# COMMENTS

# "MÖBIUS-STRIP REASONING": THE EVOLUTION OF THE FCC'S NET NEUTRALITY NONDISCRIMINATION PRINCIPLE FOR BROADBAND INTERNET SERVICES AND ITS NECESSARY DEMISE

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TABLE OF CONTENTS



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## INTRODUCTION: THE COMMISSION'S NONDISCRIMINATION FRAMEWORK

The Internet plays an important role in the economy, providing jobs, productivity growth, and cost savings. More than anything, it makes the lives of many simpler—except of course for those who seek to regulate or classify it. Indeed, computers and subsequently the Internet have proven to be a significant challenge to the Federal Communications Commission (FCC or Commission) since the rise of the modern-day computer in the 1960s.[1] The challenges continue today, as network neutrality (net neutrality) remains at the forefront of the policy debate after President Obama specifically included provisions in his stimulus package requiring the Commission to formulate a national broadband plan.[2] Thus, since the 1960s, the Internet and the net neutrality term "nondiscrimination,"[3] (the

1. *See, e.g.*, *In re* Regulatory & Policy Problems Presented by the Interdependence of Computer & Commc'n Servs. & Facilities (*Computer I Notice of Inquiry (NOI)*), 7 F.C.C. 2d 11, 17 (1966) (seeking information from the public on how to treat the computer).

2. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(j), 123 Stat. 115, 515 (incorporating by reference the Federal Communication Commission's (FCC's or Commission's) four net neutrality principles); *see also* Christopher S. Yoo, *Innovations in the Internet's Architecture that Challenge the Status Quo*, 8 J. ON TELECOMM. & HIGH TECH. L. 79, 79–80 (2010) (emphasizing that the net neutrality debate remained a central focus of Congress, the Commission, and the Democratic and Republican presidential candidates during the 2008 election).

3. The Commission in *In re* Preserving the Open Internet Broadband Industry Practices (*Net Neutrality Notice of Proposed Rulemaking (NPRM)*), 24 FCC Rcd. 13,064, 13,105 (2009), defines nondiscrimination "to mean that a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider." As the Internet evolved, network equipment makers responded with more sophisticated routers that allow providers to distinguish between different classes and qualities of traffic. *Id.* at 13,087. Therefore, providers started to charge different prices for different kinds of traffic, a practice known as price differentiation. Providers then took it one step further by using "deep packet inspection" to determine what packets to favor by examining the contents of an e-mail, Web page, or downloaded file. *Id.*

principle that the Internet is comprised of "dumb pipes" which should give equal priority to all bits on the Internet—whether an e-mail bit or a video bit, have been on a roller coaster ride. That ride has recently sent the Commission down its sharpest hill yet: a Notice of Proposed Rulemaking (NPRM) to codify its four net neutrality policy principles[4] and to add and codify principles of nondiscrimination and transparency.[5]

The Commission began weaving its tangled net neutrality web long before the emergence of the Internet. Indeed, it was the introduction of the computer that sent the Commission off course, causing the Commission to craft different categories of services that entailed different levels of regulation. In *In re Regulatory & Policy Problems Presented by the Interdependence of Computer & Communication Services & Facilities* (*Computer I*),[6] the categories took the form of "communications" and "data processing."[7] But regulatory uncertainty resulting from *Computer I* led the Commission to initiate *In re Amendment of Section 64.702 of the Commission's Rules & Regulations* (*Computer II*)[8] shortly thereafter, this time drawing a line between "basic" and "enhanced" services.[9] "Basic service" was "limited to the common carrier offering of transmission capacity for the movement of information."[10] The Commission defined "enhanced service" as "combin[ing] basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information."[11] Then, in the Telecommunications Act of 1996,[12] "basic" and "enhanced" services were replaced with the terms "telecommunications" and

4. *See In re* Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities (*Internet Policy Statement*), 20 FCC Rcd. 14,986, 14,987–88 (2005) (listing the four net neutrality principles: "To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to" (1) "access the lawful Internet content of their choice"; (2) "run applications and use services of their choice, subject to the needs of law enforcement"; (3) "connect their choice of legal devices that do not harm the network"; and (4) "competition among network providers, application and service providers, and content providers"(emphasis omitted)).

5. *See Net Neutrality NPRM*, 24 FCC Rcd. at 13,068, 13,100, 13,104, 13,108 (noting the Commission's belief that codifying these principles will ensure the preservation of a free and open Internet).

6. 28 F.C.C. 2d 267 (1971).

7. *See id.* at 268–69; *see also infra* Part I.A (discussing the Commission's findings in *Computer I*).

8. 77 F.C.C. 2d 384 (1980).

9. *Id.* at 387.

10. *Id.*

11. *Id.* (continuing, "or provid[ing] the subscriber additional, different, or restructured information, or involv[ing] subscriber interaction with stored information").

12. Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151–615(b) (2006)).

"information services."[13] Although the wording changed, the idea remained the same: the carriers formerly labeled "basic" and currently labeled "telecommunications" would be regulated under the FCC's Title II common carrier restrictions.[14] These restrictions included the requirement of nondiscrimination. On the other hand, those carriers labeled "enhanced" or "information services" were free from Title II regulations.

This era of deregulation stemmed from the Telecommunications Act's mandate of regulatory forbearance on broadband Internet services.[15] Realizing the lighter regulatory touch on information services, service providers soon began pushing both the Commission and the courts to recognize their services as information services.[16] Within a few years, both cable modem and wireline broadband services fell into the virtually unregulated information services category.[17] During the *National Cable & Telecommunications Ass'n v. Brand X Internet Services* (*Brand X*)[18] oral arguments, Justice Ginsburg famously asked, "What would be left in the common-carrier category?"[19] Justice Ginsburg correctly recognized that almost a half-century after *Computer I*, the Commission, constantly asserting its mandate from Congress and its regime of regulatory forbearance, had

13. *Id.* § 254(b)(2), 110 Stat. at 71–72.

14. *See id.* § 3(a)(2), 110 Stat. at 60 (declaring that a telecommunications carrier will be treated as a common carrier). "Common carriage" in the context of communications networks derives its *meaning* from the law of franchise and monopoly, an area of law that historically entailed a duty of nondiscrimination. *See* Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 878 (2009) ("[C]ertain basic transportation businesses (e.g., operators of ports or cranes through a license with the sovereign) historically had a duty to serve all comers and serve them equally."). On the other hand, the *name* "common carriage" derives from the law of bailments, an area of law that "did not necessarily carry with it a duty to serve all comers or serve them equally." *Id.* Broadly speaking, a common carrier consists of "[a] commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee. A common carrier is generally required by law to transport freight or passengers . . . without refusal, if the approved fare or charge is paid." BLACK'S LAW DICTIONARY 226 (9th ed. 2009).

15. *See* Telecommunications Act § 401(a)(3), 110 Stat. at 128 ("[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . . if the Commission determines that . . . forbearance from applying such provision or regulation is consistent with the public interest.").

16. *See* Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359, 372–74 (2007) (explaining how both telephony and cable companies, seeking to avoid common carrier status, fought back against the Internet).

17. *See infra* Part I.B (demonstrating how the Commission classified both as information services).

18. 545 U.S. 967 (2005).

19. Transcript of Oral Argument at 18, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (No. 04-277).

stripped away its Title II authority, leaving itself virtually powerless to regulate in the cable modem and broadband Internet space. Each time the Commission narrowed its Title II authority, however, it leaned on its Title I ancillary jurisdiction to assert its continued power.[20]

On April 6, 2010, however, the Commission's reliance on Title I took a blow when Judge Tatel and two other judges of the D.C. Circuit unanimously held in *Comcast Corp. v. FCC*[21] that the Commission failed to make the necessary showing to warrant an exercise of ancillary jurisdiction.[22] This decision stemmed from the Commission's order against Comcast for blocking a peer-to-peer (P2P) application.[23] The Commission had taken action under a policy statement that it issued the same day it deregulated wireline broadband.[24] The court reasoned that once the Commission removed discrimination requirements from both cable and wireline broadband, it could not then enforce a policy statement against Comcast for discriminating against a P2P application.[25]

Following oral arguments in the D.C. Circuit, but before the court issued its ruling, the Commission released *In re Preserving the Open Internet Broadband*

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20. *See Computer II*, 77 F.C.C. 2d 384, 435 (1980) (concluding that the Commission's goals of assuring a "[n]ationwide [] wire and radio communications service with adequate facilities at reasonable charges" for emerging enhanced services would be "more effectively promoted by relying on [its] ancillary regulatory powers") (citations omitted); *see also In re* Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities (*Cable Modem Declaratory Ruling*), 17 FCC Rcd. 4798, 4841–42 (2002) (reflecting that "[f]ederal courts have long recognized the Commission's authority to promulgate regulations to effectuate the goals and accompanying provisions of the [Communications] Act in the absence of explicit regulatory authority, [provided that] the regulations are reasonably ancillary to existing Commission statutory authority"); *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities (*Wireline Broadband Order*), 20 FCC Rcd. 14,853, 14,914 (2005) (finding that the Commission had subject matter jurisdiction over providers of broadband Internet access services because the providers transmit signals by wire or cable and the Communications Act of 1934 gives the Commission subject matter jurisdiction over "'all interstate and foreign communications by wire or radio . . . and . . . all persons engaged within the United States in such communication'" (alteration in original) (quoting 47 U.S.C. § 152(a) (2006))).

21. 600 F.3d 642 (D.C. Cir. 2010).

22. *See id.* at 644. The court notes that in the past the FCC "strain[ed] the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts," that elsewhere it "exceeded those limits," and "here it seeks to shatter them entirely." *Id.* at 655.

23. *Id.* at 645.

24. *Compare Internet Policy Statement*, 20 FCC Rcd. 14,986 (2005) (released Sept. 23, 2005), *with Wireline Broadband Order*, 20 FCC Rcd. 14,853 (2005) (released Sept. 23, 2005).

25. *See Comcast*, 600 F.3d at 644 (finding that the Commission could not support its exercise of ancillary authority over Comcast's network management practices under the current regulatory framework).

*Industry Practices (Net Neutrality Notice of Proposed Rulemaking (NPRM)* under its ancillary powers, perhaps in anticipation of the opinion.[26] There, the Commission sought to codify the four policy principles laid out in its policy statement, and to add and codify principles of nondiscrimination and transparency.[27] In its description of the nondiscrimination principle, the Commission conceded that the proposed nondiscrimination and reasonable network management rule resembled the unqualified prohibitions on discrimination that were added to Title II by the Telecommunications Act.[28] Defending this more restrictive rule, the Commission explained that "a bright-line rule against discrimination . . . may better fit the unique characteristics of the Internet."[29]

Realizing that both the *Net Neutrality NPRM* and key provisions of its Broadband Plan were placed in jeopardy after *Comcast*, the Commission issued a notice of inquiry (NOI), *In re Framework for Broadband Internet Service (Third Way NOI)*, in June 2010 seeking to regain its regulatory footing and maintain the status quo.[30] The *Third Way NOI* contemplates Chairman Genachowski's approach to regulating broadband Internet services, in which the Commission imposes Title II obligations but forbears from enforcing all but six of the provisions.[31] Thus, while the Commission's policy since the Telecommunications Act of 1996 consisted of regulatory forbearance and an essential move away from Title II regulations, the current *Net Neutrality NPRM* and *Third Way NOI* seek to alter course once

26. *See* Editorial, *The FCC Loses—Again*, WALL ST. J., Apr. 7, 2010, at A14 (noting that prior to *Comcast*, the Commission drafted formal "net neutrality rules to justify enforcement actions against Internet providers"); *see also Net Neutrality NPRM*, 24 FCC Rcd. 13,064, 13,099 (2009) (finding that while the matter was not directly addressed in the Telecommunications Act, it fell within the agency's general jurisdiction and was "reasonably ancillary to the effective performance of the Commission's various responsibilities").

27. *Net Neutrality NPRM*, 24 FCC Rcd. at 13,068, 13,100, 13,104, 13,108.

28. *See id.* at 13,106 (comparing the general prohibition of unjust or unreasonable discrimination placed on common carriers in § 202(a) of the Telecommunications Act).

29. *Id.*

30. 25 FCC Rcd. 7866, 7916 (2010) (Statement of Chairman Genachowski) ("[M]y desire is simply that we restore the status quo and have a workable light-touch framework for broadband access."); *see also* David Lieberman, *FCC Chief Seeks Regulation of Speedy Internet*, USA TODAY, May 7, 2010, at 3B (explaining that Chairman Genachowski's "third way" approach is an effort to "restore authority the FCC thought it had" before the *Comcast* decision).

31. *Third Way NOI*, 25 FCC Rcd. at 7867 (stating that the NOI would look at whether broadband Internet services should be classified under Title I, Title II, or the Chairman's "third way," in which the Commission would classify the Internet under Title II but forbear "from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support").

again, this time reemploying Title II obligations on services the Commission previously deemed regulated solely under Title I. Indeed, the very Commissioners who strongly resisted removing Title II obligations from broadband Internet service providers also strongly advocated for the implementation of a net neutrality nondiscrimination principle under Title I.[32] However, according to Justice Scalia, "such Möbius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way."[33]

This Comment analyzes the current state of the net neutrality nondiscrimination principle after the *Net Neutrality NPRM*, *Comcast*, and the *Third Way NOI*, arguing that despite Congress's mandate to the Commission for regulatory forbearance, the Commission has repositioned the Internet to fit within a Title II regulatory framework. Part I of this Comment explores the path the Commission has taken up to this point and how that path has led the Commission to desert and later reassert its Title II authority. Part II analyzes how the nondiscrimination framework came from the shadows to the forefront of the Internet debate and asserts that nondiscrimination can be better clarified—and Congress's mandate better fulfilled—if the Commission takes the advice of Commissioner Robert M. McDowell, by labeling the fifth principle as "procompetitive" rather than "nondiscrimination."[34] In doing so, "beneficial" discrimination—such as family friendly filtering and preventing congestion—can survive regulation of the Internet. Finally, this Comment concludes with a recommendation for how the Commission should move forward, suggesting that the term *discrimination*—like the terms *common carriage* and *basic transport*—should be

32. *See, e.g.*, *Cable Modem Declaratory Ruling*, 17 FCC Rcd. 4798, 4870 (2002) (Dissenting Statement of Comm'r Copps) ("A powerful case has been made that cable modem services should also be subject to Title II."). *But see, e.g.*, *Net Neutrality NPRM*, 24 FCC Rcd. at 13,157 (Statement of Comm'r Copps) (commending the Commission's *Net Neutrality NPRM* and claiming it to be "an historic day at the FCC . . . because the Commission takes a long stride—perhaps its longest ever—toward ensuring a free, open and dynamic Internet"); *see also Third Way NOI*, 25 FCC Rcd. at 7917 (Statement of Comm'r Copps) ("For much of the past decade, the FCC took American consumers on a costly and damaging ride, moving broadband Internet connectivity outside the statutory Title II framework that applies to telecommunications carriers . . . . I didn't buy it . . . . I cannot believe that Congress ever envisioned that its fundamental statutory requirements could be made obsolete by a new service offering.").

33. *Brand X*, 545 U.S. 967, 1014 (2005) (Scalia, J., dissenting). A Möbius strip is "a one-sided surface that is constructed from a rectangle by holding one end fixed, rotating the opposite end through 180 degrees, and joining it to the first end." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 797 (11th ed. 2009).

34. *See Net Neutrality NPRM*, 24 FCC Rcd. at 13,162 (Statement of Comm'r McDowell Concurring in Part, Dissenting in Part) (explaining that in the network management context, discriminatory conduct does not necessarily mean anticompetitive conduct).

retired rather than expanded in this new era of communications law.

## I. BACKGROUND: THE EVOLUTION OF THE TITLE II REGIME

In the Communications Act of 1934,[35] Congress established the FCC for the purpose of "regulating interstate and foreign commerce in communication by wire and radio so as to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . for the purpose of securing a more effective execution of this policy by centralizing authority."[36] Decades went by and the Commission was able to fulfill its congressional mandate; however, complications began to arise as new technology crept into the communications field.[37] This section analyzes how such complications sent the Commission off its Title II regulatory course and led the Commission to its new regulatory framework under Title I.

### *A. Stripping Away Title II Regulations: The Computer Inquiries and the Telecommunications Act of 1996*

In the 1960s, the modern-day computer led the Commission to issue *In re Regulatory & Policy Problems Presented by the Interdependence of Computer & Communication Services & Facilities* (*Computer I NOI*),[38] the NOI that resulted in *Computer I*. Recognizing that common carriers were increasingly becoming equipped to enter the data processing field and were making use of computers for their services, the Commission sought information to determine if data processing should be regulated.[39] Five years later, the Commission concluded that while data processing was characterized by free entry and open competition, communications—the basic transport of unaltered messages—was not.[40] Therefore, communications providers remained subject to Title II nondiscrimination obligations, while data processing service providers were not.[41]

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35. Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–615(b) (2006)).

36. *Id.* § 1, 48 Stat. at 1064 (codified at 47 U.S.C. § 151 (2006)).

37. *See supra* note 1 and accompanying text.

38. 7 F.C.C. 2d 11 (1966).

39. *See id.* at 11–14 (citing the growing convergence of computers and communications as giving rise to regulatory and policy questions).

40. *See, e.g.*, *Computer I*, 28 F.C.C. 2d 267, 270 (1971) (determining that low entry barriers present in the data processing market that did not exist in the communications market resulted in the flourishing of competition and entry into the data processing market and therefore the FCC should not assert its regulatory authority over data processing).

41. *See id.* at 269–70 (asserting that regulating communications would allow the

Regulatory uncertainty that resulted from *Computer I* led to *Computer II*.[42] In *Computer II*, the Commission created a new categorical framework, this time drawing the line between basic and enhanced services.[43] The Commission concluded that common carrier offerings of basic transmission services were actually communications services to be regulated under Title II.[44] Regulation of enhanced services, however, was not required. Instead, regulatory forbearance offered "the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network."[45] Ultimately, ad hoc proceedings resulting from regulating enhanced services would divert the Commission's resources that would be better spent regulating basic services and preventing discrimination in access to common carrier facilities.[46] However, despite removing Title II regulations, the Commission asserted jurisdiction to regulate enhanced services under Title I.[47]

In 1996, Congress amended the Communications Act with the Telecommunications Act. Congress made deregulation a priority by instructing the Commission to forbear from applying any regulation if the Commission concluded that forbearance was consistent with the public interest.[48] To further deregulate, Congress replaced the terms "basic

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Commission to remove foreseeable anticompetitive practices).

42. *See In re* Amendment of Sections 64.702 of the Comm'ns Rules & Regulations (*Computer III*), 104 F.C.C. 2d 958, 967–68 (1986) (discussing how after *Computer I*, technological and competitive developments in the computer and telecommunications industries arose, exposing shortcomings in its definitional structure).

43. *See Computer II*, 77 F.C.C. 2d 384, 387 (1980) ("We find that basic service is limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combines basic service with computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.").

44. *Id.*

45. *Id.*

46. *See id.* at 429 (finding that "[s]emantic distinctions are avoided as to whether a given service is data processing, information processing, process control, communications processing, or some other category. As such, the potential for the development of an inconsistent regulatory scheme to accommodate these services is eliminated; all enhanced services are accorded the same regulatory treatment . . . . With the nonregulation of all enhanced services, FCC regulations will not directly or indirectly inhibit the offering of these services, nor will our administrative processes be interjected between technology and its marketplace applications").

47. *See id.* at 432 (finding Title I ancillary powers applicable because "enhanced services under consideration in this proceeding constitute the electronic transmission of writing, signs, signals, pictures, etc., over the interstate telecommunications network and, as such, fall within the subject matter jurisdiction of this Commission").

48. Telecommunications Act of 1996, Pub. L. No. 104-104, § 401, 110 Stat. 56, 128

service" and "enhanced service" with "telecommunications" and "information service." *Telecommunications* is 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."[49] Meanwhile, *information services* encompasses "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[50] Thus, while the terms "basic" and "enhanced" changed, their meanings remained. Ultimately, the Commission was left to regulate information services under Title I, common carriers under Title II, wireless providers under Title III, and cable television companies under Title IV, maintaining different powers under these Titles—telecommunications services are subject to the heavy regulation borne by common carriers, while information services are virtually unregulated under Title I provisions.[51]

### *B. The Demise of Title II Regulations: The Cable Modem Declaratory Ruling,* Brand X, *and the Wireline Broadband Order*

When cable and wireline providers began offering Internet services, the question arose as to how these services should be classified. As the Commission remained silent on the matter, courts began filling in the gaps. In *AT&T Corp. v. City of Portland*,[52] the Ninth Circuit determined that the cable modem service @Home offered a hybrid of both telecommunications and information services.[53] The case arose when AT&T, the nation's largest long-distance telephone provider at the time, sought to merge with Telecommunications, Inc. (TCI), one of the nation's largest cable television operators.[54] To take effect, the merger had to be approved at three

(codified at 47 U.S.C. § 160 (2006)).

49. *Id.* § 3, 110 Stat. at 60.

50. *See id.* § 3, 110 Stat. at 59 (continuing, "includ[ing] electronic publishing, but . . . not includ[ing] any use of any such capability for the management, control, or operation of a telecommunications system").

51. 47 U.S.C. §§ 160, 251, 332, 521 (2006); *see also* J. Israel Balderas, *Speaking with One Broadband Voice: The Case for a Unified Circuit Appeals Process After* Brand X Internet Services v. FCC, 13 COMMLAW CONSPECTUS 377, 386–87 (2005) (noting that the Telecommunications Act made sweeping changes to the Communications Act, creating a new regulatory framework).

52. 216 F.3d 871 (9th Cir. 2000).

53. *See id.* at 878 (determining that where the Internet access provider @Home acts as an Internet service provider (ISP), it is an information service, but to the extent that it provides subscribers Internet transmission over broadband, it is telecommunications).

54. *See id.* at 873–74 (opining that the race to acquire broadband transmission systems—in which "a single medium carries multiple communications at high transmission

regulatory levels—the FCC, the Department of Justice (DOJ), and the local franchising authorities.[55] The FCC and DOJ both gave the green light, but Portland and Multnomah County voted to approve the transfer subject to an open access condition.[56] When AT&T refused to accept the open access condition, the merger was denied.[57] The Ninth Circuit determined that because @Home consisted of both telecommunications and information services, the counties could not regulate the merger.[58]

The Commission disagreed. In *In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities* (*Cable Modem Declaratory Ruling*), the Commission first looked at the definitions of telecommunications, telecommunications service, and information service, and determined that the statutory definitions rested on the *functions* that make the services available rather than the particular *facility* used.[59] Finding "that the classification of cable modem service turns on the nature of the functions that the end user is offered, the Commission concluded that because cable modem service "combines the transmission of data with computer

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speeds," allowing "users to access the Internet at speeds fifty to several hundred times faster than those available through conventional computer modems"—prompted mergers such as the one between AT&T, a telephone company, and Telecommunication's Inc. (TCI), a cable television operator, both of which have technologies in place to provide broadband transmissions).

55. *See id.* at 874–75 (maintaining that because TCI operated as a cable television service it was required to franchise with Portland and Multnomah County, the localities, so they too played a role in effectuating the merger).

56. *See id.* (stating that the DOJ approved the merger on antitrust grounds and the FCC approved the merger after addressing public interest concerns, in which the FCC specifically rejected an open access requirement). Pursuant to the local franchising authorities' open access condition, "[t]ransferee shall provide, and cause the Franchisees to provide, non-discriminatory access to the Franchisees' cable modem platform for providers of Internet and on-line services, whether or not such providers are affiliated with the Transferee or the Franchisees, unless otherwise required by applicable law." *Id.* at 875.

57. *See id.* at 875–76 (explaining that AT&T then filed suit in federal district court, seeking a declaration from the court that the open access condition imposed by the county violated the Communications Act of 1934).

58. *See id.* at 877–78. In finding that the @Home Internet access consisted of two separate services, the court explained that the first service consisted of the connection to the Internet, which subscribers accessed through telephone lines or a "pipeline." This service was classic "telecommunications." In contrast, the second service constituted the services provided by the ISPs that it delivered through the telephone lines, which were "information services." Because @Home consisted of a pipeline and an Internet service transmitted through that pipeline, the court found it to be a hybrid of both. *Id.* at 878.

59. *See* 17 FCC Rcd. 4798, 4820–21 (2002) (concluding that functions such as "[e]-mail, newsgroups, [and] the ability for the user to create a web page that is accessible by other Internet users" better informed its classifications than the particular facility, or Internet transmission, utilized).

processing, information provision, and computer interactivity, enabling end users to run a variety of applications," it *offers* Internet access.[60] Thus, because cable modem services offered integrated transmission and data processing capability rather than a pure transmission path for the transmission of information, it was an interstate information service.[61] The Commission conceded that cable modem services are provided by the cable operator's use of telecommunications, but explained that when doing this, it "is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service."[62]

Defending its conclusion, the Commission noted that its decision was based on a much more plentiful record than what was before the Ninth Circuit in *Portland*.[63] Further, the Commission based its decision on its belief—and Congress's mandate—that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[64] By classifying cable modem services as an information service, the Commission sought public comment as to whether it should forbear from applying every provision of Title II common carrier regulations.[65] Tentatively, the Commission concluded that common

60. *See id.* at 4822–23 (determining that cable modem services operated as "a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering").

61. *See id.* (reasoning that offering Internet access positions cable modem services to support e-mail, newsgroups, and maintenance of the user's World Wide Web presence and other applications, the Commission stated that because "[e]ach of these applications encompasses the capability for 'generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,' they together comprised an information service).

62. *Id.* at 4823–24 (noting that merely providing cable modem service over the cable operator's facilities does not necessarily create a telecommunications service "separate and apart from the cable modem service"; instead, the Commission's analysis "focuses . . . on the single, integrated information service that the subscriber to cable modem service receives and the nature of the relationships among cable operators and the entities with which they cooperate to provide cable modem service").

63. *See id.* at 4831 (contending that because the parties in *Portland* presumed cable modem services constituted cable services, they did not brief the court on the regulatory classification). The Commission also noted that it was not a party to the case and did not provide its expert opinion on the issue. To the contrary, the Commission's record consisted of comments, replies, and meetings with interested parties gathered over the course of a year. *Id.*

64. *Id.* at 4802 (seeking to remove regulatory uncertainty that could discourage investment and innovation and limit unnecessary and unduly burdensome regulatory costs).

65. *See id.* at 4847–48 (adding that the Commission has a long history of classifying information services under Title I, immune from the obligations and requirements imposed by Title II).

carrier regulations were not appropriate.[66]

The *Cable Modem Declaratory Ruling* was immediately challenged and seven petitions for review were filed in the Third, Ninth, and D.C. Circuits.[67] All petitions were consolidated in the Ninth Circuit via the random selection procedure.[68] In *Brand X Internet Services v. FCC* (*Brand X Internet Services*),[69] rather than applying *Chevron* deference[70] to the *Cable Modem Declaratory Ruling*, the Ninth Circuit applied stare decisis and determined that it was bound by its holding in *Portland*.[71] This precedent forced the Ninth Circuit to rule against the Commission and conclude that cable modem services were a hybrid of both telecommunications and information services.[72]

In their petition for a writ of certiorari, the National Cable and Telecommunications Association and other petitioners emphasized the important regulatory consequences of both the Commission's decision and the Ninth Circuit's holding. The petitioners argued that "[t]he FCC decision that the court of appeals vacated could not be more pivotal to the future of not only cable modem service but also all other forms of

66. *See id.* (concluding that the public interest would be best served by a uniform national policy of regulatory forbearance as cable modem services remained in their early stages, supply and demand were still evolving, and rival networks providing Internet access continued to develop). *But see id.* at 4870 (Dissenting Statement of Comm'r Copps) (noting that the classifications established by the Commission had made the categorizations more difficult, citing one example by asking, "is [Internet protocol] telephony subject to Title II as is cable telephony, or Title I, as is cable modem service?"). Commissioner Copps also contended that the ruling would deem cable modem services immune from Title II obligations, and stated, "I cannot conceive that Congress intended to remove from its statutory framework core communications services such as the one at issue in this proceeding." *Id.*

67. *See* Petition for Writ of Certiorari at 13, *Brand X*, 545 U.S. 967 (2005) (No. 04-277) (explaining that petitioners included ISPs, state governments, consumers, groups of local franchising authorities, and Verizon, a provider of Digital Subscriber Line (DSL)).

68. *Id.* at 14.

69. 345 F.3d 1120 (9th Cir. 2003).

70. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (creating a two-step formula for courts to use when reviewing an agency's interpretation of a statute). Under *Chevron*, the reviewing court looks to the language of the statute and determines whether the intent of Congress is clear: if the statute is unambiguous, the court and agency are bound by the expressed intent of Congress, but if the statute is silent or ambiguous, the court looks to whether the agency's response is a reasonable construction of the statute. *Id.*

71. *See Brand X Internet Services*, 345 F.3d at 1131 (contending "we are not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine").

72. *See id.* at 1132 (holding that stare decisis "requires our adherence to the interpretation of the Communications Act we announced in *Portland* [where] we concluded that cable broadband service was not a 'cable service' but instead was part 'telecommunications service' and part 'information service'" (citations omitted)).

broadband."[73] The importance of the Court's review rested in the Commission's erected framework of a minimal regulatory approach to broadband service. By concluding that cable modem services were "in part telecommunications service," the Ninth Circuit subjected cable modem services to common carrier regulations.[74] The petitioners argued that such an outcome could stifle investment and innovation and profoundly impact the lives of millions across the United States—alone an ample justification for the Court's review.[75] Thus, beyond the importance of the subject matter, the Court granted certiorari because the Ninth Circuit failed to apply *Chevron* deference. The Court ultimately used *Chevron* to overturn the Ninth Circuit,[76] holding that the Commission passed both prongs of the *Chevron* test.[77]

Justice Scalia, however, was not convinced. Although he recognized and appeared to support the policy of regulatory forbearance that both the Commission and the Court were attempting to achieve, he found the approach severely flawed.[78] In his dissent, Justice Scalia explained that the Commission's attempt to create a new regime of nonregulation had been achieved "through an implausible reading of the statute, and ha[d] thus exceeded the authority given it by Congress."[79] Justice Scalia blamed the Commission's ruling and the majority's upholding of the ruling on a fear held by both the Commission and the Court that if cable modem services were classified as a telecommunications service then all Internet service providers (ISPs) must be categorized this way, because they all "use"

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73. Petition for Writ of Certiorari at 17–18, *Brand X*, 545 U.S. 967 (No. 04-277) (stressing the widely held belief that "ubiquitous broadband deployment will bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance economic opportunity for the American public").

74. *Id.* at 19 (internal quotation marks and citation omitted) (emphasizing that common carrier regulations were designed for monopoly telephone service providers and are unsuitable for services subject to intense competition).

75. *See id.* (asserting also that the outcome would contravene federal communications policy).

76. *See generally Brand X*, 545 U.S. 967 (2005).

77. *See id.* at 980–1000 (finding first the Communications Act, as amended by the Telecommunications Act, ambiguous, and then, looking at how the Commission interpreted the definitions of the statute, determined that such interpretations were reasonable).

78. Transcript of Oral Argument at 16, *Brand X*, 545 U.S. 967 (No. 04-277) ("[W]hat I'm still waiting to hear is how you get that out of the definitions, which is the lever that the Commission is using to implement this good policy. It is saying, in some cases, that a bundled offering is an offering of telecommunications; and, in other cases, it's saying a bundled offering isn't. And the reason, you say, is . . . because you tell us it has good consequences in one case, and doesn't have good consequences in the other . . . . That's not my understanding . . . of how definitions work.").

79. *Brand X*, 545 U.S. at 1005 (Scalia, J., dissenting).

telecommunications when providing Internet access.[80] Justice Scalia believed that instead of removing cable modem services from the category of telecommunications, the Commission could instead retain the telecommunications classification but then forbear from imposing most Title II regulations, as it did in *Computer I* and *Computer II* (collectively, the Computer Inquiries) when the Commission forbore from regulating as common carriers value-added networks.[81] Finally, Justice Scalia pointed out that the Commission had rendered the main source of its regulatory authority over common carriers inapplicable by removing its Title II powers.[82] However, under the Commission's Title I ancillary powers, it could always reapply Title II regulations. Justice Scalia opined that, "Such Möbius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way."[83]

Once the *Cable Modem Declaratory Ruling* was released and upheld by the Supreme Court, the Commission issued *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* (*Wireline Broadband Order*), classifying wireline broadband services as interstate information services.[84] The Commission emphasized that "Title II obligations have never generally applied to information services, including Internet access services."[85] Instead, the Commission would impose regulatory requirements on information services under its Title I ancillary jurisdiction only when necessary.[86] In concluding, the Commission firmly stated that it would not delay in adopting regulatory obligations in order to protect consumers, network security, and reliability under its Title I jurisdiction.[87]

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80. *Id.* at 1010–11 (deeming the fear of what will happen to ISPs to be "nonsense").

81. *See id.* at 1011–12 (discussing the Commission's treatment of "value-added networks—non-facilities-based providers who leased basic services from common carriers and bundled them with enhanced services" and how the Commission "said that they, unlike facilities-based providers, would be deemed to provide only enhanced services" (internal quotation marks and citation omitted)).

82. *Id.* at 1013–14 (stating that this result occurred due to the Commission's "current view" that the term "telecommunications service" was ambiguous and did not apply to cable services).

83. *Id.* at 1014.

84. 20 FCC Rcd. 14,853, 14,864–65 (2005) (finding wireline broadband to be an information service as it "inextricably combines the offering of powerful computer capabilities with telecommunications" and this classification "promot[es] the ubiquitous availability of broadband Internet access services").

85. *Id.* at 14,913.

86. *See id.* (citing the Commission's previous action of imposing obligations on facilities-based common carriers pursuant to its Title I jurisdiction in *Computer I*, *Computer II*, and *Computer III* (collectively, the Computer Inquiries) as an example).

87. *See id.* at 14,915 (recognizing that such measures may need to be adopted "in this dynamically changing broadband era").

Commissioners Adelstein and Copps concurred in the *Wireline Broadband Order,* realizing that the Supreme Court had crafted a different regulatory landscape in upholding the *Cable Modem Declaratory Ruling* in *Brand X*.[88] Commissioner Adelstein, however, worried about deserting Title II's "core legal protections" afforded by Congress.[89] After noting his discomfort, Commissioner Copps laid out what the FCC's new goals must be as it heads into the Title I era: protect homeland security, meet universal service responsibilities, protect competition, and "state clearly that innovators, technology companies, and consumers will not face unfair discrimination on the Internet by network providers."[90]

### C. *The Rebirth of Title II Regulations?: The Internet Policy Statement and the Comcast P2P Order*

While stripping away Title II regulations in its *Cable Modem Declaratory Ruling* and *Wireline Broadband Order*, the Commission imposed Title I obligations in *In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities* (*Internet Policy Statement*), a policy statement it issued along with the *Wireline Broadband Order*.[91] In the *Internet Policy Statement*, the Commission began by emphasizing the "profound impact" the Internet had on American life.[92] Then, the Commission noted its mandate from

88. *See id.* at 14,982–83 (Statement of Comm'r Adelstein, Concurring) ("Indeed, were the pen solely in my hand, these are not the precise items I would have drafted or the procedural framework I would have chosen. In the wake of the Supreme Court decision, however, this reclassification was inevitable."); *id.* at 14,979 (Statement of Comm'r Copps, Concurring) (conceding that after *Brand X* "the handwriting [was] on the wall").

89. *See id.* at 14,983 (Statement of Comm'r Adelstein, Concurring) (contending that the Commission's reclassification approach gave him "grounds for real concern," as the approach "gave a significant and articulate minority of the Supreme Court grounds for questioning whether the Commission had fundamentally misinterpreted the Communications Act").

90. *Id.* at 14,979 (Statement of Comm'r Copps, Concurring) (emphasizing that the Commission's "ability to advance these critical goals should progress as we advance to broadband . . . not shrink as we fiddle with legalisms and parse definitions").

91. 20 FCC Rcd. 14,986; *see Wireline Broadband Order*, 20 FCC Rcd. at 14,976 (Statement of Chairman Martin) (highlighting his belief that the *Internet Policy Statement* reflects "certain rights all consumers of broadband Internet access should have" and noting that competition had guaranteed these rights up until this point, but "government will continue to have a role in this dynamic, new broadband marketplace"); *see also id.* at 14,980 (Statement of Comm'r Copps, Concurring) (stating that he was pleased with the adoption of the *Internet Policy Statement* but criticizing its lack of an enforcement mechanism).

92. *See Internet Policy Statement*, 20 FCC Rcd. at 14,986–87 ("This network of networks has fundamentally changed the way we communicate. It has increased the speed of communication, the range of communicating devices and the variety of platforms over which we can send and receive information. As Congress has noted, '[t]he rapidly

Congress "to preserve the vibrant and competitive free market that presently exists for the Internet."[93] Finally, the Commission stated that under Title I, the Commission had the authority "to impose additional regulatory obligations . . . to regulate interstate and foreign communications."[94] Pursuant to this power, the Commission adopted four net neutrality principles to ensure that the Internet is operated in a neutral manner and "that broadband networks are widely deployed, open, affordable, and accessible to all consumers."[95] The net neutrality principles consisted of consumer entitlements to: (1) "access the lawful Internet content of their choice"; (2) "run applications and use services of their choice"; (3) "connect their choice of legal devices that do not harm the network"; and (4) "competition among network providers, application and service providers, and content providers."[96]

Two years after the *Internet Policy Statement* was released, the Commission issued *In re Broadband Industry Practices* (*Net Neutrality NOI*), seeking public comments on its net neutrality principles.[97] Throughout the *Net Neutrality NOI*, the Commission noted that there was no evidence of discriminatory practices in the broadband industry.[98] Nevertheless, the Commission sought public comments to provide it with a deeper understanding of broadband market participants' behavior.[99] Specifically, the Commission sought comments on beneficial discrimination—such as preventing congestion; blocking child pornography, spyware, viruses, and spam; improving network performance—and harmful practices affecting consumers, such as price discrimination.[100] After discussing several different types of discrimination, the Commission sought comment on whether a nondiscrimination principle should be incorporated into its net

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developing array of Internet . . . services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.' . . . In addition, the Internet plays an important role in the economy, as an engine for productivity growth and cost savings.").

93. *Id.* at 14,987.

94. *Id.* at 14,987–88.

95. *Id.* at 14,988.

96. *Id.* (beginning each principle with the phrase "To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to . . .").

97. 22 FCC Rcd. 7894, 7894 (2007).

98. *See, e.g.*, *id.* at 7895 ("In several proceedings evaluating wireline mergers, the Commission found that no commenter had alleged that the entities engage in packet discrimination or degradation, and that, given conflicting incentives, it was unlikely that the merged companies would do so.").

99. *Id.* at 7896–97.

100. *See id.* at 7896–98 (exploring current package management and pricing practices).

neutrality principles.[101]

Again, Commissioner Copps concurred, expressing disappointment in the Commission's decision to issue an NOI rather than an NPRM.[102] Commissioner Copps argued that a net neutrality nondiscrimination principle was crucial because "the concentrated providers out there increasingly have the ability—and some think the business incentive—to build networks with traffic management policies that could restrict how we use the Internet."[103] Commissioner Copps found the Commission at an important crossroad that would shape the Internet in the future, with one road leading the Commission down a path that would prevent discrimination, and the other road forcing the Commission to sit idly by while providers dictate the rules of the (online) road.[104] Thus, while pleased with the original four net neutrality principles, Commissioner Copps believed something more was needed.[105]

Echoing Commissioner Copps, Commissioner Adelstein's statement argued for "a new principle to our Policy Statement to address incentives for *anti-competitive* discrimination and to ensure the continued vibrancy of the Internet."[106] However, Commissioners McDowell and Tate remained unconvinced. Commissioner McDowell contended, "I agree with my colleagues that we must remain vigilant against possible market failure or anti-competitive conduct . . . . But we also must resist the temptation to impose regulations that are based merely on theory."[107] Commissioner Tate argued that it was important for the Commission to ensure its policies promoted, rather than deterred, "investment, innovation, and new entry in

101. *See id.* at 7898 (questioning the contours of a nondiscrimination principle, including how it would be defined, how it would read, if it would "permit any exclusive or preferential arrangements among network platform or access providers and content providers," and how it would "affect the ability of content and access providers to charge their customers different prices").

102. *See id.* at 7903–04 (Statement of Comm'r Copps, Concurring) ("We proceed too leisurely here. Rather than strike out and unflinchingly proclaim this agency's commitment to an open and non-discriminatory Internet, we satisfy ourselves with one tiny, timid step.").

103. *Id.* at 7902.

104. *See id.* at 7903 ("I want an FCC that unconditionally states its preference for non-discrimination on the Internet. I think consumers want that, too.").

105. *See id.* ("It is time for us to . . . commit industry and the FCC unequivocally to a specific principle of enforceable non-discrimination, one that allows for reasonable network management but makes clear that broadband network providers will not be allowed to shackle the promise of the Internet in its adolescence.").

106. *Id.* at 7906 (Concurring Statement of Comm'r Adelstein) (emphasis added) (opining that Americans view the Internet differently than other communications mediums and want to have choices online, rather than watch the Internet "become another version of TV, controlled by corporate giants").

107. *Id.* at 7909 (Statement of Comm'r McDowell).

networks, products, and services that will help America remain competitive in the increasingly global economy."[108] In Commissioner Tate's view, the NOI and the Commission's current policies appeared to be seeking a cure "before there has been a disease, or even a high fever."[109]

In 2007, the Commission believed it found symptoms of a "disease" when Comcast was found blocking BitTorrent, an open-source P2P networking protocol.[110] Content providers, including Vuze, Inc., utilize BitTorrent to legally distribute videos to online viewers.[111] Thus, these P2P applications offer a competitive threat to cable operators such as Comcast, as Internet users can watch high-quality videos online that they would otherwise have to pay to watch on cable television.[112] In October 2007, the Associated Press (AP) broke the story of Comcast's blocking.[113] By November, Free Press filed a formal complaint against Comcast with the Commission, asking the Commission to hold "that an Internet service provider violates the [Commission's] Internet Policy Statement when it intentionally degrades a targeted Internet application."[114] Shortly

108. *Id.* at 7908 (Statement of Comm'r Tate).

109. *Id.*

110. *See In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications (*Comcast P2P Order*), 23 FCC Rcd. 13,028, 13,031–32 (2008).

111. *See id.* at 13,029–30 (explaining that "BitTorrent employs a decentralized distribution model" in which "[e]ach computer in a BitTorrent 'swarm' is able to download content from the other computers in the swarm, and in turn each computer also makes available content for those same peers to download, all via [Transmission Control Protocol (TCP)] connections").

112. *See id.* at 13,030 (finding the threat especially significant to Comcast's video-on-demand (VOD) service). VOD "operates much like online video, where Internet users can select and download or stream any available program without a schedule and watch it any time, generally with the ability to fast-forward, rewind, or pause the programming." *Id.* (internal quotation marks and footnote omitted). Comcast had recently begun expanding its VOD business by incorporating it online—putting itself in direct competition with BitTorrent. *Id.*

113. *See id.* at 13,031 (reporting the Associated Press's (AP's) conclusion that Comcast "actively interferes with attempts by some of its high-speed Internet subscribers to share files online. . . . [F]or instance, an independent movie producer who wanted to distribute his work using BitTorrent and his Comcast connection could find that difficult or impossible" (internal quotation marks and footnote omitted)); *see also id.* at 13,031–32 (revealing that even after Comcast first admitted that it targeted traffic for interference, it later "changed its story yet again," and after the report of one customer who conducted numerous tests over the network, "admitted that its current P2P management is triggered . . . regardless of the level of overall network congestion at th[e] time" (alterations in original)).

114. *Id.* at 13,032 (alteration in original). Vuze, Inc. also filed a petition for rulemaking with the Commission. *See* Petition to Establish Rules Governing Network Mgmt. Practices by Broadband Network Operators at 2, *In re* Vuze, Inc., *filed*, No. 07–52 (FCC Nov. 14, 2007) (*Vuze, Inc. Petition*), *available at* http://fjallfoss.fcc.gov/prod/ecfs/

thereafter, more than 20,000 Americans filed complaints to the Commission concerning Comcast's blocking.[115]

In *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications* (*Comcast P2P Order*), the Commission ordered Comcast to disclose within 30 days the precise contours of the network management practices at issue, submit a compliance plan that described how Comcast intended to transition from discriminatory to nondiscriminatory network management practices by the end of the year, and disclose to the Commission and the public the new network management practices it planned to initiate after the termination of its current discriminatory practices.[116] Before the *Comcast P2P Order* was issued, Comcast brought forth several arguments to the Commission. First, it specifically reminded the Commission of its congressional mandate of regulatory forbearance.[117] Comcast interpreted the mandate to mean that the Internet should not be regulated at all, which the Commission flatly rejected.[118] Second, the Commission rejected Comcast's arguments that adjudication was improper because "the Commission has a twenty-seven-year-old policy of leaving information services unregulated," contending instead that throughout its period of regulatory forbearance the Commission always stated that "it would not hesitate to take action in the event that providers violated the principles set forth in the *Internet Policy Statement*."[119] Because Comcast had violated the net neutrality principles by

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retrieve.cgi?native_or_pdf=pdf&id_document=6519813947 (contending that "Vuze is aware that at least one major broadband network operator, Comcast, is attempting deliberately to degrade and, at times, block content from Vuze and other Internet companies that use similar P2P technology").

115. *See Comcast P2P Order*, 23 FCC Rcd. at 13,032 (explaining that these complaints urged the Commission to "'take immediate action to put an abrupt end to this harmful practice'").

116. *See id.* at 13,059–60 ("These disclosures will provide the Commission with the information necessary to ensure that Comcast lives up to the commitment it has made in this proceeding.").

117. *Id.* at 13,042.

118. *See id.* at 13,042–43 (finding it "inconceivable that Congress was unaware of or intended to eliminate this regulatory framework given its stated purpose of '*preserv*[*ing*] the vibrant and competitive free market'").

119. *See id.* at 13,049–50 (highlighting the *Wireline Broadband Order* as an example in which the Commission found it had jurisdiction and maintained that "we will not hesitate to adopt any non-economic regulatory obligations that are necessary to ensure consumer protection and network security and reliability in this dynamically changing broadband era"(internal quotation marks omitted)). The Commission further relied on a consent decree it previously entered into with Madison River in 2005 blocking a Voice over Internet Protocol (VoIP) to "render hollow Comcast's protestation that engaging in this adjudicative proceeding is somehow inconsistent with prior Commission policy." *Id. But see id.* at 13,091

preventing consumers from running applications and accessing the content of their choice, the Commission was within its authority to act.[120]

When issuing the *Comcast P2P Order*, then-Chairman Martin indicated his belief that the Commission had to act in order to warn "bad actors" that the Commission would not sit idly by.[121] The Chairman stated that on one hand the Commission took an important step toward ensuring open access to the Internet for consumers, but on the other hand the Commission's actions were not about regulating the Internet.[122] Chairman Martin then went on to emphasize that beneficial and helpful discrimination on the Internet remained permissible after the Commission's ruling.[123] Commissioner Copps also defended the Commission's actions, but noted that they still needed to adopt a nondiscrimination principle.[124]

In his dissenting statement, however, Commissioner McDowell argued that the Commission was acting under its Title II authority rather than Title I in issuing the *Comcast P2P Order*.[125] A formal complaint preceded the Commission's order, and under Commission rules formal complaints were to apply only to common carriers.[126] Thus, even if the Commission's ruling survived this procedural misstep, Commissioner McDowell argued that the Commission had no rules governing Internet network management to

(Dissenting Statement of Comm'r McDowell) (reminding the Commission that it had regulated Madison River, a rural local exchange carrier, under its Title II authority, rather than under Title I).

120. *See id.* at 13,052–53 ("On its face, Comcast's interference with peer-to-peer protocols appears to contravene the federal policy of 'promot[ing] the continued development of the Internet' . . . .").

121. *See id.* at 13,067–68 (Statement of Chairman Martin) (believing that inaction would lead to certainty among broadband operators that the FCC would allow them to block access).

122. *See id.* at 13,067 (continuing his point by stating that "[i]ndeed, I have consistently opposed calls for legislation or rules to impose network neutrality. Like many other policy makers and members of Congress, I have said such legislation or rules are unnecessary, because the Commission already has the tools it needs to punish a bad actor. Instead, we take a cautious approach").

123. *See id.* ("The Order makes clear, for instance, that providers can block child pornography or pirated video and music. Indeed, blocking illegal content could reduce bandwidth congestion.").

124. *See id.* at 13,080 (Statement of Comm'r Copps) ("A clearly-stated commitment of non-discrimination would make clear that the Commission is not having a one-night stand with net neutrality, but an affair of the heart and a commitment for life.").

125. *Id.* at 13,089–90 (Dissenting Statement of Comm'r McDowell).

126. *See id.* at 13,088–89 (reminding the Commission that, "[a]s the Supreme Court held in the *Brand X* case, and as the Commission has held on numerous occasions since, cable modem service is not common carriage but, rather, an information service under Title I of the Act").

enforce.[127] While Commissioner Copps continuously argued that the Commission was moving too slowly in fashioning its regulatory policy for the Internet, Commissioner McDowell argued that the Commission was moving too quickly. Commissioner McDowell contended that instead of jumping to the "unprecedented, and likely unsustainable" step of rulemaking by adjudication, the Commission should have issued an NPRM, allowing a chance for public comment.[128] Commissioner McDowell worried not only that Comcast was given inadequate notice, but also that beneficial discrimination on the Internet had been compromised, and that slower online speeds for 95% of America's Internet consumers would likely result as all Internet traffic would have to be treated equally.[129] According to the Commissioner, "That sounds good if you say it fast. But the reality is that the Internet can function only if engineers are allowed to *discriminate* among different types of traffic."[130] Commissioner McDowell then explained, "Discriminatory conduct, in the network management context, does not necessarily mean anticompetitive conduct. And this is where a lot of the misunderstandings come into play."[131] Whereas previously the expectation of clear and undistorted movies was achieved by giving video bits priority over other bits, "now that all traffic must be treated equally, that is going to change. The new regime is tantamount to a congested downtown area without stoplights. Gridlock is likely to result."[132]

### *D. The Reassertion of Title II Regulations: The Commission's Net Neutrality Notice of Proposed Rulemaking and the Aftermath of* Comcast v. FCC

In 2009, with a new President in office and a new Chairman at the Commission, the FCC issued its *Net Neutrality NPRM* and proceeded down the road that Commissioner Copps had advocated—introducing a net

127. *See id.* at 13,089 ("Since the Supreme Court's decision in *Brand X*, we have been busy taking broadband services out of the common carriage realm of Title II and classifying them as largely *unregulated* Title I information services. It does not take a law degree to understand that once we did that, the rules of Title II would no longer apply to broadband services.").

128. *See id.* at 13,090 (conveying the belief that the Commission was on the right track in 2007 when it issued a NOI concerning the *Internet Policy Statement*, and that the next logical step would have been an NPRM rather than rulemaking by adjudication: "Like it or not, no notice of proposed rulemaking, with a chance for public comment, was ever issued. Nothing regulating Internet network governance has been codified in the Code of Federal Regulations. In short, we have no rules to enforce.").

129. *See id.* at 13,092 (contending that "up until this point, engineers made engineering decisions, not unelected bureaucrats").

130. *Id.*

131. *Id.* at 13,092–93.

132. *Id.* at 13,093.

neutrality nondiscrimination principle and seeking public comment on its codification. In this NPRM, the Commission seemed to firmly understand the crossroads that Commissioner Copps referred to in the Commission's *Net Neutrality NOI*.[133]

The Commission began the *Net Neutrality NPRM* by noting that while the *Internet Policy Statement* helped preserve openness on the Internet, the time had come for more clarity to be achieved through notice-and-comment rulemaking.[134] In reaching this decision, the Commission first sought to codify the four net neutrality principles; not only did the Commission seek to codify the policy, but it also sought to alter the wording of these principles, making them *requirements* of broadband service providers rather than consumer *entitlements*.[135] Therefore, each of the four current principles would begin with the following words: "Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from . . . ."[136] This change in language presents a significant change to the principles themselves, as it turns guidelines into obligations. Consequently, as the Internet era continues—or in the Commission's words, comes out of its adolescence—the bite to Title I regulation grows stronger and more familiar.

After explaining the need to codify the four current net neutrality principles, the Commission turned to an explanation of its new net neutrality nondiscrimination principle.[137] The Commission began by reminding its readers that network operators' abilities to discriminate "may impose significant social costs, particularly if the discrimination is motivated by *anticompetitive* purposes."[138] The Commission, however, also recognized

133. *See, e.g.*, David Lieberman, *Does Cable Have Grip on Speedy Internet?*, USA TODAY, Apr. 7, 2010, at 1B (quoting Colin Crowell, senior counsel to Chairman Genachowski, stating "We're at a crossroads . . . . Congress, the (Obama) administration and the FCC have recognized the importance of broadband to ongoing investment and innovation").

134. *See Net Neutrality NPRM*, 24 FCC Rcd. 13,064, 13,066 (2009) (stating that the basis for the rulemaking comes from the Commission's "statutory responsibility to preserve and promote advanced communications networks that are accessible to all Americans").

135. *Id.* at 13,100–01; *see* Barbara Esbin & Adam Marcus, *"The Law Is Whatever the Nobles Do": Undue Process at the FCC*, 17 COMMLAW CONSPECTUS 1, 17 (2008) (finding that the intent of the original net neutrality principles was "to provide 'guidance and insight into [the Commission's] approach to the Internet and broadband that is consistent with . . . Congressional directives,' rather than to establish normative and enforceable rules of provider behavior" (alteration in original)).

136. *Net Neutrality NPRM*, 24 FCC Rcd. at 13,101.

137. *See id.* at 13,104 ("Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.").

138. *Id.* at 13,104 (emphasis added).

that beneficial discrimination is vital to the Internet's success.[139] "The key issue we face," the Commission recognized, "is distinguishing socially beneficial discrimination from socially harmful discrimination in a workable manner."[140]

The Commission believed it effectively struck this balance by imposing a nondiscrimination principle subject to reasonable network management, along with several enumerated exceptions for law enforcement and homeland security. The Commission conceded that this obligation resembled the nondiscrimination obligations of Title II.[141] "Rather than extending that common carrier standard to broadband Internet access services," the Commission proposed promulgating "a general nondiscrimination rule subject to reasonable network management and specifically enumerated exceptions."[142] The Commission defended this approach by contending that a bright-line rule against discrimination subject to these exceptions would better fit the unique characteristics of the Internet.[143] Further, if the Commission used the general prohibition of "'*unjust or unreasonable*' discrimination" by common carriers from § 202(a) of the Act, the Commission believed the type of discrimination that would be deemed "just" and "reasonable" would likely involve reasonable network management or fall within one of the exceptions it enumerated.[144] The Commission based this contention on its experience with the ongoing debate over the net neutrality principles.[145] Thus, while seeking to maintain beneficial discrimination (e.g., by blocking child pornography, viruses, and congestion) and eliminate harmful discrimination (e.g., by pinning the Google search engine against Microsoft's "Bing" search engine), the Commission has ended up reasserting Title II obligations on

139. *See id.* ("At the same time, we recognize that traffic on the Internet is increasing rapidly and that broadband Internet access service providers must be able to manage their networks and experiment with new technologies and business models in ways that benefit consumers.").

140. *Id.*

141. *See id.* at 13,106.

142. *Id.*

143. *See id.* (explaining that while other networks—such as the telephone or cable television networks—were designed to support just one application, the Internet was designed "to allow users at the edge of the network to decide toward which lawful uses to direct the network").

144. *Id.* (emphasis added). The Commission thus concluded "that a case-by-case approach to providing more detailed rulings in this area is inevitable and valuable. At the same time, where [the Commission] can identify and describe *ex ante* exceptions to the general nondiscrimination rule . . . it is helpful to do so." *Id.*

145. *See id.* (noting that the debate over open Internet principles extended back well before 2005).

broadband Internet services.[146]

Chairman Genachowski began his statement to the *Net Neutrality NPRM* by asserting that the time was ripe for a next step.[147] Believing there were severe consequences to inaction, the Chairman continued, "the time is now to move forward with consideration of fair and reasonable rules of the road."[148] Similarly, Commissioner Copps, who had long urged the Commission to adopt an enforceable net neutrality nondiscrimination principle, strongly supported the *Net Neutrality NPRM*, asserting that "[t]his is an historic day at the FCC. It is historic because the Commission takes a long stride—perhaps its longest ever—toward ensuring a free, open and dynamic Internet."[149]

Other Commissioners, however, were unconvinced that a problem existed and that the appropriate solution had been discovered. Commissioner Baker argued that more needed to be known about reasonable network management before the Commission considered acting, "and the same is true for the concept of discrimination."[150] Commissioner McDowell disagreed with the majority on several levels but reminded readers (and perhaps the Commission itself) that the *Net Neutrality NPRM* was just that, a starting process to seek comments and build a record.[151]

This "starting process," however, was called into question in April 2010 when the D.C. Circuit issued its *Comcast* decision. Following the *Comcast P2P Order*, Comcast appealed to the D.C. Circuit in order to "clear its name."[152] Notably, before Comcast was caught blocking, the Commission

146. *See, e.g.*, Comments of AT&T Inc. at 210–11, *Net Neutrality NPRM*, 24 FCC Rcd. 13.064 (2009) (No. 09-191) (arguing that the Commission's proposed nondiscrimination principle "embod[ies] the very *criteria* of common-carrier regulation"); *see also* Comments of Verizon and Verizon Wireless at 6, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (noting that the nondiscrimination principle "for the first time, interject[s] archaic common carriage concepts into the Internet where they have no relevance").

147. *See Net Neutrality NPRM*, 24 FCC Rcd. at 13,153–54 (Statement of Chairman Genachowski) ("[T]he Commission's actions, laudable in so many respects, have left the protection of the free and open Internet unnecessarily vulnerable.").

148. *Id.* at 13,154 ("[I]t would be a serious failure of responsibility not to consider such rules, for that would be gambling with the most important technological innovation of our time.").

149. *Id.* at 13,157 (Statement of Comm'r Copps) (recalling his long fight for the Commission to adopt the net neutrality nondiscrimination principle to ensure that consumers maintained access to an open Internet).

150. *Id.* at 13,169 (Statement of Comm'r Baker, Concurring in Part, Dissenting in Part).

151. *See id.* at 13,159 (Statement of Comm'r McDowell, Concurring in Part, Dissenting in Part) (emphasizing that "[t]he window of opportunity for dialogue is just beginning to open").

152. *See* Cecilia Kang, *Court Limits FCC Clout Over Web*, WASH. POST, Apr. 7, 2010, at A1

had stripped away Title II obligations and had imposed only minimal Title I obligations. Nevertheless, according to Chairman Martin, action had to be taken to set a precedent.[153] Therefore, as Commissioner McDowell explained, the Commission moved forward without regulatory footing to do so, and referred back to what it had dedicated the past twenty-seven years to removing: Title II obligations.[154] The D.C. Circuit recognized the contradiction and lack of regulatory footing, and criticized the Commission for essentially deregulating the Internet while simultaneously imposing and enforcing regulations on an Internet service provider. The court concluded that the Commission had not provided the necessary connection to assert its Title I jurisdiction in such a manner, and vacated the *Comcast P2P Order*.[155] Through the thirty-six-page decision, the court significantly limited Title I jurisdiction and called into question the validity of the Commission's *Net Neutrality NPRM*.[156]

The *Comcast* decision has left the Commission with several viable options to maintain its hold over broadband Internet services and continue net neutrality regulations: appeal the decision, proceed cautiously under Title I, reclassify the Internet under Title II, or go to Congress for clearer jurisdiction.[157] The Democratic Commissioners advocated for reclassification, while the Republican Commissioners emphasized the narrow holding of the *Comcast* decision, and that the Commission could proceed with its policy goals while operating under Title I.[158] A month

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(citing Sena Fitzmaurice, a Comcast spokeswoman, explaining that the company was "gratified" by the ruling and that Comcast's "primary goal was always to clear [their] name and reputation"); *see also* Edward Wyatt, *U.S. Court Curbs F.C.C. Authority on Web Traffic*, N.Y. TIMES, Apr. 7, 2010, at A1 (quoting Comcast: "Comcast remains committed to the FCC's existing open Internet principles, and we will continue to work constructively with this FCC as it determines how best to increase broadband adoption and preserve an open and vibrant Internet").

153. *See supra* note 121 and accompanying text.

154. *See* discussion *supra* Part I.C (highlighting Commissioner McDowell's statement, in which he argued that the Commission was acting under its Title II authority which it had stripped away, and therefore the order was "unprecedented, and likely unsustainable").

155. *See* Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010) ("[F]or a variety of substantive and procedural reasons those provisions [that the Commission relies on] cannot support its exercise of ancillary authority over Comcast's network management practices. We therefore . . . vacate the challenged order.").

156. *See* Jonathan Make & Adam Bender, *Losing Comcast Case Said to Augur New FCC Tack on Net Neutrality*, COMM. DAILY, Apr. 7, 2010, at 1 ("By concluding the commission lacks authority to regulate the network management of an ISP, the decision saps FCC ability to regulate net neutrality and perhaps other aspects of broadband behavior, public interest and industry lawyers said in interviews.").

157. *Id.* at 1, 3.

158. *See id.* at 1 (quoting Commissioner Copps: "The only way the Commission can

after *Comcast*, Chairman Genachowski revealed a "third way" of regulating broadband Internet services, where the Commission would reassert Title II authority but forbear from applying all but six provisions in Title II—§§ 201, 202, 208, 254, 222, and 255.[159] In June, 2010 the Commission issued its *Third Way NOI*, in which the Commission asked which regulatory approach it should adopt: Title I, Title II, or Chairman Genachowski's "third way."[160] Although Chairman Genachowski emphasized in his statement that he remained open-minded, Commissioners McDowell and Baker, dissenting from the opinion, argued that the sheer issuance of these discussions had caused uncertainty in the marketplace.[161] Commissioner Baker also challenged the third way's approach and the alleged open nature of the proceeding, expressing her concern that the outcome was prejudged.[162] In her statement, Commissioner Baker accentuated that "The Chairman has publicly endorsed the so-called 'Third Way' approach in the days leading up to this Notice, and I cannot support such a conclusion. At the outset, I reject the effort to re-brand a Title II

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make lemonade out of this lemon of a decision is to do now what should have been done years ago: Treat broadband as the telecommunications service that it is"); *see also* Kang, *supra* note 152 (quoting Commissioner Copps: "It is time we stop doing the 'ancillary authority' dance and instead rely on the statue Congress gave us to stand on solid legal ground in safeguarding the benefits of the Internet for American consumers"). *But see* Robert M. McDowell, *Hands off the Internet, Please*, WASH. POST, Apr. 9, 2010, at A19 (arguing that deregulation spawned from the Clinton Administration and led to an innovative and competitive Internet). *See also* Kara Rowland & Stephen Dinan, *Court Blocks Push to Regulate Internet Traffic*, WASH. TIMES, Apr. 7, 2010, at A1 (citing Commissioner McDowell's warning against classifying broadband as a telecommunications service: "I hope this decision will provide certainty in the marketplace and will not lead to the unnecessary classification of broadband service as a monopoly phone service").

159. *See Third Way NOI*, 25 FCC Rcd. 7866, 7894–95 (2010); *see also* Amy Schatz & Spencer E. Ante, *FCC Web Rules Create Pushback*, WALL ST. J., May 7, 2010, at B1 (specifying each section under Title II that the Commission would not forbear from enforcing and explaining that § 201 requires Internet providers to interconnect and charge reasonable rates; § 202 prevents price or service discrimination; § 208 sets up an FCC complaint process; § 222 protects customer privacy and proprietary commercial information; § 254 allows for the use of a Universal Service Fund for broadband; and § 255 ensures disability access).

160. *Third Way NOI*, 25 FCC Rcd. at 7867.

161. *See id.* at 7916 (Statement of Chairman Genachowski) (requesting that all participants keep an open mind); *see also id.* at 7928 (Dissenting Statement of Comm'r Baker) (arguing that "this is the rare case where opening a proceeding creates so much regulatory uncertainty that it harms incentives for investment in broadband infrastructure and makes providers and investors alike think twice about moving forward with network investments under this dark regulatory cloud").

162. *See id.* at 7928–29 (Dissenting Statement of Comm'r Baker) (noting that events leading to the open meeting gave her significant concerns).

classification with forbearance as a middle ground, it is not."[163]

## II. ANALYSIS: TRANSITIONING TO A PROCOMPETITIVE APPROACH

In the early 1960s, before the Commission broke away from its Title II regime, regulatory nondiscrimination was a dominant communications principle. As Title II obligations disappeared, however, so did the nondiscrimination principle. While the nondiscrimination principle fell into the background, technologies advanced and virtually unregulated private companies obtained the capability to discriminate online, as Comcast demonstrated in 2007.[164] Realizing both the potential for anticompetitive behavior and the widening regulatory gap, Commissioners Copps and Adelstein first resisted the move from Title II to Title I; however, upon realizing that this move was inevitable, they began advocating for adding an enforceable net neutrality nondiscrimination principle.[165] Alas, for a brief moment in time, nondiscrimination had no place in online communications law as Title II was abandoned and Title I omitted the principle altogether.

Today, however, with the Commission's *Net Neutrality NPRM* the nondiscrimination principle has come full circle, from the forefront of Title II obligations to the forefront of the Commission's Title I obligations. Further, in the aftermath of *Comcast,* the nondiscrimination principle could potentially reemerge stronger than ever if the Commission opts to reclassify the Internet under Title II—even if the Commission forbears from most provisions, it has made clear its intentions not to forbear from § 202, the nondiscrimination provision. Thus, rather than reclassify under Title II, the Commission should pursue clear congressional guidance in order to establish jurisdictional footing to move forward with its *Net Neutrality NPRM*

163. *Id.* at 7928.

164. *See supra* Part I.C (exploring how the Commission sprung into action when the AP revealed that Comcast was blocking BitTorrent).

165. *Compare Cable Modem Declaratory Ruling,* 17 FCC Rcd. 4798, 4870 (2002) (Dissenting Statement of Comm'r Copps) (arguing that Congress could not have intended to remove Title II obligations from cable modem services), *and Wireline Broadband Order,* 20 FCC Rcd. 14,853, 14,983 (2005) (Statement of Comm'r Adelstein, Concurring) (worrying about deserting Title II's core legal protection afforded by Congress and noting that this approach "has always given me some grounds for real concern"), *with Net Neutrality NOI,* 22 FCC Rcd. 7894, 7906 (2007) (Concurring Statement of Comm'r Adelstein) (arguing in 2007 for the addition of "a new principle to our Policy Statement to address incentives for anti-competitive discrimination and to ensure the continued vibrancy of the Internet"), *and Net Neutrality NPRM,* 24 FCC Rcd. 13,064, 13,157 (2009) (Statement of Comm'r Copps) (deeming it "an historic day at the FCC" when the Commission finally sought to add an enforceable nondiscrimination principle under its Title I powers).

under Title I.[166] Then, the Commission should implement a narrower anticompetitive framework in which it either reworks the language of the proposed net neutrality principle in a way that eliminates its broad reach or maintains the current proposed rule but adopts a much narrower interpretation of the language. Essentially, as the Commission takes its next steps at the crossroads it has reached—in which it must determine how to assert its net neutrality policy—the Commission should take the road less traveled by.

### *A. Trapped in the Habits of the Old Regulatory Framework*

One can only wonder what Justice Scalia thinks of the Commission's actions since the *Cable Modem Declaratory Ruling*. Had a few more Justices sided with him in *Brand X*, the Commission's regulatory scheme for broadband Internet would be much different today. Or would it? Justice Scalia argued that rather than remove the telecommunications classification from Internet services, the Commission should retain the classification and simply forbear from imposing Title II obligations as it had in its Computer Inquiries.[167] Using this approach, the Commission could have chosen to selectively forbear many of its Title II obligations, including nondiscrimination, and issue an NPRM seeking to impose such obligations today. Instead, the Commission classified cable modem services, and subsequently wireline broadband services, as information services immune from all Title II obligations. Now, the Commission seeks to create an enforceable net neutrality nondiscrimination principle that resembles the nondiscrimination principle in Title II. Thus, despite the path taken, it appears that both approaches lead to virtually the same nondiscrimination framework that the Commission has reached today. Under Justice Scalia's approach, the Commission would assert its powers through its long understood Title II regulations. On the other hand, under the Commission's approach, the Commission utilizes its Title I powers to assert a "new" net neutrality nondiscrimination principle (that the Commission concedes resembles the nondiscrimination principle in Title II). The

166. Under Title I the FCC still has authority to implement the provisions of its National Broadband Plan, *see generally* FCC, *National Broadband Plan: Executive Summary*, BROADBAND.GOV, http://www.broadband.gov/plan/executive-summary/ (last visited Nov 9, 2010), it just no longer has the authority to regulate Internet network management. *See, e.g.*, *Third Way NOI*, 25 FCC Rcd. at 7921 (Dissenting Statement of McDowell) ("[T]he *Comcast* decision was quite limited in its scope. The court merely held that Title I does not grant us authority to regulate Internet network management. . . . In short, if the Commission would like to regulate that activity, it must wait for Congress to change the law. We are not Congress.").

167. *See supra* Part I.B.

difference resides solely in the label—perhaps providing the Commission a compelling reason to reclassify the Internet under its Title II powers and forbear, just as Justice Scalia suggested in *Brand X*.[168]

However, the shift from Title II to Title I historically occurred because of both the Commission's awareness of and dedication to upholding Congress's mandate of regulatory forbearance.[169] In *Brand X*, Justice Scalia witnessed this shift beginning to unfold, and warned the agency that removing services from Title II regulations, but maintaining the power to reassert these provisions at will, mocked the constraints the statute placed on the agency.[170] Years later in *Comcast*, the D.C. Circuit reached this same conclusion, holding that the Commission could not deregulate the Internet by placing it under its Title I jurisdiction on the one hand but imposing Title II-like obligations on the other hand without making a clearer showing of an ancillary connection.[171] Thus, following *Comcast*, the Commission has the choice of either fully committing itself to Congress's mandate of regulatory forbearance or continuing down the road of promising forbearance on the one hand, but sneaking in regulation on the other.[172]

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168. In fact, the Commission's *Third Way NOI* leans heavily on Justice Scalia's dissent in *Brand X*. *See Third Way NOI*, 25 FCC Rcd. at 7874, 7909; *see also* Lynn Stanton, *Dingell Seeks Answers on 'Third-Way' Proposal*, TR DAILY, May 27, 2010 (relaying several questions Representative John D. Dingell (D., Mich.) asked of the Chairman, including why the third way proposal cited the minority opinion in *Brand X*, and a challenge for the Chairman to "cite any other Commission decision or order that has relied so heavily upon a minority opinion in a Supreme Court case").

169. *See Third Way NOI*, 25 FCC Rcd. at 7872–75 (discussing the Commission's analysis on how to classify cable modem services and wireline broadband services; in both instances the Commission referred to the congressional mandate when deciding to classify the services as information services). In its *Wireline Broadband Order*, the Commission even noted, "Title II obligations have never generally applied to information services, including Internet access services." 20 FCC Rcd. at 14,913; *see also supra* Part I.C (pointing out that upon issuing the *Internet Policy Statement*, the Commission noted its mandate from Congress "to preserve the vibrant and competitive free market that presently exists for the Internet").

170. *See supra* notes 79, 83 and accompanying text.

171. *See* Comcast Corp. v. FCC, 600 F.3d 642, 650 (D.C. Cir. 2010) (concluding that the Supreme Court's holding in *Brand X*, upholding the Commission's deregulation of cable modem services, did not solve the jurisdictional question: "By leaping from *Brand X*'s observation that the Commission's ancillary authority may allow it to impose *some* kinds of obligations on cable Internet providers to a claim of plenary authority over such providers, the Commission runs afoul of [established Supreme Court precedent]").

172. *See, e.g.*, Richard Bennett, Senior Research Fellow, Info. Tech. & Innovation Found., Remarks at *Comcast* Ruling: Now What? (June 1, 2010) (pointing out that §§ 201 and 202 of the Act—two sections in which the Commission would not forbear from enforcing under the Chairman's "third way" approach—are foundational sections on which all sections in the Act are built upon); *see also* Kamala Lane, *Pending Senate Bill Could Start Spectrum*

Essentially, congressional mandate requires that the Commission forbear from applying *any* regulation if the Commission concludes that forbearance is consistent with the public interest.[173] The broad reach of the Commission's net neutrality nondiscrimination principle challenges the extent of the Commission's selective forbearance—demonstrating that Congress's mandate of regulatory forbearance has led the Commission not to forbear at all, but instead to reimpose Title II obligations under its Title I powers. Alas, as Justice Scalia and Judge Tatel warned, reasserting Title II provisions at will mocks congressional constraints placed on the Commission. Further, reclassifying the Internet under its Title II powers reeks of arbitrary and capricious action.[174]

While the Commission's prior and potential moves violate congressional mandate,[175] it is logical to see why the Commission made this misstep (and could likely make it again). There is a natural instinct for human beings to hear the word "discrimination" and automatically assume it is bad. The term has certainly earned its reputation, even in the communications field. For example, in the mid-1800s Western Union acted discriminatorily when it made an exclusive deal with the Associated Press (AP) granting the company preferential access to its telegraph network.[176] In exchange, AP

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*Inventory, Sherman Says*, COMM. DAILY, June 14, 2010 (quoting James Cicconi, AT&T senior executive vice president, explaining that keeping the Internet open after *Comcast* is "'a fairly narrow problem'" and the FCC's third way could be analogized with the attempt to kill a fly with a sledgehammer: "'First you're not likely to kill the fly and second, you're likely to do a lot of damage in the process'").

173. *See supra* notes 35–36, 48 and accompanying text (describing the enactment of the Communications Act of 1934 and its later amendment by the deregulation-driven Telecommunications Act of 1996).

174. *See* John Eggerton, *McDowell: BitTorrent Decision is 'Big Problem' For Net Neutrality Rulemaking*, BROADCASTING & CABLE (Apr. 23, 2010, 11:34 AM), http://www.broadcastingcable.com/article/451825-McDowell_BitTorrent_Decision_Is_Big_Problem_For_Net_Neutrality_Rulemaking.php (quoting Commissioner McDowell's position that if the FCC tried to reclassify under Title II, the Commission's decision would "start smelling to a court like arbitrary and capricious" agency action, as there was no change in fact or law to justify such a reclassification (internal quotation marks omitted)).

175. *See, e.g.*, Comments of Verizon and Verizon Wireless at 10, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (2009) (No. 09-191) (contending that "the proposed rules would violate, rather than implement, Congress's statutory directives," with the violation stemming from the nondiscrimination rule imposing "legacy common carrier requirements" on broadband Internet service providers). Verizon and Verizon Wireless noted: "Consistent with the Commission's long history of treating these types of services as unregulated, Congress decided in the 1996 Act that information services should be free from common carrier regulation and created a separate statutory category for these services to ensure that they remain so. The Commission would have no legal or factual basis to reverse course." *Id.*

176. *See* Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. TELECOMM. & HIGH TECH. L. 15, 29 (2006) (explaining that access to a

members promised not to support any competing telegraph company.[177] Thus, by advancing themselves, these powerful monopolies distorted competition among newspapers.[178] Congress, which in 1888 gave the Interstate Commerce Commission the power to regulate telegraph lines and in 1910 declared the telegraph companies to be common carriers, ultimately abolished these discriminatory practices.[179]

Another example of discriminatory practices in the communications field occurred in the early part of the twentieth century when AT&T refused to allow nonaffiliated carriers to connect to its long-distance network in order to push local rivals out of existence.[180] This form of discrimination negatively impacted consumers who wanted to reach people on other telephone networks but could not do so because AT&T withheld the interconnection ability. After attracting the attention of the Justice Department in 1913, AT&T made what is known as the Kingsbury Commitment, in which it agreed to interconnect its long-distance services with independent telephone carriers.[181] Many believe that the loopholes left open in the Kingsbury Commitment led AT&T to solidify its status as a regulated monopoly.[182]

Finally, AT&T's blocking of network attachments offers another story of discriminatory practices in the communications industry. In the 1950s and 1960s, consumers began seeking to connect devices to their telephone lines,

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telegraph network was an obvious advantage for newspapers, which led to the agreement between Western Union and the Associated Press (AP)).

177. *See id.* (describing the AP's action as a "startling promise").

178. *See id.* at 29–30 (quoting historian Paul Starr: "'Western Union had exclusive contracts with the railroads; AP had exclusive contracts with Western Union; and individual newspapers had exclusive contracts with AP. These linkages made it difficult for rival news services to break in'").

179. *See id.* at 30 (explaining common carriage to be an important concept in that it requires "businesses affected with the public interest to offer their services to all without discrimination, at just and reasonable rates, in exchange for certain immunities" (internal quotation marks omitted)).

180. *See id.* at 31 (deeming AT&T's discrimination as less obvious than that of Western Union's but, nonetheless, finding that AT&T effectively used its long-distance network to stamp out the competition).

181. *See id.* at 32 (highlighting that the Kingsbury Commitment was far from perfect, as it prevented AT&T from engaging in long-distance to local discrimination but left open the possibility of other forms of discrimination).

182. *See id.* ("Consequently, as many have documented, the Kingsbury Commitment, along with many other strategies, ultimately lead to AT&T consolidating its position in American telephone service as a regulated monopoly."); *see also* STEVE COLL, THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T 58 (1986) (noting that for thirty years following the Kingsbury Commitment "AT&T slowly transformed itself from an acquisitive monopolist into a steady, regulated utility").

such as answering and fax machines. In 1956, the D.C. Circuit's *Hush-a-Phone*[183] decision found that a telephone subscriber had a "right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."[184] The Commission then underwent a process of deregulating the consumer network, which it completed in 1981. Through this process, the Commission reached its Caterfone principle which allowed users to connect whatever devices they wanted, provided no harm to the network or other users occurred.[185] Indeed, by the time *Computer II* launched in 1981, the Commission had crafted a strong nondiscrimination rule for consumer network equipment.[186]

Thus, the communications field is plagued with monopolies and examples of discriminatory practices. To combat these practices, the founders of U.S. communications law opted to allow private companies to provide general purpose communications services subject to a regulatory requirement of nondiscrimination.[187] For most of the twentieth century, the regime of nondiscrimination continued to dominate communications law. The rise of the Internet, however, led the Commission to finally alter its course. Despite knowledge of the communications field's history, both Congress and the Commission believed that the highly competitive nature of the Internet made it special, and Title II obligations would hinder consumer capabilities rather than help.[188] The petitioners in *Brand X* also recognized this, arguing to the Court that the Ninth Circuit's decision to classify cable modem services as a telecommunications service subject to Title II obligations could stifle investment and profoundly impact the lives of millions across the United States.[189] These potential encumbrances led

183. Hush-a-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956).

184. *Id.* at 269.

185. *In re* Use of the Carterfone Device in Message Toll Tel. Serv., 13 F.C.C. 2d 420, 423 (1968); *see also* Wu, *supra* note 176, at 33 (noting the extended period from 1956 to 1981 that elapsed before the Commission completed the deregulation of consumer network attachments).

186. *See supra* Part I.A.

187. *See* Crawford, *supra* note 14, at 873–74 (noting that the Commission selected this model "having in mind a long tradition of imposing non-discrimination obligations on companies that are involved in the general-purpose transport of communications. As a result, general-purpose communications network law over the last 150 years in this country has assumed the existence of an underlying non-discriminatory network").

188. *See* Justin P. Hedge, *The Decline of Title II Common-Carrier Regulations in the Wake of* Brand X*: Long-Run Success for Consumers, Competition, and the Broadband Internet Market*, 14 COMMLAW CONSPECTUS 427, 461–62 (2006) ("Internet service has been, and will continue to be, a rapidly changing product, and the FCC's Title II deregulation has ensured that consumers will be able to experience the benefits of these changes in an efficient long-term manner without the burden of reactionary regulatory lag.").

189. *See supra* Part I.B.

to deregulation, which subsequently led the United States into a new age of communications law where common carriage is practically extinct.[190]

In this new era, the broad net neutrality nondiscrimination principle that the Commission proposes in its *Net Neutrality NPRM* threatens to swallow the current regime that Congress, the Commission, and the Court have slowly crafted, repositioning communications law back to where it was when monopolies dominated the field. This threat looms even larger after *Comcast*, as the Commission contemplates scratching the use of Title I altogether and reclassifying the Internet under Title II, selectively forbearing from enforcing certain common carrier obligations (but maintaining the nondiscrimination principle).[191] Thus, rather than betray its constant assertions that Title II regulations were not suitable for the Internet and falling back on its archaic regulatory regime—designed for monopolists such as AT&T discussed above—the Commission should seek to revive Title I through congressional guidance and maintain a light touch with Title I by reworking the language of its nondiscrimination principle.[192]

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190. *See* Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1235 (2007) ("Nondiscrimination rules of 'common carriage' dominated communications law for most of the twentieth century. This made sense, because there was a single regulated monopoly network, AT&T, which delivered a fixed set of voice-based services . . . . Technology is now eliminating historical differences between network platforms, as well as blurring the lines between physical networks and the service providers that use those networks."); *see also* Transcript of Oral Argument at 18, *Brand X*, 545 U.S. 967 (2005) (No. 04-277) (quoting Justice Ginsburg who famously asked, "What would be left in the common-carrier category?").

191. *See, e.g.*, Reply Comments of Public Knowledge at 1, 14, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (2009) (No. 09-191) (arguing first, "[t]he FCC must address the legal basis of its authority to promote an open Internet," and then, "[t]he simplest solution . . . is to reclassify broadband Internet access as a Title II service").

192. *See, e.g.*, *Wireline Broadband Order*, 20 FCC Rcd. 14,853, 14,913 (2005) ("Title II obligations have never generally applied to information services, including Internet access services."). Moreover, congressional members from both parties have indicated their desire to provide statutory footing for the Commission. *See* Edward Wyatt, *Congress to Review Communications Law*, N.Y. TIMES, May 25, 2010, at B2 (noting that two top Democratic leaders would begin the process of modernizing the 1996 Telecommunications Act in the wake of the *Comcast* decision and the FCC's announced plan to reclassify broadband Internet services); Cecilia Kang, *FCC's Broadband Plan Provokes Partisan Response*, WASH. POST, May 29, 2010, at A14 (explaining that nearly every Republican member of the House, and many Democrats, wrote letters to Chairman Genachowski urging the agency to leave it to Congress to define and clarify the agency's authority to regulate broadband ISPs); *see also* Neil Fried, Senior Counsel, House Energy and Commerce Committee, Remarks at Looking Forward: Will Congress Establish Broadband Policy? (Oct. 12, 2010) (arguing that Representative Henry Waxman's recent bill and the Democratic push for legislation indicate that both parties agree that reclassification is the worst option).

### *B. Constructing a New Regulatory Framework*

While it is logical to understand the Commission's missteps, the Commission should consider a new framework—one that honors the Telecommunications Act's mandate of regulatory forbearance—as it moves into the new era of communications law. Ultimately, discrimination online is different than discrimination offline.[193] Therefore, while a broader principle of nondiscrimination made sense in the old era of scarcity, in the new age of abundance the Commission should narrow its focus.[194] Thus, this necessary shift in focus should not encompass banning all discrimination since certain forms of online discrimination can be used to benefit users by improving security, improving quality of service, decreasing infrastructure costs, and allocating resources to those who benefit the most from them.[195] Instead, the Commission must adopt a new net neutrality framework that eliminates the broad reach of the current proposed net neutrality nondiscrimination principle. In doing so, the Commission should either rewrite or reinterpret the language of its proposed rule so that the confines of the principle are much narrower and focus on anticompetitive practices rather than all discriminatory practices.

The dichotomy between discrimination and anticompetitive behavior is critical, as the Internet can only function if engineers can discriminate amongst traffic.[196] Thus, "[d]iscriminatory conduct, in the network management context, does not necessarily mean anticompetitive conduct."[197] Other scholars and practitioners have stressed this point,

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193. *See Comcast P2P Order*, 23 FCC Rcd. 13,028, 13,092–93 (2008) (Dissenting Statement of Comm'r McDowell) (differentiating between discrimination online and offline and reminding readers that in order to view online videos without interruption or distortion video bits have to be given priority over other bits).

194. *See* Werbach, *supra* note 190, at 1236 (arguing that interconnection is more important than nondiscrimination); *see also id.* at 1277–78 (arguing that relying on a net neutrality nondiscrimination principle falls short because distinguishing between "benign" and "harmful" discrimination is nearly impossible and the current debate fails to appreciate engineering tradeoffs that will determine the shape of the future broadband Internet).

195. *See* Jon Peha, *The Benefits and Risks of Mandating Network Neutrality, and the Quest for a Balanced Policy*, 1 INT'L J. COMM. 644, 650–52, 664–65 (2007), *available at* http://ijoc.org/ojs/index.php/ijoc/article/view/154/90 (suggesting that discrimination can be used in beneficial ways and that there exists no reason for regulatory intervention). John Peha is currently the FCC's Chief Technologist.

196. *See Net Neutrality NPRM*, 24 FCC Rcd. 13,064, 13,162 (2009) (Statement of Comm'r McDowell, Concurring in Part, Dissenting in Part) (stating that "[d]uring the course of this debate, many have confused the important difference between discriminatory conduct and anticompetitive conduct").

197. *Id.* (stating that "[t]he word 'discriminate' carries with it negative connotations, but to network engineers it means 'network management'").

arguing that advocates engaged in the net neutrality debate appear "guilty of using the term 'discrimination' sloppily."[198] In AT&T's comment to the Commission's *Net Neutrality NPRM*, it both cites to this quotation and suggests that the concept of "nondiscrimination" has essentially become an "empty vessel."[199]

The procompetitive framework that Commissioner McDowell advocates for in the *Net Neutrality NPRM* has strong advantages. It is not all discrimination that the Commission has to fear, but rather anticompetitive, harmful discrimination.[200] Further, beneficial discrimination becomes increasingly important, as consumers continue to reject the dumb pipes theory that once ruled the Internet and instead demand the value and efficiency derived from intelligence inside networks.[201] Both AT&T and Verizon contend that the *Net Neutrality NPRM* utterly fails to address the differentiation between these types of discrimination that are employed on the Internet.[202] Thus, even contesting this argument—as the *Net Neutrality*

198. Statement of Alfred E. Kahn at the FTC Workshop On Broadband Connectivity Competition Policy, at 4 (Feb. 13, 2007), http://www.ftc.gov/opp/workshops/broadband/presentations/kahn.pdf (finding that the definition of nondiscrimination by net neutrality advocates only embraces differences in prices for different qualities of services); *see also* Jonathan Make, *Baker Criticizes 'Tortured Semantics' of Net Neutrality Debate*, COMM. DAILY, Oct. 8, 2010, at 1 (quoting Commissioner Baker criticizing the "wordplay" embedded in the net neutrality debate).

199. *See* Comments of AT&T Inc. at 104, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (asserting that—depending on the precise meaning assigned to the term—nondiscrimination could potentially eliminate entire categories of established and beneficial broadband network practices).

200. *See* Comments of Comcast Corp. at 42, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (noting that a nondiscrimination rule prohibiting unreasonable and anticompetitive discrimination "would better balance concerns about discrimination against the preservation of public interest benefits that will accrue from leveraging innovative technologies and business models to deliver services more effectively, efficiently, and securely").

201. *See Net Neutrality NPRM*, 24 FCC Rcd. at 13,161 (Statement of Comm'r McDowell, Concurring in Part, Dissenting in Part) (referencing a recent joint blog post by the heads of Google and Verizon Wireless that described an agreement to continue to collaborate in order to enhance the consumer experience and keep pace with consumer demands); Eric Schmidt, Chairman & CEO, Google & Lowell McAdam, President & CEO, Verizon Wireless, *Finding Common Ground on an Open Internet*, GOOGLE PUBLIC POLICY BLOG (Oct. 21, 2009, 6:15 PM), http://googlepublicpolicy.blogspot.com/2009/10/finding-common-ground-on-open-internet.html (discussing the agreements between the two companies).

202. *See* Comments of AT&T Inc. at 9, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (expressing worry that the Commission's new proposed rule would cast doubt on the legality of many current and central practices of broadband service providers); Comments of Verizon and Verizon Wireless at 6–7, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (reminding the Commission that it has readily conceded that procompetitive discrimination exists online but failed to distinguish these types of discrimination in its *Net*

*NPRM* recognizes that "the key issue we face is distinguishing socially beneficial discrimination from socially harmful discrimination in a workable manner"—Comcast asserts that this "key issue" was not properly addressed by the Commission.[203] By replacing the nondiscrimination label with a procompetitive label, however, the Commission can create a new framework that does not require treating all packets equally. The new era of communications law can allow for discrimination online. This addition would allow engineers rather than unelected bureaucrats to make engineering decisions, thereby avoiding gridlock.[204] This new framework also differentiates what Title I could be from what Title II is—an unqualified prohibition on discrimination.

Of course, the Commission believed that the net neutrality nondiscrimination principle it crafted in its *Net Neutrality NPRM* under Title I differed from Title II's principle in that under Title I, nondiscrimination is subject to reasonable network management and other enumerated exceptions for law enforcement, public safety, and homeland and national security. The Commission reasoned that these exceptions would both provide for flexibility and protect beneficial discrimination online.[205] However, these exceptions will fail on both accounts.

First, the Commission does not have enough information or data about what reasonable network management actually entails to adequately implement it.[206] Further, corporations could potentially stretch the meaning of "reasonable network management" while they employ anticompetitive practices. Comcast, for example, asserted that it was merely engaging in reasonable network management when it was originally caught blocking BitTorrent.[207] It was not until the Commission launched

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*Neutrality NPRM*).

203. *See* Comments of Comcast Corp. at 37–38, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (contending that although the Commission—and numerous leading engineers and scholars—recognized some discrimination can benefit consumers, it nonetheless created an absolute prohibition on discrimination).

204. *See supra* notes 129–31 and accompanying text; *see also* Comments of Comcast Corp. at 42, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (advocating for a nondiscrimination rule that prohibits only anticompetitive discrimination).

205. *See Net Neutrality NPRM*, 24 FCC Rcd. at 13,106 (concluding that a nondiscrimination rule subject to reasonable network management "would be sufficient to address concerns that a general prohibition on discrimination lacks necessary flexibility").

206. *See id.* at 13,169 (Statement of Comm'r Baker, Concurring in Part, Dissenting in Part) (contending that the Commission "need[s] to know much more about the parameters of reasonable network management before we consider acting").

207. *See Vuze, Inc. Petition, filed*, No. 07–52 (FCC Nov. 14, 2007), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519813947 (calling for the Commission to rule that despite Comcast's claim, the policy statement's exception for reasonable network management does not cover Comcast's conduct).

further investigations that Comcast's story was contradicted and the Commission ruled that Comcast's actions could not be considered reasonable network management.[208] Google stressed the potential abuse to this exception in its comment to the Commission, advocating for a narrow definition of reasonable network practices restricted to "engineering practices legitimately related to network congestion."[209] Thus, although Comcast's first attempt at using reasonable network management to justify its blocking was unsuccessful, Google and other net neutrality advocates fear that subsequent corporations with savvy legal teams will use reasonable network management as a loophole rather than as a halt to the blocking of their applications and programs. Further, in *Comcast*, the D.C. Circuit vacated the Commission's *Comcast P2P Order* on procedural grounds, leaving the substantive questions of the case for another day.[210] Thus, it remains unanswered whether Comcast's blocking indeed constituted reasonable network management—and the FCC Enforcement Bureau's scant record on the matter provides little guidance for future cases. Consequently, reasonable network management cannot adequately prevent anticompetitive practices—its flexible attributes potentially make it *too* flexible, essentially allowing broadband Internet service providers to use this exception to implement anticompetitive practices.

Secondly, while reasonable network management interpreted broadly can leave open the possibility of anticompetitive practices online, interpreted narrowly, reasonable network management threatens to wipe out beneficial discrimination online. Thus, if the Commission adopts

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208. *See supra* notes 110–16 and accompanying text.

209. Comments of Google Inc. at 68, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (insisting that any other approach adopted by the Commission would allow broadband providers to easily abuse the reasonable network management exception). Google suggested three principles for the Commission to employ when evaluating reasonable network management: First, techniques addressing congestion should not become permanent solutions to providers' capacity issues. Second, techniques should be addressed through tailored means, "that is, they should address actual performance and congestion problems in a way that minimizes collateral harm to innovation, competition and consumer choice." Finally, "to be reasonable, [the techniques] must be applied in a neutral and nondiscriminatory manner with respect to the identity of the user and to the affiliation of the content and applications affected." *Id.* at 68–70; *see also* Comments of Public Interest Commenters at 31, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (advocating for the elimination of the phrase "subject to reasonable network management" before each of the codified rules in order to limit the contours of this exception). *But see* Comments of Verizon and Verizon Wireless at 9–10, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (noting the proposed rules would create uncertainty on what is to be deemed reasonable and what is not).

210. *See* Comcast Corp. v. FCC, 600 F.3d 642, 645 (D.C. Cir. 2010) ("We begin—and end—with Comcast's jurisdictional challenge.").

Google's interpretation of reasonable network management as practices only related to network congestion, broadband providers will no longer be able to block child pornography, malicious content, or other bits on the Internet that possess no value, unless it can demonstrate such blocking is solely for the purposes of preventing congestion. Accordingly, as reasonable network management is insufficient to prevent anticompetitive practices, and a complete prohibition of discrimination will eliminate the beneficial discrimination currently existing online, the nondiscrimination framework will not work as currently drafted.[211]

The Commission also believed it created a unique nondiscrimination principle for the specific characteristics of the Internet by adopting a rule resembling unqualified prohibitions on discrimination added to Title II in the 1996 Telecommunications Act rather than the unjust or unreasonable standard provided by § 202(a) of the Act.[212] The Commission defended this approach by suggesting that the unreasonable standard would be repetitive, as those actions deemed just and reasonable would involve either reasonable network management or one of their enumerated exceptions.[213] Google agreed, stating that the "'unjust and unreasonable discrimination' standard" coupled with the reasonable network management exception would result in a "more murky, complex, and likely ineffectual legal standard."[214] Google's premise was that the unjust and unreasonable standard would allow an additional defense for broadband service providers, as a provider could argue that its conduct constituted reasonable network management and then, if this defense failed, could argue that though its actions were discriminatory, given the circumstances its actions were not unreasonable.[215]

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211. Comcast itself argues against the reasonable network management principle, contending in its comment to the Commission that such an unclear exception could stifle innovation. Comments of Comcast Corp. at 42, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191). Comcast quotes Professor David Farber:

> The problem here is everyone talks about reasonable network management, but if you look at it from a technical perspective, someone trying to build new ways of operating networks is going to sit there saying, "I wonder if this new brilliant idea is reasonable or not. And if I go through all the energy of implementing it and testing it, will someone in Washington say that that violates some reasonable network management criteria?"

*Id.*

212. *See generally supra* notes 144–45 and accompanying text.

213. *See id.*

214. Comments of Google Inc. at 62, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (advocating for the nondiscrimination principle the Commission set forth in its *Net Neutrality NPRM* rather than the "'unjust and unreasonable discrimination' standard").

215. *See id.* at 62–63 (contending that such a standard would be overly complex, ambiguous, and only establish new questions regarding the scope of permissibility of

Broadband service providers, of course, disagreed. Verizon lashed out at the "extraordinarily broad" nondiscrimination principle, as it prohibited *all* discrimination, rather than discrimination that was merely "unjust or unreasonable."[216] AT&T, constantly deeming the Commission's new principle a "strict nondiscrimination rule," pointed out that the "unreasonable discrimination standard" provided by § 202(a) was much more flexible.[217] Ironically, the Commission contemplates asserting a less flexible standard on the Internet[218] than it did on monopolists such as AT&T in the earlier part of the twentieth century. Even further, the Commission's reconstruction of Title I prohibits many proconsumer capabilities that Title II permitted.[219] Although upon reclassification § 202(a) could replace the current nondiscrimination framework, the breadth of either the proposed net neutrality nondiscrimination principle or § 202(a) creates a regime designed for monopolists. However, the Internet's underlying competitive forces and unique characteristics demonstrate the necessity for a narrower principle.

### *C. Retiring the Nondiscrimination Framework*

In the *Comcast P2P Order,* Commissioner McDowell dissented, arguing that the Commission was acting under the Title II authority that it had long since removed from information services.[220] Needing to act, the Commission reverted back to Title II, perhaps because it had done so each time it regulated communications services experiencing discrimination in the past.[221] But what happened to the Commission's proclamation in its *Wireline Broadband Order* that "Title II obligations have never generally

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discriminatory practices).

216. Comments of Verizon and Verizon Wireless at 6, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (deeming the principle so "broad" that the proposed rule "would go well beyond proscribing actions that harm competition and therefore injure consumers").

217. Comments of AT&T Inc. at 8, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (arguing that the Commission's new principle is not a nondiscrimination rule in any conventional sense and that a more flexible standard had been applied to telephone monopolists in 1934); *see also supra* Part II.A (explaining the different discriminatory practices employed by monopolists and the resulting communications law policy).

218. *See supra* note 93 and accompanying text (citing Congress's mandate to the Commission "to preserve the vibrant and competitive free market that presently exists for the Internet").

219. *See* Comments of AT&T Inc. at 106, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (finding that because the Commission's proposed rule provides no qualifier allowing discrimination that is "reasonable," it could prohibit many efficient arrangements permitted under Title II).

220. *See supra* text accompanying notes 125–31.

221. *See supra* Part II.A.

applied to information services, *including Internet access services*?"[222] Congress's mandate of regulatory forbearance in the Telecommunications Act of 1996 demonstrates that the Internet is different.[223] The Supreme Court echoed both the difference and importance of broadband Internet services in 2005 when it granted certiorari in *Brand X*.[224] Finally, moving both cable modem services and wireline broadband services out of Title II and into the realm of Title I demonstrates that the Commission—at least at one time—understood the distinctive elements of the Internet as well.[225] The Commission should remember this distinction as it contemplates reclassifying broadband Internet services under its Title II jurisdiction. Although the Commission may impose this authority and then forbear from most obligations, the Commission has in the past rejected such a move, as it would create a presumption in favor of Title II regulation—inconsistent with the deregulatory and procompetitive goals of the Telecommunications Act.[226]

Alas, despite the Court and Congress's calling for regulatory forbearance, when anticompetitive practices are employed, action must be taken. Then-Chairman Martin believed this when the Commission issued the *Comcast P2P Order* and rejected Comcast's contention that regulatory forbearance meant no regulation of the Internet;[227] President Obama

222. *Wireline Broadband Order*, 20 FCC Rcd. 14,853, 14,913 (2005) (emphasis added).

223. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 401(a)(3), 110 Stat. 56, 128 ("[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . . if the Commission determines that . . . forbearance from applying such provisions or regulation is consistent with the public interest.").

224. *See* Petition for Writ of Certiorari at 13–14, 17, *Brand X*, 545 U.S. 967 (2005) (No. 04-277) ("The enormous stakes—not just for the parties, but for the Nation at large—justify review by this Court at this time.").

225. *See supra* text accompanying notes 84–87 (demonstrating how the Commission crafted a minimal regulatory framework for both cable modem services and wireline broadband services by regulating them under Title I rather than Title II of the Act).

226. *See, e.g.*, Reply Comments of AT&T Inc. at 157–58, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (2009) (No. 09-191) (citing the Commission's *Report to Congress*, 13 FCC Rcd. 11,501, 11,529 (1998), where the FCC rejected a "presumption in favor of Title II regulation," as such a presumption would "chill innovation" and frustrate "the deregulatory and procompetitive goals of the 1996 Act"); *see also Third Way NOI*, 25 FCC Rcd. 7866, 7921–22 (2010) (Dissenting Statement of Comm'r McDowell) (quoting various Democrats encouraging the classification of broadband Internet services under Title I, including President Bill Clinton, former FCC Chairman William Kennard, and other House and Senate Democrats).

227. *See supra* note 118 and accompanying text (introducing Comcast's argument that Congress's mandate to the Commission meant the Internet could not be regulated at all and the Commission's quick rejection of this argument, finding it "inconceivable that Congress

believed this in October 2007 when he explained why he is a strong supporter of net neutrality.[228] Even Comcast, in its comment to the *Net Neutrality NPRM*, concedes that the Commission should regulate "*unreasonable and anticompetitive* discrimination."[229] Thus, there is little dispute that action is required to combat anticompetitive discriminatory practices. The question then becomes: what action? Should the Commission retreat down the road it crafted in the early twentieth century by reemploying Title II obligations, or should it take the road less traveled by? Going down a new road is required in this new era of communications law. The terms *anticompetitive conduct* and *discrimination* seem so similar in one sense; however, in another sense discrimination allows for the blocking of viruses, child pornography, and congestion, while anticompetitive conduct consists of blocking consumer applications and leads to what President Obama noted in 2007 as the great compromise of equality that the Internet uniquely offers.[230] These differences are colossal. Therefore, just as Robert Frost did in the 1920s when two roads diverged, the Commission can take the road less traveled by—taking the one labeled procompetitive rather than nondiscrimination. It could make all the difference.

The purpose of this Comment is not to minimize the importance of an open Internet. Instead, it argues that while the potential for harmful discrimination lies ahead, beneficial discrimination actually exists online and can be compromised if its only protections are reasonable network management. Therefore, perhaps it is time to retire the term *nondiscrimination* once and for all, just as the basic transport category has been virtually retired. Title II obligations ended once for a reason: both Congress and the Commission realized the importance of regulatory

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was unaware of or intended to eliminate this regulatory framework given its stated purpose of 'preserv[ing] the vibrant and competitive free market'").

228. *See Sen. Barack Obama Discusses Net Neutrality on MTV*, YOUTUBE (Oct. 29, 2007), http://www.youtube.com/watch?v=Vd8qY6myrrE [hereinafter Obama Speech] (responding to a question by a viewer on whether Obama would "make it a priority in [his] first year of office to reinstate net neutrality as the law of the land" and to "pledge to only appoint FCC Commissioners that support open Internet principles like net neutrality").

229. Comments of Comcast Corp. at 42–43, *Net Neutrality NPRM*, 24 FCC Rcd. 13,064 (No. 09-191) (advocating for a limited focus on unreasonable and anticompetitive discrimination rather than the broad proposal of eliminating all discrimination online, as this narrow focus would provide service providers with the flexibility they need to experiment with different business models, technologies, and network practices, while at the same time, guaranteeing the Commission authority to address situations when broadband ISPs take actions that compromise the Commission's goal of an open, vibrant Internet).

230. *See* Obama Speech, *supra* note 228 (explaining that the best thing about the Internet is that "there's an incredible equality there," which creates a level playing field that in essence has allowed for the creation of Facebook, MySpace, and Google).

forbearance. Reintroducing Title II obligations goes against this forbearance Congress, the Commission, and the Court has championed. In the new communications era neither Title II nor a nondiscrimination principle has a place. Discrimination—despite its negative reputation—is positive online. It is anticompetitive practices that we must fear and regulate in this new era.

## CONCLUSION: UNDERSTANDING THE DICHOTOMY IN THE COMMISSION'S NEXT STEPS

As the Commission assesses the comments and replies it has received in response to both its *Net Neutrality NPRM* and *Third Way NOI*, it is important that the dichotomy between discrimination and anticompetitive conduct be understood and taken seriously. The Commission has consistently asserted its power under Title I of the Act throughout the new communications law era; however, it has struggled to define the precise contours of this power. Those who oppose the removal of Title II have done everything in their power to mold Title I into a mirror image of Title II. Recognizing this manipulation, the D.C. Circuit—although not eliminating it completely—has drastically decreased how far the Commission can go pursuant to Title I. Alas, just as Congress, the Court, and the Commission have recognized the need for the Internet to fall under a new Title of the Telecommunications Act, so too must they realize that this new Title should reflect the unique characteristics of the Internet, rather than the familiar aspects of Title II. As this new Title is challenged, the Commission should turn to Congress for clearer jurisdiction rather than hurriedly imposing Title II obligations on an industry it has consistently deemed inappropriate for such regulations.[231] In the meantime, Title I remains for specific purposes, particularly those outlined in the National Broadband Plan.[232] While the Democratic majority in the Commission provides it with the power to impose whatever principle it wants—under whatever Title it prefers[233]—it is a procompetitive principle under Title I that will carry the

231. *See* David Quinalty, Professional Staff Member, Senate Commerce Committee, Remarks at Looking Forward: Will Congress Establish Broadband Policy? (Oct. 12, 2010) (emphasizing that Congress's inability to reach a consensus in three months over the most contentious communications policy issues in the past couple of years did not indicate that Congress was unwilling or unable to pass legislation in the future).

232. *See supra* note 166 and accompanying text.

233. *But see* Adam Bender, *Prospects Dim for Capitol Hill Deal on Net Neutrality*, COMM. DAILY, Sept. 30, 2010, at 1 (noting House Commerce Committee Ranking Member Joe Barton's (R-Tex.) view that the most recent (failed) attempt by Representative Waxman to reach deal legislation on net neutrality should send a message to Chairman Genachowski not to reclassify Internet broadband services under Title II of the Communications Act).

Internet age and promote Congress's mandate further, not the basic transport idea of nondiscrimination or the old obligations of Title II.

In his statement to the *Net Neutrality NPRM*, Commissioner Copps celebrated the specificity of the NPRM, as it offered the actual language of the proposed rules. Commissioner Copps proclaimed that having such rules would better stimulate discussion and build a meaningful record by giving the public something specific to react to.[234] With the specificity of the *Net Neutrality NPRM* comes the specificity of this Comment's recommendation. As public comments and replies to the *Net Neutrality NPRM* flood in, commentators are finding that opposing parties are coming together rather than pulling apart.[235] The Commission too can reach a compromise—or middle ground—provided that the Commissioners fully grasp the dichotomy that Commissioner McDowell has consistently explained, and refrain from applying "Möbius-strip reasoning." This compromise does not include Chairman Genachowski's "third way." Instead, it represents a "fourth way"—turning to Congress to reestablish jurisdictional footing under Title I of the Act, rather than relying on Title II.[236] Upon receiving congressional authority, the Commission must either rework the language of the net neutrality nondiscrimination principle to a narrower context or accept the language as proposed but adopt a much more stringent interpretation of the language. These options will allow the Commission to give credit to the competitive forces surrounding the Internet that it has long recognized and protect the beneficial discrimination that exists online, while at the same time address and combat harmful and anticompetitive practices if they arise.

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234. *See Net Neutrality NPRM*, 24 FCC Rcd. 13,064, 13,158 (2009) (Statement of Comm'r Copps) (saluting the Chairman for the process he brought to the issue by drafting the actual language of the proposed rules).

235. Traditional foes of the net neutrality debate were progressing toward compromises. For example, Google and Verizon issued joint comments where they agreed and separate comments on where they differed. *Divided Net Neutrality Comments Arrive at Deeply Divided FCC*, WASH. INTERNET DAILY, Jan. 19, 2010 (Lexis). Since filing these comments, Google and Verizon have struck a deal on reclassification, under which Verizon would agree to nondiscriminatory treatment of all traffic on its wireline network and additional transparency on the management of wireless traffic in the hope of providing the bare outlines of legislation that Congress could then take up. *See* Howard Buskirk, Jonathan Make & Adam Bender, *FCC Net Neutrality Talks Collapse in Wake of Google-Verizon Deal*, COMM. DAILY, Aug. 6, 2010, at 1.

236. It is important to note that Chairman Genachowski has publicly stated he welcomes a congressional effort to update the Communications Act. *See Third Way NOI*, 25 FCC Rcd. 7866, 7914 (2010). Representative Waxman's draft legislation of a net neutrality bill faces opposition from House Republicans. At the time of this writing, House Democrats were hopeful for success during the lame duck session. *See* Adam Bender, *House Action on Net Neutrality Would Come After Election*, COMM. DAILY, Sept. 29, 2010, at 1.