>

If history is a guide, therefore, it is at best uncertain whether the hypothetical interconnection requirement described above “necessarily confers” common carrier status on broadband Internet access providers. That FCC should be able to impose such a requirement is in some ways surprising, however, and may well be resisted by a court. In *Cellco* and *Verizon*, the judges were concerned with whether the regulations in question resembled those imposed by §§ 201 and 202 of the Communications Act, provisions that apply (absent forbearance) to every communications common carrier. The direct interconnection obligation described above most closely resembles an obligation, described in § 251(c)(2), reserved exclusively for telephone monopolists. As the Act is currently structured, therefore, it would be an odd outcome if the Commission were able to apply the latter but not the former to entities—such as information-service providers—that the Act itself specifically exempts from common carrier treatment.

It is thus anyone's guess whether, under the current legal framework, such an obligation would amount to a prohibited common carrier obligation. More fundamentally, the framework locates the argument in the wrong place. Whether interconnection or any other kind of duty should be imposed on network owners ought to depend on considerations of sound public policy, such as whether the market is functioning well without regulation and whether there is a potential for market failure. Whether the obligation in question is conceptually similar to those imposed, rightly or wrongly, on entities the law has historically deemed common carriers seems beside the point.

### 3. “Flexibility” as an Antidote to Common Carrier Status

If one thing can confidently be gleaned from the D.C. Circuit's case law on what it means to treat someone as a common carrier, it is that a regulation is more likely to be upheld if it is in the form of a broadly worded

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209. 47 U.S.C. § 251(a)(1).

210. *Id.* § 251(c)(2).

standard, enforced through a process of case-by-case adjudication, than if it is a prescriptive rule. In *Cellco*, the fact that the regulation in question left considerable room for discretion in its application was what ultimately saved it from invalidation.<sup>211</sup> As the court explained, the *Data Roaming Order* left “substantial room for individualized bargaining” regarding data roaming terms, subject to a “commercial[] reasonab[ility]” standard that left both the Commission and regulated parties with “considerable flexibility.”<sup>212</sup> In this respect, the court looked approvingly at the Commission’s pronouncement that the “commercial reasonability” standard would be applied on a case-by-case basis in which the decision-maker weighed no less than “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.”<sup>213</sup>

In *Verizon*, likewise, the perceived inflexibility of the rules at issue in that case ultimately pushed the court to conclude that they imposed common carrier obligations in contravention of the Communications Act. As noted above, the *Verizon* court saw a similarity between the *Open Internet Order*’s nondiscrimination rule and the traditional nondiscrimination rule imposed on common carriers, contrasting both with the “flexible” commercial reasonability standard upheld in *Cellco*.<sup>214</sup> In doing so, the court pointed to the fact that the *Open Internet Order* had presumptively concluded, in the abstract, that paid prioritization agreements were unlikely to pass muster under the rules the Commission was adopting.<sup>215</sup> This was, again, in contrast with the *Data Roaming Order*, which had deferred such particulars to a later stage, thus preserving *ex ante* contracting flexibility by regulated parties.<sup>216</sup>

The differing results in *Cellco* and *Verizon* thus make clear that the Commission will be on much surer footing to the extent it uses its § 706 power to regulate the Internet marketplace through broadly worded, flexible standards that defer specific issues to later consideration. Prescriptive rules that leave less discretion to future decisionmakers, by contrast, are much more likely to be invalidated. Moreover, as *Cellco* also made clear, a purportedly flexible system may morph into a prohibited

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211. *Cellco P’ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012).

212. *Id.*

213. *Id.*

214. *Verizon v. FCC*, 740 F.3d 623, 657 (D.C. Cir. 2014).

215. *Id.*

216. See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Second Report and Order*, 26 FCC Red. 5411, 5452 ¶ 85 (2011) [hereinafter *Data Roaming Order*].

“common carriage” regime in its application.<sup>217</sup> The Commission thus must ensure that adjudicators, too, stick close to the facts in resolving particular cases, avoiding broad, rule-like generalizations that may overly limit network owners’ discretion. As the next Part argues, the Commission will thus predictably move toward a model of Internet regulation that relies to a greater extent on announced standards that are then enforced and evolve through a process of narrow, case-by-case adjudications: a new common law for the age of the Internet.

### III. THE EMERGING COMMON LAW OF INTERNET REGULATION

As a matter of general administrative law, agencies have great discretion over both the specific form their regulations take and the process through which they are announced. For example, an agency tasked with a specific project—say, protecting the environment or regulating the airwaves—may, absent congressional direction, carry out that project through a rule or a standard. And, in doing so, the agency may rely on notice-and-comment procedures or case-specific adjudication.<sup>218</sup> Different agencies have different preferences regarding the form their policymaking takes. The National Labor Relations Board, for example, has a well-known preference for acting through case-by-case adjudication.<sup>219</sup> FCC has historically acted through rulemaking.<sup>220</sup>

This is not to say that the courts have no influence over the form agency policymaking takes. Indeed, this Part argues that the legal dynamics outlined above will increasingly push FCC toward a model of Internet governance that relies on announced standards subsequently enforced through a process of case-by-case adjudication. The result may well be a gradual evolution of the law through application of the standard in specific cases, a method not unlike that typically associated with the common law.<sup>221</sup> Part III.A outlines the content of the emerging model as well as its possible scope. Part III.B then turns to a tentative assessment of the merits of the new regime, drawing both on the general literature concerning rules

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217. *Cellco*, 700 F.3d at 548.

218. See generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

219. *Id.* at 1385.

220. *Id.*

221. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (“[S]ticking close to those facts, not relying upon overarching generalizations, and thereby leaving considerable room for future judges is thought to be the genius of the common law system. The law grows and develops, the theory goes, not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time.”).

versus standards as well as on considerations specific to FCC.

### A. *The Model*

#### 1. *Content*

The content of the new model is most clearly displayed in the *Data Roaming Order* upheld in *Cellco*. There, FCC “require[d] that facilities-based providers of commercial mobile data services offer data roaming arrangements to other such providers on commercially reasonable terms and conditions.”<sup>222</sup> As noted above, the Commission stressed that the commercial reasonability requirement would allow providers “flexibility” in negotiating individualized terms and conditions attached to their data roaming agreements, “without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.”<sup>223</sup>

The *Data Roaming Order* also stated, however, that should a dispute concerning data roaming arise, an aggrieved party could file a complaint with the Commission alleging that the terms it was being offered—or the opposing party’s conduct—were not “commercially reasonable.”<sup>224</sup> As to how those disputes would be resolved, the Commission offered little concrete guidance beyond that they would be judged under the “totality of the circumstances.”<sup>225</sup> The Commission also listed a total of sixteen factors that “relate to public interest benefits and costs of a data roaming arrangement offered in a particular case, including the impact on investment, competition, and consumer welfare and whether a particular data roaming offering is commercially reasonable.”<sup>226</sup> Those factors included a catch-all factor for “other special or extenuating circumstances” and a disclaimer from the Commission that “these factors are not exclusive or exhaustive and that providers may argue that the Commission should consider other relevant factors in determining the commercial reasonableness of the negotiations, providers’ conduct, and the terms and

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222. *Data Roaming Order*, *supra* note 216, at 5431 ¶ 40.

223. *Id.* at 5433 ¶ 45.

224. *Id.* at 5448–50 ¶¶ 74–75, 78.

225. *Id.* at 5448–49 ¶ 74.

226. *Id.* at 5452 ¶ 86. Those factors included: “whether the host provider has responded to the request for negotiation, whether it has engaged in a persistent pattern of stonewalling behavior, and the length of time since the initial request”; “whether the terms and conditions offered by the host provider are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement”; “whether the providers involved have had previous data roaming arrangements with similar terms”; and “whether a host provider’s decision not to offer a data roaming arrangement is reasonably based on the fact that the providers are not technologically compatible.” *Id.* at 5452–53 ¶ 86.

conditions of the proffered data roaming arrangements, including the prices.”<sup>227</sup>

A similar framework is evident in FCC’s May 2014 net-neutrality NPRM, issued after *Verizon*.<sup>228</sup> That NPRM proposes to retain the *Open Internet Order*’s “no-blocking” rule, picking up on the D.C. Circuit’s suggestion that such a rule may be lawful if not paired with a strict nondiscrimination requirement.<sup>229</sup> At the core of the new open Internet rules, however, the Notice proposes a “commercial reasonability” standard, explicitly modeled on the data roaming regulations, to govern paid prioritization arrangements and other types of discriminatory practices by broadband Internet access providers.<sup>230</sup> That rule would “prohibit as commercially unreasonable those broadband providers’ practices that, based on the totality of the circumstances, threaten to harm Internet openness and all that it protects.”<sup>231</sup> The FCC also called for comment on “factors the Commission can use to administer the proposed commercially reasonable practices standard.”<sup>232</sup> Those factors would be used as part of “a case-by-case approach, considering the totality of the circumstances, when analyzing whether conduct satisfies the proposed commercially reasonable legal standard, or another legal standard ultimately adopted.”<sup>233</sup>

The FCC’s approach to data roaming and its proposed approach in the net neutrality context thus embody a standards-based system, in the particular sense that many of the important decisions about what is forbidden are made *ex post*, after the relevant action.<sup>234</sup> By contrast, a rule-like system would—as the FCC did in the 2011 *Open Internet Order*—resolve many issues in the abstract, before concrete disputes had arisen. A preference for standards, enforced *ex post*, and rules, announced *ex ante*, is indeed the defining characteristic of the new common law regime.

## 2. *Scope*

An additional question concerns the scope, or potential scope, of the new model of Internet governance. If open-ended standards, promulgated using

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227. *Id.* at 5453 ¶¶ 86–87.

228. *See 2014 Net Neutrality NPRM*, *supra* note 3.

229. *Id.* at 36 ¶ 97.

230. *Id.* at 39, 42 ¶¶ 110, 116.

231. *Id.* at 42 ¶ 116.

232. *Id.* at 44 ¶ 122.

233. *Id.* at 48 ¶ 136.

234. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (adopting a definition of rules and standards in which “the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act”).

the Commission's § 706 authority, are going to play an increasingly important role in the Commission's regulation of the Internet, over how broad a category of disputes can we expect that model to extend? Relatedly, what categories of *provider* might the Commission regulate?<sup>235</sup>

The answer to these questions is that the Commission's potential reach is quite broad, though only time will tell how far it will extend in fact. That is so because of the nature of the Commission's authority under § 706 of the Telecommunications Act. In short, the Commission's authority under that provision depends on whether the regulation promotes broadband infrastructure deployment. And, as was discussed in Part II, FCC's determination on that score will likely receive a substantial amount of deference from the courts.

In the *Open Internet Order*, the Commission used its § 706 authority to regulate companies—wired and wireless broadband Internet access providers—that were the same as, or closely allied with, the telephone and cable operators the Commission has traditionally regulated under the Communications Act.<sup>236</sup> But there is nothing inherent in the nature of § 706 that would limit the reach of that section to those particular providers. And even if § 706 is not read to expand the Commission's general jurisdiction over “interstate and foreign communication by wire or radio,” it could still potentially pull in many other types of entities that FCC has not historically regulated.

Take, as the most prominent example, edge providers such as Google or Facebook. The *Open Internet Order* regulated broadband Internet access providers in order to promote innovation by edge providers. But there is no reason that FCC could not use its § 706 power instead to regulate edge providers directly, at least as long as it could tell a credible story regarding why such regulation enabled innovation at the edge (in turn spurring consumer demand for broadband and, with it, broadband infrastructure deployment, under the “virtuous cycle” theory).<sup>237</sup> That prospect is not fanciful. In 2012, for example, FTC investigated Google over allegations that the Internet giant was manipulating search results to favor its own products (Google Maps, for example) over those of its competitors (say,

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235. This Section focuses on § 706 because it is the broadest and most general grant of FCC authority over the Internet. Especially outside the competition policy area—which this Essay does not explore, *see supra* note 1—the Commission may have additional authority to impose, for example, E-911, disability access, and privacy requirements that do not depend on common carrier status. *See Weiser, supra* note 34, at 43 n.11.

236. *See Open Internet Order, supra* note 91, at 17,934 ¶ 49.

237. The FCC would also have to convince a court that the regulation in question concerned interstate communication by wire, which would turn on the object of the regulation. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

MapQuest).<sup>238</sup> Although FTC later terminated that investigation, the concern in such cases is conceptually similar to that at issue in the net neutrality dispute: namely, that a company with market power or potential market power in one market will use its position to harm competition in an adjacent market, where it also may compete. This is not to say that FCC will choose to intervene in the applications markets. But the potential is certainly there.

Despite the dynamics outlined above, there may also be pockets of the Internet in which a more rule-like approach predominates. One potential avenue for favoring more restrictive rules over open-ended standards involves FCC's ability to condition its approval of proposed mergers on the post-merger company's agreement to abide by certain restrictions.<sup>239</sup> Those restrictions can, in the words of two commentators, be quite "onerous and rule-like."<sup>240</sup> And because merger conditions are imposed with the consent of the regulated party, they do not have to conform to the restrictions contained in the Communications Act, including the prohibition on treating information-service providers as common carriers.<sup>241</sup> Comcast, for example, agreed to follow the *Open Internet Order's* net neutrality rules—including its nondiscrimination obligation—as part of its merger with NBC Universal in 2011.<sup>242</sup> That commitment remains fully in place despite the D.C. Circuit's partial invalidation of those rules in *Verizon*.<sup>243</sup> FCC could further extend the same net neutrality rules by conditioning the proposed Comcast-Time Warner Cable and AT&T-DirectTV mergers on similar commitments.<sup>244</sup>

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238. See Steve Lohr, *Drafting Antitrust Case, F.T.C. Raises Pressure on Google*, N.Y. TIMES, Oct. 12, 2012, [http://www.nytimes.com/2012/10/13/technology/ftc-staff-prepares-antitrust-case-against-google-over-search.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/10/13/technology/ftc-staff-prepares-antitrust-case-against-google-over-search.html?pagewanted=all&_r=0).

239. FCC must approve mergers involving the transfer of Commission-issued licenses. See 47 U.S.C. § 214(a)–(c) (2012).

240. Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 51.

241. See Babette E.L. Boliek, *FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries*, 52 B.C. L. REV. 1627, 1665 (2011) (stating that "there are no statutory limitations as to the type of obligations that the FCC may impose on the merged entity").

242. Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4275 ¶ 94 (2011).

243. See *id.* (providing that commitment to abide by 2010 net neutrality rules will remain in effect notwithstanding outcome of any judicial challenges to those rules).

244. See Gautham Nagesh, *Comcast-TWC Deal Opens Door for Net Neutrality*, WALL ST. J., Feb. 14, 2014, <http://online.wsj.com/articles/SB10001424052702303704304579383470188363010>; Brian Fung, *AT&T Will Honor Net Neutrality for Three Years If Regulators Let it Buy DirectTV*, WASH. POST, May 18, 2014, <http://www.washingtonpost.com/blogs/the-switch/wp/2014/05/18/att-will-honor-net-neutrality-for-three-years-if-regulators-let-it-buy-directv/>.

It is also possible that FCC will move at least some parts of the Internet into the Title II framework. Calls to reclassify broadband Internet access providers as Title II common carriers have again intensified following the 2014 *Net Neutrality NPRM*, which was perceived by many as too permissive regarding discrimination by access providers.<sup>245</sup> Another, narrower option, contained in the same NPRM and in a recent paper by Tejas Narechania and Tim Wu, would be to classify the transmission service that broadband Internet access providers supply to edge providers—but not the service they provide to their own end-user customers—as a Title II “telecommunications service.”<sup>246</sup> This proposal takes advantage of the fact that an Internet transaction can be conceptually broken down into two pieces: a “call” from a consumer to a website or other edge provider requesting a certain piece of information, and a “response” from the provider with the requested information.<sup>247</sup> Although both the call and response will traverse the facilities of the consumer’s chosen broadband provider, it may be possible for the Commission to conclude that only the response involves a telecommunications offering (by the access provider to the edge provider). Under such logic, FCC would be able to re-impose the nondiscrimination and no-blocking rules struck down in *Verizon* because those rules deal with how broadband Internet access providers treat edge providers and not their own end-users.<sup>248</sup>

As stated above, it is not inevitable that FCC will decide to apply Title II classification to any part of the Internet. But in any event, even a decision to reclassify some broadband Internet access services as within Title II, for example, will leave many Internet-based networks and services outside of that framework. And in those areas, we are likely to see a move toward the common law-type regulatory system described above.

### *B. Some Benefits and Drawbacks*

This Section surveys some potential benefits and drawbacks of the emerging common law model of Internet governance. As with any system that relies on standards as opposed to rules, the great advantage will be flexibility in the application of the law. Rules are by necessity rigid; they

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245. See, e.g., Protecting and Promoting the Open Internet et al., *Comments of Free Press*, GN Docket. No. 14-28 (March 21, 2014) (arguing that “Title II is the only path for protecting Internet users against such discriminatory practices”).

246. See 2014 *Net Neutrality NPRM*, *supra* note 3, at 54–55 ¶¶ 151–52; Tejas N. Narechania & Tim Wu, *Sender Side Transmission Rules for the Internet*, 66 FED. COMM. L.J. 467, 481 (2014).

247. Narechania & Wu, *supra* note 246.

248. See *id.* at 3, 481-82.

may prohibit certain behavior before the full set of relevant facts is known. They can be overinclusive—that is, they may apply even when the principle underlying the rule does not apply. Standards avoid these pitfalls. For these reasons, regulation through standards has often been favored in technologically complex or dynamic areas, where rules have the ability to cut off technological changes that may prove socially beneficial. At the same time, standards come with their own costs, namely a significant increase in *ex ante* uncertainty. It is more difficult to tell in a standards-based system whether a particular form of conduct will be prohibited. Accordingly, standards may make it more difficult to assess the legal consequences of a decision, including whether to invest in, for example, next-generation networks.

There are also considerations more specific to FCC that bear on the choice of standards versus rules. I discuss two in particular below. The first is the potential that a standards-based system will be more prone to capture by regulated parties, and thus will lead to a systemic underenforcement of the announced legal norm. The second concerns FCC's internal ability to administer a standards-based regime that relies heavily on case-specific adjudication. The Commission has historically relied more on prospective rules than standards administered *ex post*, and significant questions have been raised about FCC's processes when it comes to important adjudications. Whether FCC can develop a culture conducive to governance through standards is one of the biggest unknowns concerning the new regime.<sup>249</sup>

One disclaimer about this section is in order: since the topic of this Essay cuts across different areas, I speak here generically about the considerations that bear on the choice between rules and standards in the Internet space generally. No one would advocate that standards should always be preferred to rules, or vice versa. A rule may be appropriate in some cases but not others due to the specific nature of the dispute in question. With regard to net neutrality, for example, some favor a standards-based regime because they believe that although there is no general basis on which to condemn discrimination by Internet access providers as a blanket matter, FCC intervention may still be justified where certain specific conditions hold.<sup>250</sup> Proponents of a rule-like net neutrality regime, by contrast, believe

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249. The dichotomy between rules and standards presented here is, of course, necessarily somewhat simplified. In practice, for example, FCC's treatment of wireless carriers, though technically common carriers, depends less on hard-and-fast rules than on the threatened enforcement of vaguely worded standards. See *supra* notes 157–161 and accompanying text (discussing *Orloff* and FCC's historical treatment of wireless voice providers).

250. See Philip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN. L. REV. 273,

that a standards-based system is likely to systematically under-protect the values affected by different treatment of edge providers.<sup>251</sup> This Essay sidesteps those specific disputes, instead focusing on the systemic considerations that inform the choice between rules and standards and that cut across different substantive areas. For that reason, I offer no opinion on whether a rule should be preferred to a standard, or a standard to a rule, in any particular area.

### 1. Greater Flexibility

In the technological realm, the primary virtue of standards is their greater flexibility—that is, because the legal content of a standard is not fully specified in advance, standards are more easily adapted to changing circumstances or the specific situation at hand. As Cass Sunstein has written, “[r]ules are often shown to be perverse through new developments that make them anachronistic. Those who issue a rule cannot know the full range of situations to which the rule will be applied, and in the new circumstances, the rule may be hopelessly outmoded.”<sup>252</sup> Similarly, the rigidity of a rule may make it both overinclusive and underinclusive with regard to the justifications underlying it. In other words, because a rule is cast generally, it will necessarily apply in some situations where the reason for the rule does not seem to hold. Likewise, it will not apply in situations where it seems like it should. This is especially true if the rule is designed

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313 (2008) (favoring a standards-based regime in the net neutrality context because “(1) there are likely to be legitimate reasons for offering preferential treatment in some cases (meaning that a rule banning such treatment would undermine procompetitive efficiencies); (2) there are effective enforcement strategies for policing the duty to provide reasonable access to [quality-of-service] assurances; and (3) the continuing provision of best efforts broadband access will provide a safeguard by ensuring some opportunity for outside innovators to deploy new applications”); Christopher S. Yoo, *Network Neutrality After Comcast: Toward a Case-by-Case Approach to Reasonable Network Management* 6–7 (Feb. 1, 2009) (unpublished manuscript), available at [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1288&context=faculty\\_scholarship](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1288&context=faculty_scholarship); see also Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 93–105 (2003); Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 YALE J. ON REG. 55, 99–104 (2007).

251. See, e.g., Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 74–81 (2015). This debate reflects the choice between per se rules and the more flexible “rule of reason” in the antitrust realm. See generally Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49 (2007); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (“Resort to per se rules is confined to restraints . . . ‘that would always or almost always tend to restrict competition and decrease output.’”).

252. Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 993 (1995).

under conditions of uncertainty, in which the rule maker lacks perfect information regarding the predicted consequences of a rule and whether it will “yield sufficiently accurate results” in practice.<sup>253</sup>

Since a standard is purposefully imbued with little *ex ante* content and is therefore more nimble, it may avoid many of these problems. Especially under a “totality of the circumstances” approach, the adjudicator in a standards-based system will have much greater flexibility whether to condemn the particular practice at hand. For these reasons, standards have often been thought preferable to rules in the regulation of technology.<sup>254</sup> Edward Lee has remarked with respect to the Internet in particular that

[t]he speed at which the Internet is developing presents significant difficulties to the formulation of rules. Rapidly changing technology frustrates a rule-maker’s ability to gather sufficient information about that technology to fashion a rule that can produce accurate results. If the technology keeps changing, there is a high probability that the rule will become obsolete or, even worse, will result in negative consequences that courts did not foresee.<sup>255</sup>

Although that statement was written over a decade ago, the Internet—including its component networks and the economic and technological bonds linking them—continues to evolve. For example, Christopher Yoo has recently chronicled the various ways in which both the “topology” and the business relationships governing the Internet are changing.<sup>256</sup> To take one example, edge providers—especially large ones such as Google and Yahoo!—have increasingly eschewed storing their content in concentrated server farms, instead opting for a more distributed model in which content is stored at multiple points on the network, in some cases bypassing the Internet backbone entirely.<sup>257</sup> That and other developments have important implications for public policy.<sup>258</sup> More broadly, the continuing

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253. *Id.* at 992.

254. See Derek E. Bambauer, *Rules, Standards, and Geeks*, 5 BROOK. J. CORP. FIN. & COM. L. 49, 49 (2010) (“When it comes to regulating technology, the age-old debate between rules and standards tilts heavily towards standards. Rules, for all their clarity, are seen as slow-changing tools in industries characterized by dynamism. They are also viewed as being both under- and over-inclusive, and in prizing form—one means of achieving a desired result—over substance—the result itself.”).

255. Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1307 (2002).

256. See generally Christopher S. Yoo, *Innovations in the Internet’s Architecture that Challenge the Status Quo*, 8 J. ON TELECOMM. & HIGH TECH. L. 79 (2010).

257. See *id.* at 88–89.

258. See Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767, 785–90 (2012) (arguing that the rise of distributed content delivery networks has implications in the net neutrality debate); see also Tejas N. Narechania,

evolution of the Internet counsels against regulatory methods—such as broad rules—that may lock-in existing architectures and/or prematurely cut off potentially beneficial developments.

## 2. *Increased Uncertainty*

Governance through standards also has well-known costs. For present purposes, the most important such cost is regulatory uncertainty. It is easy to see why a standards-based system might generate greater uncertainty than one based on rules. Borrowing an example from Sunstein, imagine a standard (“do not drive unreasonably fast”) and compare it to a rule governing the same conduct (“do not go over 60 miles per hour”).<sup>259</sup> If given no further information, it is self-evident that the rule provides more certainty regarding what the law does and does not allow. The standard, by contrast, leaves much hanging on what it means to drive “unreasonably” fast—something that might depend on weather conditions, the shape of the road, the number of other drivers present, and any number of other factors. Of course, this is something of a simplification, and a standard might impart similar certainty, for example if it is well known, perhaps due to precedent or simply a shared societal understanding, that “unreasonably fast” translates to “over 60 miles per hour.”<sup>260</sup> And a rule might fail to provide certainty if, for example, it is subject to difficult-to-apply exceptions.<sup>261</sup> Nevertheless, as a general matter, a rule will yield more certainty than a standard.

Frederick Schauer has called this argument for rules the “argument from reliance.”<sup>262</sup> According to it, “decision-makers who follow rules even when other results appear preferable enable those affected to predict in advance what the decisions are likely to be. Consequently, those affected by the decisions of others can plan their activities more successfully under a regime

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*Network Nepotism and the Market for Content Delivery*, 67 STAN. L. REV. ONLINE 27, 31–34 (2014) (raising concern that broadband providers may favor affiliated content delivery networks for the transmission of traffic across the Internet).

259. Sunstein, *supra* note 252, at 959.

260. See Kaplow, *supra* note 234, at 577 (noting that a standard can be transformed into a rule through a system of precedent); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 68 (1983) (stating that a standard may operate like a rule if it is widely understood to have a specific meaning).

261. See Sunstein, *supra* note 252, at 962–63 (“An exception might be broad and vague or broad and specific. A specific exception might well convert the rule with exceptions into a complex rule or a formula.”).

262. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 138 (1993).

of rules than under more particularistic decision-making.”<sup>263</sup> The argument from reliance is closely related to the argument from fairness (or the rule of law), which prizes rules because of their tendency to result in like cases being treated alike and to prevent individualized discretion from devolving into mere caprice.<sup>264</sup> Both suggest that rules may be preferable precisely because of their resistance to particularized decisionmaking.

In the Internet realm, one important consequence of the comparative regulatory uncertainty created by a standards-based system is its possible effect on investment incentives. It often stated that “legal uncertainty can impede investment and the development of sound business strategies” by Internet companies.<sup>265</sup> How much regulatory uncertainty actually impedes investment by such companies in the aggregate can be debated. But at the least, uncertainty regarding how a new network technology or service will be treated by regulators can affect a company’s calculus regarding whether to invest in that technology or service on the margins. And those kinds of effects are particularly important in the § 706 context, where stimulating investment in broadband network deployment is FCC’s *raison d’être*.

### 3. Possible Underenforcement

Another possible effect of a standards-based system is possible underenforcement of the announced legal norm. It is important to disaggregate, in this context, two possible meanings of underenforcement. First, a standard is necessarily more permissive than a rule in some situations. For example, under the prohibition on driving “unreasonably fast,” it may sometimes be permissible to drive faster than 60 miles per hour, something the strict speed-limit rule would not allow. The greater permissiveness of standards is a principal reason why proponents of a strict ban on discrimination by Internet access providers object to a standards-based system. This form of “underenforcement” is not necessarily pernicious, however. Indeed, the possibility that a standard may allow what a rule does not is precisely what gives a standards-based system its greater flexibility. Whether that flexibility is on balance desirable will depend on an underlying judgment concerning the extent to which the behavior in question is always or very likely to be harmful, something that is

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263. *Id.* at 137–38.

264. *See id.* at 135–38; Sunstein, *supra* note 252, at 974 (stating that rules can combat “bias, favoritism, or discrimination in the minds of people who decide particular cases” and, for that reason, “are associated with impartiality, a notion which is captured in the idea that Justice, the goddess, is ‘blindfolded’”). *See generally* Scalia, *supra* note 221.

265. *E.g.*, Philip J. Weiser, *Regulatory Challenges and Models of Regulation*, 2 J. TELECOMM. & HIGH TECH. L. 1, 2 n.7 (2003).

outside the scope of this Essay.

There is a way that a standards-based system may lead to a more pernicious form of underenforcement, however. That is the possibility that certain kinds of interests may be systematically disfavored under a standard—namely, the interests of small players and the public at large. The fundamental concern, expressed by some in the net neutrality context, is that although such interests may find expression in large one-off rulemakings, the ongoing costs of participating in a system that relies on case-by-case adjudication will be prohibitive.<sup>266</sup> Thus, well-heeled parties—in the Internet context, incumbent access providers, for example—will be better able to manipulate the process to their advantage. This fear is amplified by well-known concerns regarding agency capture and the collective action problems that hinder organization around interests shared by the public at large.<sup>267</sup>

Although this concern is real, it should not be overstated. For one, it is likely to be more important in some areas than others. In the data roaming context, for example, both sides in a dispute will normally be established carriers well able to protect themselves at the Commission. The concern is heightened in the net neutrality context, where the interests seeking protection are those of fledgling edge providers and the public at large, or if FCC moves to regulate some aspects of broadband providers' relationships with their end-users. Even in those situations, however, the public is unlikely to go completely unrepresented. In the telecommunications area, there are several sophisticated groups that represent the public interest in proceedings at the Commission. It was such groups that filed a complaint with the Commission bringing to its attention Comcast's treatment of peer-to-peer applications and culminating in the *Comcast Order*.<sup>268</sup> In addition, a number of established companies, such as Netflix, have (at least so far) found it in their own economic interest to advocate on behalf of the public in disputes concerning net neutrality and related issues.

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266. See VAN SCHEWICK, *supra* note 251, at 27; Crawford, *supra* note 20, at 919 (arguing that a system of case-by-case adjudication “assumes everyone involved has the wherewithal and the sophistication to pursue relief, which may not be true of would-be competitors”); Sunstein, *supra* note 252, at 977 (“It is . . . plausible to think that case-by-case judgments systematically favor the well-to-do. Litigation is extremely expensive, and for litigants to seek fine-grained, individualized judgments, they need resources.”); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 120–21 (1998) (noting the high cost associated with participation in repeated adjudications).

267. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1283–92 (2006). Of course, agencies might have countervailing incentives to overregulate in order to stay relevant. See *id.* at 1283 (describing and critiquing theory of agency “overzealousness”).

268. See *Comcast Order*, *supra* note 74, at 13,032 ¶ 10.

One intriguing possibility, suggested by the *2014 Net Neutrality NPRM*, is the creation of an FCC “ombudsperson” who would be appointed to represent the interests of smaller providers and the public at large.<sup>269</sup> Some states similarly have a public advocate appointed to represent consumers in public utility commission proceedings.<sup>270</sup> If given adequate funding and power, such offices may minimize the concern regarding relative influence in a standards-based system.

#### 4. Institutional Considerations

One final consideration regarding a move to regulation-through-standards is FCC’s institutional capacity to administer such a system. Agencies like NLRB that regulate primarily through case-specific adjudication normally do so by delegating initial decisionmaking authority to an Administrative Law Judge (ALJ), who finds facts and renders an initial decision that is then reviewed by higher officials. That process mimics that of judges in the common law system. FCC currently has only one ALJ, and it rarely relies on formal adjudication.<sup>271</sup> Both the *Data Roaming Order* and the *2014 Net Neutrality NPRM* indicate that the Commission’s Enforcement Bureau, and not an ALJ, will initially resolve complaints alleging violations of the announced standards, presumably through a process of informal adjudication.<sup>272</sup>

There are significant concerns regarding FCC’s processes in such cases. Those concerns have been articulated most forcefully by Philip Weiser, though Weiser ultimately concludes that a system of case-by-case adjudication is preferable in the net neutrality context. According to Weiser:

The limitations of the FCC’s Enforcement Bureau are two-fold. First, the Enforcement Bureau has not developed an independent mission whereby it can proceed in its adjudicatory or prosecutorial responsibilities free from political interference. Thus, as discussed and criticized in the House Commerce Committee majority report on the FCC’s operations, enforcement actions are often treated as political negotiations and resolved through deals made by the Chairman’s office. The second critical shortcoming of the FCC’s Enforcement Bureau is that it has not developed an effective separation between its adjudication and prosecutorial functions

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269. See *2014 Net Neutrality NPRM*, *supra* note 3, at 61 ¶ 171.

270. See, e.g., MAINE OFFICE OF THE PUBLIC ADVOCATE, <http://www.maine.gov/meopa/about/> (last visited January 8, 2015).

271. Benjamin Kapnik, *Affirming the Status Quo?: The FCC, ALJs, and Agency Adjudications*, 80 GEO. WASH. L. REV. 1527, 1534 (2012).

272. *Data Roaming Order*, *supra* note 216, at 5451 ¶ 82; *2014 Net Neutrality NPRM*, *supra* note 3, at 58 ¶ 161.

nor an effective strategy to ensure that it performs either mission adequately. Not surprisingly, the agency has failed, according to a General Accountability Office report, to resolve many of the complaints brought to the Enforcement Bureau or to explain why it failed to act with respect to those complaints.<sup>273</sup>

The Commission itself has also proceeded less than ideally when faced with high-profile enforcement proceedings. As Weiser states, in *Comcast*, the Commission “did not receive any evidence under oath, held no cross-examination, and merely evaluated filings where parties advanced self-serving claims,” leading Commissioner McDowell to remark in his dissent that “[t]he truth is, the FCC does not know what Comcast did or did not do.”<sup>274</sup> If a common law type system of Internet regulation indeed prevails, the Commission must accordingly work hard to overcome these institutional shortcomings and, perhaps, swallow a potentially bitter pill by relying to a greater extent on fact-finding by neutral adjudicators and not the Commission itself.<sup>275</sup>

#### CONCLUSION

Communications policy is at a crossroads. Old technologies are quickly being replaced, and the regulatory framework governing next-generation networks and services is still only emerging. For its part, FCC is currently considering whether to reverse its prior pronouncements and conclude that broadband Internet access providers are “common carriers” under the Communications Act, a decision that would have potentially far reaching consequences.

Regardless of how the Commission resolves that classification question, however, recent decisions by the D.C. Circuit have undoubtedly expanded the scope of FCC’s authority over the Internet while simultaneously shaping that authority in important ways. In particular, I have argued that the current legal framework governing Internet regulatory issues at the FCC will push the Commission toward a form of regulation with which it has little prior experience—namely, a standards-based regime involving heavy reliance on case-by-case adjudication and incremental development of the law. That regime has both predictable costs and benefits, and only time will reveal whether the trend I have identified proves durable. In the

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273. Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529, 585 (2009).

274. *Id.* at 567.

275. Another possibility, not discussed in depth here, is for FCC to largely cede jurisdiction to generalist antitrust authorities, perhaps especially if a case-by-case approach is to predominate. See generally Nuechterlein, *supra* note 59.

meantime, I hope at least to have opened a dialogue concerning the emerging common law of Internet regulation.

