NOTE

FCC JURISDICTION OVER ISPS IN PROTOCOL-SPECIFIC BANDWIDTH THROTTLING

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Cite as: Andrew Gioia, *FCC Jurisdiction over ISPs in Protocol-Specific Bandwidth Throttling*, 15 MICH. TELECOMM. TECH. L. REV. 517 (2009), *available at* http://www.mttlr.org/volfifteen/gioia.pdf

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I. INTRODUCTION

Over the past decade, the Internet has matured from its dial-up infancy into the nation's dominant communications infrastructure. Such rapid growth and accessibility—while fostering free speech and innovation like nothing before—has nonetheless created complex regulatory and policy questions for both the Federal Communications Commission (FCC) and the cable companies providing the nation's broadband Internet access. For instance, Comcast, one such Internet provider, has recently brought to the fore the question of how, and to what extent, the FCC can ensure an open and accessible Internet through the company's recent actions in selectively targeting and interfering with the connections of certain peer-to-peer, or P2P, applications.[1]

After the FCC concluded this past summer that such conduct does not constitute reasonable network management,[2] the existence and extent of the FCC's jurisdiction over broadband Internet access was challenged by Comcast in the D.C. Circuit Court of Appeals.[3] The FCC can and must act to address the types of unreasonable discrimination in which ISPs, like Comcast, have engaged if it wants to ensure an open, competitive Internet and guarantee that broadband networks are "operated in a neutral manner,"[4] and the 1996 Telecommunications Act conveniently provides the requisite jurisdictional basis for such action. First, Title I of the 1996 Act confers an alternative basis for the FCC's statutory author-

1. Last September, Comcast challenged the FCC's August order in the D.C. Circuit Court of Appeals, which required Comcast to alter its network management practices, specifically those aimed at restricting BitTorrent connections; that case has not yet been argued as of the time of the writing of this Note. *See* Comcast Corp. v FCC, No. 08-1291 (D.C. Cir. filed Sept. 4, 2008).

2. *In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management", 23 F.C.C.R. 13028 (Aug. 20, 2008) [hereinafter *FCC Report*].

3. *See Comcast Corp.*, No. 08-1291. *See also* Petition for Review and, in the Alternative, Notice of Appeal, Comcast Corp. v. FCC, *petition for review filed*, (D.C. Cir. Sept. 4, 2008), *available at* http://government.zdnet.com/images/network-management-fcc-petition-for-review.pdf (containing a letter and motion requesting review of the FCC's final order and, in the alternative, its request for appeal).

4. *In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C.R. 14986 (Sept. 23, 2005) [hereinafter *Internet Policy Statement*].

ity over broadband Internet providers—namely, its Title I "ancillary" jurisdiction over all wire and radio communication.[5] Second, as Title I requires, the Commission's exercise of that jurisdiction is "reasonably ancillary," or sufficiently related, to advancing congressional goals and policies—specifically, Section 230 of the 1996 Act.[6] Finally, and just as importantly, the Supreme Court has confirmed the FCC's ancillary jurisdiction over innovative technologies like broadband Internet throughout its long history addressing Title I.

II. Technical and Procedural Background

A. *The BitTorrent Protocol*

One of the more recent, and perhaps most prolific, sources of debate in maintaining "net neutrality" has been the BitTorrent protocol, an open-source, peer-to-peer networking protocol (or standard of electronic communication) that allows users to download files from each other. Unlike traditional methods of file sharing, which typically require a direct connection between a user's computer and a central hub, "BitTorrent employs a decentralized distribution model: Each 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."[7] Essentially, BitTorrent allows users to download different portions of the same file while simultaneously uploading parts of that file to other users, taking full advantage of the numerous Internet connections its users establish.[8] Though it was originally popularized by users sharing allegedly unlawful content, new distributors have begun to take commercial—but non-infringing—advantage of the efficiency and speed that the BitTorrent protocol offers as an improved content delivery platform for existing television and video programming.[9]

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5. *See* 47 U.S.C. § 152(a) (2006); United States v. Sw. Cable Co., 392 U.S. 157, 167 (1968) ("*Southwestern*") (affirming Title I's explicit application to "all interstate and foreign communication by wire or radio").

6. The FCC may assert its Title I authority where its exercise is "reasonably ancillary to the effective performance of the Commission's various responsibilities." *Id.* at 178. As will be set out in greater detail below, Section 230 of the 1996 Act, which outlines the FCC's Internet policies, provides responsibilities on which to base such jurisdiction. 47 U.S.C. § 230(b).

7. *FCC Report*, *supra* note 2, at 13029 (internal citations omitted).

8. *See Comcast Blockage of BitTorrent 101*, Free Press, Oct. 23, 2007, *available at* http://www.freepress.net/files/comcast_blocking_factsheet.pdf (containing a detailed description of the BitTorrent protocol).

9. Peter Grant, *Companies Try New Ways to Boost Web Video Quality*, Wall St. J., Oct. 9, 2007, at B10 (discussing the use of torrent technology to transmit high quality video

As a result, many new peer-to-peer applications have posed legitimate competitive threats to companies like Comcast, offering the same high-quality video content which is otherwise available to watch on cable television and directly competing with the similar online video-on-demand ("VOD") services that Comcast itself provides. Over the past year, Comcast has dedicated a large amount of its resources to providing video content delivered through cable television whenever its customers want,[10] and has even begun "incorporating its VOD content online through sites competing directly with BitTorrent protocol sites," such as its online Fancast service.[11]

B. *Comcast's Protocol-Specific Discrimination Policy*

Increasingly, Comcast provides broadband Internet access as well as the types of video content that competitors offer via BitTorrent.[12] This arrangement has predictably led to significant conflicts of interest as Comcast attempts to balance its Internet use policies while bolstering its competitive advantage online. Though all ISPs engage in some form of network management—for instance, placing restrictions on the amount of information that can be transferred at one time and ensuring that all connections are continuous and reliable[13]—Comcast began, in late 2007, to single out BitTorrent, one of the protocols it determined was responsible for a disproportionate amount of network activity.[14] Essentially, when one Comcast Internet user attempts to share a file or communicate with another user, all of the data must pass through Comcast's servers. Under its policy, however, if Comcast determines that the data was sent via BitTorrent and decides to act, each user receives a message "that looks like it comes from the other computer, telling it to stop communicat-

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files). For instance, CBS, Fox, MLB, and the Discovery Channel all currently employ torrent technology.

10. *See, e.g.*, Tim Arango, *Comcast to Expand On-Demand Programming*, INT'L HERALD TRIB., Jan. 8, 2008, *available at* http://www.iht.com/articles/2008/01/08/technology/cable.php.

11. Comments of Free Press, *In re* Petitions of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," and Vuze et al. to Establish Rules Governing Network Management Practices by Broadband Network Operators, WC Docket No. 07-52, CS Docket No. 97-80, at 51, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519841216 [hereinafter *Comments of Free Press*].

12. *See supra* notes 10–11.

13. *FCC Report*, *supra* note 2, at 13029.

14. *See* Peter Svensson, *Comcast Blocks Some Internet Traffic*, WASH. POST, Oct. 19, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html.

ing,"[15] and terminates the connection. Moreover, "Comcast's interference affects all types of content, meaning that, for instance, an independent movie producer who wanted to distribute his work using BitTorrent and his Comcast connection could find that difficult or impossible . . . ."[16]

After a number of tests performed by the Associated Press[17] and the Electronic Frontier Foundation[18] demonstrated that Comcast was indeed "actively interfer[ing] with attempts by some of its high-speed Internet subscribers to share files online" and knowingly "falsifying network traffic,"[19] Comcast admitted that it was discriminately restricting certain types of network activity and, nearly six months later, that its "P2P management [was] triggered . . . regardless of the level of overall network congestion at the time, and regardless of the time of day."[20] As a result, Comcast's customers across the country had up to 40 percent of their BitTorrent-established connections reset.[21]

In light of this, both the newly formed Vuze, Inc., a company providing software to download and view licensed and self-published video content over the BitTorrent protocol, and the media-focused nonprofit organization, Free Press, filed petitions against Comcast requesting a declaration that Comcast had violated the FCC's Internet policies.[22] Vuze and Free Press asked the FCC to adopt a set of reasonable rules that would prevent Comcast and other ISPs from discriminating against particular Internet applications, content, or technologies like that of Vuze.[23] After months of public hearings across the country and in the Senate, culminating in more than 20,000 comments from concerned Comcast users,[24] the FCC issued a final Report and Order on August 20, 2008,

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15. *Id.*
16. *Id.*
17. *Id.*
18. FCC, Reply Comments of the Electronic Frontier Foundation, WC Docket No. 07-52, Feb. 28, 2008, at 2, 9; *see also* PETER ECKERSLEY, FRED VON LOHMANN, & SETH SCHOEN, ELEC. FRONTIER FOUND., PACKET FORGERY BY ISPS: A REPORT ON THE COMCAST AFFAIR, 2 (2007), http://www.eff.org/files/eff_comcast_report2.pdf.
19. Svensson, *supra* note 14.
20. Letter from Kathryn A Zachem, Vice President of Regulatory Affairs, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, at 5 (July 10, 2008).
21. *FCC Report*, *supra* note 2, at 13032.
22. *In re* Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators, No. 07-52 (Nov. 4, 2007), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519813947 (petition for declaratory ruling); *In re* Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," No. 07-52, No. 02-52, (Nov. 1, 2007) *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document= 6519825121 (petition for declaratory ruling).
23. *FCC Report*, *supra* note 2, at 13032–33.
24. *Id.* at 13032.

requiring Comcast to discontinue network blocking and to provide further details about its past and future network policies.[25] Though the issue of the FCC's jurisdiction in regulating Comcast's broadband Internet policies was thoroughly briefed and outlined in the Report, Comcast brought a federal action against the FCC in September 2008, questioning the extent of the FCC's authority and the evidentiary and legal support used to prohibit the type of protocol-specific network throttling that Comcast employed.[26]

III. The FCC Has Title I Jurisdiction over Broadband Internet

A. *Broadband Internet Must Find Regulatory Authority Under Title I*

In general, the FCC's authority to regulate various forms of communications is derived from the Communications Act of 1934,[27] as amended principally by the Telecommunications Act of 1996 (together, the "Act", or "Telecommunications Act").[28] The Act is explicitly applicable to "all interstate and foreign communication by wire or radio,"[29] and it requires the FCC to endeavor to "make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[30] Ultimately, the Act is intended to grant the FCC "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio,"[31] and which is, for this purpose, given sufficiently "broad authority."[32]

Amidst this expansive regulatory context, however, the Act grants authority to the FCC over only three *specific* modes of communication services: interstate common carriers under Title II, spectrum licensees

25. *Id.*

26. *See* David Kravetz, *Comcast Appeals FCC Throttling Order*, Wired Blog Network, Sept. 4, 2008, http://blog.wired.com/27bstroke6/2008/09/comcast-appeali.html (" 'We filed this appeal in order to protect our legal rights and to challenge the basis on which the commission found that Comcast violated federal policy in the absence of pre-existing legally enforceable standards or rules,' [Comcast] said in a statement.").

27. Communications Act of 1934, 47 U.S.C. § 151 (2006).

28. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). In addition to its substantive amendments, the 1996 Act also renumbered the provisions in the 1934 Act. All pre-1996 references to Communications Act provisions in this Note have been edited to their 1996 Act numbering to avoid confusion.

29. 47 U.S.C. § 152.

30. *Id.* § 151.

31. S. Rep. No. 73-781, at 1 (1934).

32. United States v. Sw. Cable Co., 392 U.S. 157, 168 (1968) ("*Southwestern*").

under Title III, and cable operators under Title VI.[33] In defining the types of regulation Title II authorizes, the Supreme Court further divided entities that may be potentially regulated under Title II into two categories, each carrying different levels of FCC regulation: telecommunications carriers and information-service providers.[34]

In essence, "the Act regulates telecommunications carriers, but not information-service providers, as common carriers,"[35] holding them to mandatory statutory requirements and granting the FCC more pervasive regulatory authority over them under Title II of the Act. "Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II,"[36] and, as the FCC concluded and the Supreme Court affirmed, the "integrated nature of Internet access and the high-speed wire used to provide Internet access [confirms] that cable companies providing Internet access are not telecommunications providers," but rather information-service providers over which the FCC must find some other form of jurisdiction, if at all.[37] This two-tiered classification creates the principal difficulty for the FCC in justifying the exercise of its jurisdiction over the Internet and ultimately prompts the FCC to look to Title I for its jurisdictional basis: "[i]f the Internet is not a telecommunications service, i.e., not a common carrier service, then the FCC cannot rely on its Title II powers to make legislative rules or to adjudicate disputes."[38]

Accordingly, the FCC often looks back to Title I and its expansive, general provisions in solving this problem. In elaborating on the extent of Title I jurisdiction, for instance, the Supreme Court first held that Title I consists of a jurisdictional grant squarely in itself; that is, instead of requiring the FCC to find substantive jurisdiction in other areas of the Act, the Court specifically stated that "[n]othing in the language of Section 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms

33. *See* Susan Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 FORDHAM L. REV. 695, 728 (2005). Titles III and VI are irrelevant to broadband Internet in this discussion and are not addressed further in this Note.

34. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 975 (2005).

35. *Id.* at 975–76.

36. *Id.* at 976 (emphasis added).

37. *Id.* at 978; *but cf. id.* at 976 (concluding, with regard to ISPs, "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I *ancillary jurisdiction*," as opposed to Title II (emphasis added)).

38. James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 22–23 (2003).

of communication that are specifically described by the Act's other provisions."[39]

Many of the "necessary and proper clauses" of Titles I and II likewise confirm this understanding: Section 154(i) states that the FCC "may perform *any and all acts*, make such rules and regulations, and issue such orders . . . as *may be necessary* in the execution of its functions;"[40] Section 201 specifies that "[t]he Commission may prescribe such *rules and regulations as may be necessary* in the public interest to carry out the provisions of this [Act];"[41] and Section 303(r) again authorizes the FCC to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out the provisions of this [Act]."[42]

Although the FCC uses Section 154(i)'s "necessary and proper" provision and Title I generally for authority not specifically granted in other titles, some argue that Section 154(i) "is not a grant of legislative authority to the FCC, but rather a grant of housekeeping authority empowering the agency only to set rules of internal procedure."[43] Indeed, on the surface, the section is included in the Act's administrative provisions and those related to the internal workings of the Commission,[44] and, if interpreted to include a general, unrestricted grant of legislative rulemaking authority over all things "communication," Section 154(i) would theoretically render the three aforementioned substantive grants of authority redundant.[45] Yet the Supreme Court has, on multiple occasions, expressly authorized broad Title I ancillary jurisdiction over new forms of communication and the FCC may apply this analysis to broadband Internet as well.

For instance, when dealing with the advent of new, pervasive technologies like cable television in the 1960s, the Supreme Court flatly rejected the argument that Section 154(i) "does not independently confer

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39. United States v. Sw. Cable Co., 392 U.S. 157, 172 (1968) ("*Southwestern*") (extending Title I ancillary jurisdiction to CATV cable television); *see also* United States v. Midwest Video Co., 406 U.S. 649, 670 n.28 (1972) ("*Midwest I*") (holding that other provisions of the Act need not themselves grant the FCC "power for their implementation" because Title I already does so).

40. 47 U.S.C. § 154(i) (2006) (emphasis added).

41. *Id.* § 201 (emphasis added).

42. *Id.* § 303(r) (emphasis added).

43. Speta, *supra* note 38, at 23 (citing Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 517–19 (2002)).

44. For instance, Section 154(a) caps the number of commissioners at five, Section 154(b) lists commissioner qualifications, Section 154(c) grants them five-year term limits, Section 154(d) deals with compensation, and Section 154(g) covers expenditures. 47 U.S.C. § 154(a)–(i).

45. *See* Speta, *supra* note 38, at 24.

regulatory authority upon the Commission, but instead merely prescribes the forms of communication to which the Act's other provisions may separately be made applicable."[46] Rather, the Court routinely defers to the FCC to extend its jurisdiction over major forms of communication not contemplated by Congress in 1934, regulating communications not specifically described by the Act's other provisions under this *direct* grant of "ancillary jurisdiction" under Title I.[47] In other words, as will be discussed *infra*, with regard to emerging information-services like broadband Internet that require Title I jurisdiction, the FCC need only rely on provisions outside of the Title I grant of authority "for the *policies* they state and not for any regulatory power they might confer," because the provisions of Title I themselves provide that regulatory authority.[48]

Ultimately, it is this understanding of the "ancillary to" language, as originally interpreted from Section 152(a) by the Supreme Court, that has consistently grounded its prior grants and restrictions on ancillary jurisdiction.[49] For instance, "ancillary to" was not held by the Supreme Court to simply mean "'necessary to' the furtherance of [the FCC's] other regulatory authority . . . in common carrier, broadcast, or cable regulation" alone.[50] Rather, Title I directly accords the FCC authority over "communications by wire and radio,"[51] with the express conditions that such authority remains both ancillary to, and constrained by, explicit, substantive congressional grants or intentions.[52] Even in *Midwest II*, where the Supreme Court found the FCC's regulations to exceed the bounds of any such congressional intent, the Court fully reaffirmed that

46. United States v. Sw. Cable Co., 392 U.S. 157, 172 (1968) ("*Southwestern*").

47. *See* United States v. Midwest Video Co., 406 U.S. 649, 660 (1972) ("*Midwest I*") ("We hold that § [152(a)] is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act's other provisions governing common carriers and broadcasters apply").

48. *Id.* at 670 n.28 (emphasis added). With regard to information services, the Supreme Court has confirmed the FCC's Title I authority over a host of other services not specifically mentioned in the Act, including satellite services, microwave systems, dark fiber, and cable television. For a list of pre-*Brand X* services that the Court has extended Title I ancillary jurisdiction over, *see In re* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, CS No. 02-52, June 17, 2002, at exhibit D, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513198078, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513198074 [hereinafter *Verizon Comments*].

49. *See Southwestern*, 392 U.S. at 178 ("the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities"). As discussed *infra*, the Supreme Court further elaborated on this authority in FCC v. Midwest Video Corp., 440 U.S. 689, 706–09 (1979) ("*Midwest II*").

50. *See* Speta, *supra* note 38, at 24–25.

51. 47 U.S.C. § 152(a) (2006).

52. *Midwest II*, 440 U.S. at 707–08.

the "various responsibilities" upon which the FCC must base its Title I jurisdiction must be derived from and delimited by "congressional guidance."[53]

Ultimately, with regard to broadband Internet—as will be discussed more fully in Part III.C, *infra*—the FCC and the Court may find explicit congressional intent to regulate Internet service providers like Comcast and their protocol-specific throttling, thereby ensuring an open and competitive market over broadband Internet, within Section 230 of the Telecommunications Act. The following section outlines the history and reasoning behind the Supreme Court's recognition and application of Title I jurisdiction and the development of this general ancillary-to-congressional-intent interpretation.

B. *Courts Have Maintained the FCC's Use of Title I Ancillary Jurisdiction*

1. 1970s—*Southwestern Cable*, *Midwest I*, and *Midwest II*

In a line of cases dealing with the burgeoning cable television technologies in the late 1960s and early 1970s, the Supreme Court resoundingly interpreted the Telecommunications Act to grant the FCC the authority to regulate cable based on the idea that such regulation was "reasonably ancillary" to the Commission's statutory authority over broadcast television.[54] The first such decision was *United States v. Southwestern Cable Co.*, a 1968 case that addressed the issue of whether the FCC could create and enforce rules prohibiting a cable company from importing the "distant signals" of a broadcast company and retransmitting them through its cable system.[55] Midwest Television, the licensee of a broadcasting station in San Diego, complained that Southwestern's cable systems "transmitted the signals of Los Angeles broadcasting stations into the San Diego area, and thereby had . . . adversely affected Midwest's San Diego station."[56] After the FCC found that "cable systems were neither common carriers nor broadcasters, and [therefore] had no primary jurisdiction over them"[57]—and after Congress offered no assistance or approval[58]—the FCC "went ahead with making

53. *Id.* at 708.
54. Crawford, *supra* note 33, at 730.
55. United States v. Sw. Cable Co., 392 U.S. 157, 160–61 (1968) ("*Southwestern*").
56. *Id.* at 160.
57. Crawford, *supra* note 33, at 730–31.
58. *See Southwestern*, 392 U.S. at 171 (regarding the issue of FCC jurisdiction over cable, "the House Committee on Interstate and Foreign Commerce said merely that it did not 'either agree or disagree' with the jurisdictional conclusions of the [FCC] and that 'the question of whether or not . . . the Commission has authority under present law to regulate CATV systems is for the courts to decide.' ").

rules for the cable industry and ordered Southwestern not to expand into areas where it had not been cable casting before."[59]

In finding the Commission's assertion of jurisdiction appropriate, the Court both held that cable television was within Section 152(a)'s broad application to "all interstate and foreign communication by wire or radio"[60] and that the "legislative history indicates that the Commission was given 'regulatory power over all forms of electrical communication . . .' "[61] Perhaps most importantly, the Court stressed that Congress specifically granted this broad authority to the FCC so that it could appropriately handle new technologies as they are developed and accepted:

> Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission . . . that it conferred upon the Commission a "unified jurisdiction" and "broad authority." Thus, "underlying the whole Communications Act is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding *requirement that the administrative process possess sufficient flexibility to adjust itself to these factors*."[62]

Recognizing that Congress, in 1934, acted in a field that was demonstrably "both new and dynamic," and that Congress therefore gave the Commission "a comprehensive mandate" with "expansive powers,"[63] the Court acknowledged that it is the FCC's role to administer wire and radio communications as they develop; otherwise, absent congressional intent to the contrary, it would be prohibiting "administrative action imperative for the achievement of [the] agency's ultimate purposes."[64] Ultimately, instead of listing—or attempting to predict—every form of communication the FCC would be authorized to regulate, Congress realized that the FCC would be in a better position to understand new

59. Crawford, *supra* note 33, at 730–31.

60. *Southwestern*, 392 U.S. at 172.

61. *Id.* (citing S. REP. NO. 73-781, at 1 (1934)).

62. *Id.* at 172–73 (citing FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940)) (internal citations and corrections omitted, emphasis added).

63. Nat'l Broad. Co. v. United States, 319 U.S. 190, 219 (1943).

64. *Southwestern*, 392 U.S. at 177–78 (internal citations and quotations omitted) (citing cases and placing a large emphasis on the inability to show any congressional intent to disallow the FCC to assert rulemaking authority over cable television).

technologies and respond accordingly, and so it appropriately gave the FCC the statutory leeway and deference to do so.[65]

Title I ancillary jurisdiction was further defined and expanded four years later in *United States v. Midwest Video Corp.* ("*Midwest I*"),[66] where the Supreme Court affirmed both the FCC's jurisdiction over cable television and its order that certain cable systems had to originate some of their own programming.[67] After basing its conclusions again on Section 152(a)'s direct grant of jurisdiction, the Court went on to fill in the holes in its jurisprudence, stating that because "[152(a)] does not in and of itself prescribe any objectives for which the Commission's regulatory power over [cable] might properly be exercised," the use of jurisdiction under Title I is only appropriate when "the *Commission* has reasonably concluded that regulatory authority . . . is imperative if it is to perform with appropriate effectiveness certain of its other *responsibilities*."[68] In applying this "regulatory goals" test to the FCC's regulation, the Court found a sufficient goal upon which to base ancillary jurisdiction, as its application to cable systems would "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services."[69]

Effectively, "*Midwest Video I* thus took a giant step beyond *Southwestern* . . . in relaxing the nature of the 'ancillariness' necessary to support an assertion of Commission power."[70] In other words, the FCC can regulate wire or radio communications as long as that authority is ancillary to either continuing the effective regulation of existing responsibilities (such as broadcast regulation) or, more broadly, to one of Congress' explicit policies or to the purposes or goals of those existing responsibilities in the Telecommunications Act (like the enhancement and diversification of local service that the Court in *Midwest I* found[71]).

Though the next case dealing with the issue of ancillary jurisdiction, *FCC v. Midwest Video Corp.* ("*Midwest II*"), rightfully identified some limits on the bases for FCC ancillary authority, it did not question the jurisdiction granted by Title I, the "regulatory goals" test articulated in *Southwestern* and *Midwest I*, or the general deference given to the FCC

65. *Nat'l Broad. Co.*, 319 U.S. at 218–19.

66. *United States v. Midwest Video Co.*, 406 U.S. 649, 649 (1972) ("*Midwest I*").

67. Crawford, *supra* note 33, at 732.

68. *Midwest I*, 406 U.S. at 661 (deriving this second requirement from the Court's reasoning in *Southwestern*, U.S. 392 at 173) (emphasis added).

69. *Id.* at 667–68 (quoting Amendment to pt. 74, subpt. K, of R. & Regs. Relative to Cmty. Antenna Television Sys., 20 F.C.C.2d 201, 202 (1969) (first report and order)).

70. Crawford, *supra* note 33, at 732 (referring to *Midwest I* as *Midwest Video*).

71. *See Midwest I*, 406 U.S. at 668 n.27.

in the absence of congressional intent.[72] *Midwest II* merely applied the same test articulated in *Southwestern* and *Midwest I*, finding instead that Congress *intended* the FCC not to treat cable systems as common carriers and, in that particular case, that Congress had specifically "restricted the Commission's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting."[73] While appropriately recognizing that the "Commission was not delegated unrestrained authority,"[74] the Court did, however, affirm the reasoning and holdings in both *Southwestern* and *Midwest I*,[75] as well as the role that Congressional intent plays in deferring to, supporting, or opposing the FCC in its rules grounded in ancillary jurisdiction.

As stated above, the Court's reasoning in developing and applying the "regulatory goals" test of ancillary jurisdiction was not limited to those relating to the explicit substantive grants in Titles II, III, and VI. While it is true that *Southwestern*, *Midwest I*, and *Midwest II* each dealt with policies related to broadcast television or the encroachment upon the FCC's long-established priority of promoting broadcast,[76] the Court never acknowledged such a subject matter limitation on ancillariness and never stated that it was required to find some policy that was also related to the three specific grants of authority in the Act. Instead, the Court grounded its holdings on congressional intent in general, broadly holding in *Southwestern* that it "may not, 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.' "[77] The Court looked to congressional intent, not specifically congressional intent vis-à-vis Title II, III, or VI subject matter, and because there was no evidence of such congressional intent, the "Commission's authority over 'all interstate . . . communication by wire or radio' permit[ted] the regulation of [cable] systems."[78] Likewise, in *Midwest I*, the Court broadly

72. FCC v. Midwest Video Corp., 440 U.S. 689, 689 (1979) ("*Midwest II*") (concluding that rules requiring the development of a 20-channel capacity for certain cable television systems by 1986, selective access by third parties, and the furnishing of equipment and facilities for access purposes was not a sufficient regulatory goal on which to base Title I ancillary jurisdiction).

73. *Id.* at 707.

74. *Id.* at 706.

75. *Id.* at 706–07 (regarding the "Commission's regulatory effort at issue in *Southwestern* as consistent with the Act because it had been found necessary to ensure the achievement of the Commission's statutory responsibilities . . . [and] to prevent interference with the Commission's work in the broadcasting area. And in *Midwest [I]* the Commission had endeavored to promote long-established goals of broadcasting regulation").

76. *See id.* (acknowledging the broadcast focus in the cable case but referencing the "achievement of the Commission's statutory responsibilities" in general).

77. United States v. Sw. Cable Co., 392 U.S. 157, 177–78 (1968) ("*Southwestern*").

78. *Id.*

concluded that its "duty is at an end when [it] find[s] that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress,"[79] and in *Midwest II*, it struck down a Commission regulation after it found a conflicting, codified congressional intention without any indication that that intention was required to be based in the Act's explicit subject matter grants.[80] Overall, the fact that cable was so closely related to broadcast was irrelevant in the Court's creation of its "regulatory goals" test, and each of these cases only went so far as to require some policy on which to base ancillary jurisdiction, not a policy related to the other three titles.

2. 1980s—The Computer Inquiries

While the Supreme Court was adjudicating these cable cases, the Federal Circuit was considering the extent of FCC jurisdiction over the computer industry. In a series of FCC inquiries and subsequent court proceedings referred to as *Computer I*,[81] *Computer II*,[82] and *Computer III*,[83] the FCC and the courts drew a line "between computer data processing (computers used to direct network operations) and telecommunications (end users using computers to communicate)," creating today's regulatory dichotomy of "enhanced" and "basic" services, or "information" and "telecommunications" services.[84] Because of the substantial data processing component of the former, and the Commission's desire to promote enhanced services by generally discouraging rules and procedures from being "interjected between technology and its marketplace applications," the FCC concluded that enhanced services

79. *United States v. Midwest Video Co.*, 406 U.S. 649, 674 (1972) ("*Midwest I*") (quoting Nat'l Broad. Co. v. United States, 319 U.S. 190, 224 (1943)).

80. *See Midwest II*, 440 U.S. at 706–07.

81. Regulatory & Policy Problems Presented by the Interdependence of Computer and Commc'n Servs. & Facilities, Tentative Decision, 28 F.C.C.2d 291 (1970); Final Decision and Order, 28 F.C.C.2d 267 (1971) [hereinafter *Computer I Inquiry*] *aff'd sub nom.* GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C.2d 293 (1973) ("*Computer I*").

82. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 429 (adopted Apr. 7, 1980) [hereinafter *Computer II Inquiry*]; Computer & Comm'ns Indus. Ass'n v. FCC, 693 F.2d 198, 213 (D.C. Cir. 1982) ("*Computer II*").

83. Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958 (adopted May 15, 1986) [hereinafter *Computer III Inquiry*], *vacated sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990) ("*Computer III*").

84. Crawford, *supra* note 33, at 717.

would not be regulated under Title II,[85] instead opting, again, for Title I ancillary jurisdiction.[86]

Such a conclusion is consistent with the position that the FCC and the courts have taken on innovative communications services since *Southwestern*. In general, the FCC should be given significant leeway in adapting to and regulating emerging telecommunications technologies, and, in contrast to the rigid formalities of Title II common carrier jurisdiction, Title I ancillary jurisdiction is the most effective means of both encouraging that leeway and allowing the FCC to respond to and promote the important market forces central to those technologies. For instance, as the *Computer* inquiries concluded, the "goals under Section [151] [of the Telecommunications Act] of assuring a '[n]ationwide . . . wire and radio communications service with adequate facilities at reasonable charges . . .' will be more effectively promoted by relying upon our ancillary regulatory powers with respect to these emerging services."[87]

Even more pertinent in the justification of Title I jurisdiction, however, is the *Computer II* court's rationale for allowing the FCC to regulate the information-services sector of AT&T, effectively holding that the Commission can regulate those services if it determines that the market is either "not sufficiently competitive," or that there are no "other adequate consumer safeguards, to ensure that consumers receive reasonably nondiscriminatory access to the Internet."[88] The court concluded:

> Instead of regulating enhanced services under Title II, the Commission used its ancillary jurisdiction to impose upon AT&T a structural regulation scheme that requires AT&T to offer enhanced services only through a separate subsidiary. The Commission found that this separation requirement will effectively protect the public interest by limiting the power of AT&T to gain an unfair advantage in the marketplace by cross-subsidizing its competitive services by its monopoly ones. We believe this to be a sufficient basis to support the Commission's decision not to regulate enhanced services under Title II.[89]

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85. *Computer II Inquiry*, *supra* note 82, at 429.

86. *Id.* at 493 (finding that "[E]nhanced services . . . are within our subject matter jurisdiction although that jurisdiction is of the 'reasonably ancillary' type rather than Title II jurisdiction.").

87. *Computer II Inquiry*, *supra* note 82, at 435.

88. Letter from Marvin Ammori, Gen. Counsel of Free Press, to Marlene H. Dortch, Secretary, FCC, Attach. 1 at 33 (June 12, 2008), *available at* http://www.freepress.net/files/FP_et_al_Petition_Ex_Parte_Filing.pdf [hereinafter *Free Press Letter*].

89. Computer & Comm'ns Indus. Ass'n v. FCC, 693 F.2d 198, 211 (D.C. Cir. 1982) ("*Computer II*").

Following this rationale, the court then affirmed the efficiency and responsiveness of the FCC in using its Title I authority over new forms of communications, stating succinctly that "[o]nce the difficulty of isolating activities subject to Title II regulation outweighs the benefits to be gained by that regulation, then the Commission is justified in conserving its energies for more efficacious undertakings, at least when it establishes an alternative regulatory scheme under its ancillary jurisdiction."[90] Emerging communications technologies, like broadband Internet, are prime examples of activities the FCC can regulate far more effectively under Title I.[91]

3. 2000s—*Brand X* and the Broadcast Flag

Finally, and most recently, the Supreme Court and the D.C. Circuit have further defined the extent of ancillary jurisdiction in two other contexts. In *National Cable & Telecommunications Ass'n v. Brand X*, the Supreme Court both reaffirmed the distinction between telecommunications and information-services in the Internet context and granted the FCC the authorization to reasonably determine whether a new communication technology falls under either category.[92] In dealing with broadband Internet services provided by cable companies, the FCC concluded that this service was most akin to information-services, and again the Court deferred to that determination.[93] More importantly, though, "[t]he Court said in dicta that, although 'information-service providers . . . are not subject to mandatory common-carrier regulation under Title II . . . the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction,' and indicated that policies in this 'technical and complex' area should be set by the Commission . . . ."[94] In expanding the authority of the FCC, the Court effectively gave "the Commission complete discretion over what rules should be mandated with respect to 'information-services' (including the Internet), even if those rules are the same as rules applied to common carriers."[95]

That same year, in *American Library Ass'n v. FCC*, the D.C. Circuit also considered Title I jurisdiction in cable television's "broadcast flag"

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90. *Id.*

91. Indeed, the FCC has explicitly held that "Title II obligations are 'mandatory' on common carriers, suggesting certain obligations are permissive on other carriers" and that such subjective, non-mandatory regulation is preferred over those information services. *Free Press Letter*, *supra* note 88, at 33 (internal citations and quotations omitted).

92. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 987–88 (2005).

93. *Id.* at 996–97.

94. Crawford, *supra* note 33, at 737 n.211 (quoting *Brand X*, 545 U.S. 976, 992).

95. *Id.*

context.[96] Broadcast flags are "digital code[s] embedded in a [digital television] broadcasting stream, which prevents digital television reception equipment from redistributing broadcast content" and, most importantly, they "affect[] receiver devices only *after* a broadcast transmission is complete."[97] In addressing whether the FCC had the authority to require digital equipment manufacturers to embed technology capable of receiving these signals, the court plainly held that because such equipment operates after the communicative transmissions—i.e., the digital television broadcast—are sent and complete, the regulation does not regulate the actual transmission of the broadcast and therefore does not involve "communication by wire or radio."[98] After reaffirming the analysis from the cable cases and their two requirements for ancillary jurisdiction—namely, the broad condition that the regulation cover communication by wire or radio and that that regulation remains reasonably ancillary to some congressional goal or statutory responsibility[99]—the court invalidated the FCC's regulation on the *first* prong. The court correctly held that "these [cable] cases leave no doubt that the Commission may not invoke its ancillary jurisdiction under Title I to regulate matters outside of the compass of communications by wire or radio"[100] and the broadcast flags at issue simply did not affect communication at that stage. Therefore, the second "ancillary-to-something" prong was not necessary to address in this case, and, arguably, any analysis of that requirement is dicta.

In contrast, Comcast's protocol discrimination clearly involves "communication by wire or radio"[101] by directly terminating connections over those wires. The sole issue here is whether the FCC can regulate that communication by finding some regulatory goal, congressional policy, or statutory responsibility upon which to base its Title I authority. Because, under these facts, Section 230 of the Telecommunications Act provides the Commission with a reasonable basis to exercise its ancillary authority, the second prong—the only prong at issue here, unlike in *American Library Association*—is satisfied.

C. *Section 230's Internet Policy Advances Goals Sufficient to Satisfy Ancillary Jurisdiction*

As outlined above, while possessing jurisdiction directly under the provisions of Title I, the FCC can assert that authority merely by acting

96. Am. Library Ass'n v. FCC, 406 F.3d 689 (D.C. Cir. 2005).
97. *Id.* at 691 (emphasis in original).
98. *Id.* at 703.
99. *Id.* at 701.
100. *Id.* at 702.
101. 47 U.S.C. § 152 (2006).

in a manner "reasonably ancillary to the effective performance of the Commission's various responsibilities . . . ."[102] In the past, these responsibilities have included "further[ing] the achievement of long-established regulatory goals"[103] in a specific field, serving the public interest,[104] promoting general congressional policies,[105] and enforcing the mandates of Sections 151 and 152 of the Act itself.[106] For instance, peer-to-peer communications, like those created by the BitTorrent protocol over broadband Internet, are undoubtedly a form of "communication by wire"—and an emerging technology requiring a subjective, efficient regulatory response—over which the FCC has clear jurisdiction created in Title I itself. Moreover, if such a conclusion is deemed "reasonable," and absent congressional intent saying otherwise, the Supreme Court will even defer to the FCC in that determination.[107]

Ultimately, as the FCC explained, the "exercise of authority must be 'reasonably ancillary to the effective performance' of the Commission's responsibility for 'something.' "[108] Though that "something" can be found throughout the Act or in other congressional mandates, perhaps the most significant is the national Internet Policy enshrined in Section 230(b),[109] which has been continuously reaffirmed by the Commission since its passage. Although there are numerous other provisions providing adequate goals upon which ancillary jurisdiction can be based,[110] none are more relevant than Congress' own "policies [inscribed] into . . . the

102. United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968) ("*Southwestern*").

103. United States v. Midwest Video Co., 406 U.S. 649, 667–68 (1972) ("*Midwest I*") (internal quotations omitted) (recognizing the goal of "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services" is a valid responsibility).

104. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) (sustaining FCC regulations governing relations between broadcast stations and network organizations for the purpose of preserving the stations' ability to serve the public interest through their programming).

105. *See, e.g.*, *Southwestern*, 392 U.S. at 173–74 (finding the responsibility of "providing a widely dispersed radio and television service [with a] fair, efficient, and equitable distribution" sufficient on which to base Title I authority (footnote and citation omitted)).

106. *See, e.g.*, Computer & Comm'ns Indus. Ass'n v. FCC, 693 F.2d 198, 213 (D.C. Cir. 1982) ("*Computer II*") (finding FCC jurisdiction ancillary to the goals of section [152], requiring the FCC "to assure a nationwide system of wire communications services at reasonable prices").

107. *See Southwestern*, 392 U.S. at 175 (affirming the FCC's jurisdiction over cable television by concluding that "[t]he Commission has *reasonably found* that the achievement of each of these purposes is 'placed in jeopardy by the unregulated explosive growth of CATV' " (emphasis added)).

108. *FCC Report*, *supra* note 2, at 13035.

109. 47 U.S.C. § 230(b) (2006).

110. For instance, in its August 20, 2008 Report, the FCC cited six additional sections of the Communications Act that provide a "regulatory goals" basis for ancillary jurisdiction: §§ 151, 201, 256, 257, 601, 706. *FCC Report*, *supra* note 2, at 13036–37.

Communications Act—the very same Act that established the Commission as the federal agency entrusted with regulating interstate and foreign commerce in communication by wire."[111]

1. Section 230 and the FCC's Internet Policy Statement

The Policy Statement enacted as Section 230 of the Telecommunications Act (and as part of the Communications Decency Act) lays out congressional findings and policies regarding the Internet.[112] After subsection (a) outlines the benefits, history, goals, and technicalities of the Internet, the policies found in subsection (b) include, in pertinent part:

> 1. to promote the continued development of the Internet and other interactive computer services and other interactive media;
>
> 2. to *preserve the vibrant and competitive free market* that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
>
> 3. to encourage the development of technologies which *maximize user control over what information is received* by individuals, families, and schools who use the Internet and other interactive computer services . . . .[113]

These national policies and the FCC's responsibility in overseeing and enforcing them were further recognized in the Commission's Internet Policy Statement,[114] which reaffirmed Section 230(b) and clarified the contours of its policies. For instance, the FCC "instructed providers of broadband Internet access services that 'consumers are entitled to run applications and use services of their choice' and 'to access the lawful Internet content of their choice,' subject to reasonable network management practices."[115] It also restated its commitment to the "duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age."[116] Thus, Section 230(b) provides three different regulatory goals upon which the Commission can base Title I ancillary jurisdiction in preventing protocol discrimination over broadband Internet. Further, the FCC's Internet

111. *Id.* at 13035 (internal quotations omitted).
112. *Free Press Letter*, *supra* note 88, at 25.
113. 47 U.S.C. § 230(b) (2006) (emphasis added).
114. *Internet Policy Statement*, *supra* note 4, at 14986.
115. *FCC Report*, *supra* note 2, at 13034 (citing *Internet Policy Statement*, *supra* note 4, at 14987–88).
116. *Internet Policy Statement, supra* note 4, at 14988.

Policy Statement recognizes and supports those congressional goals and their adequacy in providing Title I jurisdiction, as discussed *infra*.

2. Section 230(b)(2) Provides a Basis for Ancillary Jurisdiction to Ensure Vibrant Online Competitive Markets

Section 230(b)(2) instructs the Commission to ensure that competition in Internet services, content, and applications exists. At the time the Act was passed in 1996, "the competitive free market that 'presently' existed for the Internet . . . consisted of consumers' unfettered access to all online services . . . ."[117] As the opponents to Comcast noted in their petition, peer-to-peer services like those taking advantage of the BitTorrent protocol are the future of online high-definition television; by offering that service alongside broadband Internet access, Comcast has an inherent anticompetitive motive to stifle such content and undermine competition.[118] To ensure true competition in video-on-demand over broadband Internet, the FCC must regulate and prevent companies like Comcast from unfairly exploiting their monopolistic advantage.[119]

Though the provision includes the phrase "unfettered by Federal or State regulation," an interpretation that would remove all FCC jurisdiction would entirely contradict the initial goal of "preserv[ing] the vibrant and competitive free market."[120] When companies like Comcast seek to destroy that competitive market, the only way the Act can provide a remedy is through regulation; and, as the Supreme Court and Federal Circuit have held, the actor best suited for this type of regulation is the FCC. Additionally, Section 230(b)(2) must be read in the context of Section 230(a)'s other findings, noting that the Internet has flourished for the "benefit of all Americans, with a *minimum* of government regulation."[121] Nowhere does Congress "refer to the 'benefit of broadband access providers' or to 'no regulation';"[122] instead, a minimum level of government regulation is necessary and expected to benefit the entire Nation, particularly with regard to the free, open marketplace that Section 230(b)(2)

117. *Free Press Letter*, *supra* note 88, at 26.

118. *See Comments of Free Press*, *supra* note 11, at 34. *See also Verizon Comments*, *supra* note 48, at 18 ("The most innovative broadband applications—streaming video programming and movies on demand—compete with the core monopoly product offered by cable operators.").

119. *Cf.* Computer & Commc'ns Indus. Ass'n v. FCC, 693 F.2d 198, 211 (D.C. Cir. 1982) ("*Computer II*") (allowing the FCC to regulate Internet services if it finds that the market is either not sufficiently competitive or that no other consumer safeguards exist).

120. 47 U.S.C. § 230(b)(2) (2006).

121. *Id.* § 230(a)(4) (emphasis added).

122. *Free Press Letter*, *supra* note 88, at 28.

promotes. At the very least, the Commission can regulate as far as the spirit of this provision allows.[123]

3. Section 230(b)(1) Requires the FCC to Use Title I Jurisdiction in Promoting the Continued Development of the Internet

Section 230(b)(1) seeks to "promote the continued development of the Internet and other interactive computer services and other interactive media,"[124] and likewise must be read in the context of Section 230's congressional findings and goals. For instance, Congress has sought to continue the competitive marketplace of and within broadband Internet;[125] it has determined that the Internet offers "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[126] Further, Congress has increasingly found that "Americans are relying on interactive media for a variety of political, educational, cultural, and *entertainment* services."[127] In this context, the failure to exercise ancillary jurisdiction would fully prevent the continued enjoyment and development of interactive media in providing various services as well as the types of forums the Internet offers. Such diversity has long been a goal of Congress and the FCC,[128] and without this basis, "Comcast would be able to block consumers' access to the diversity of political discourse available on [Internet-based content providers], such as Democracy Now!, PBS, ABC, and other political and religious outlets who rely on the inexpensive distribution methods" like BitTorrent.[129]

4. Section 230(b)(3) Requires the FCC to Maximize Internet Users' Ability to Control the Information They Receive

Congress announced a federal policy in Section 230(b)(3) to encourage the development of Internet-based technologies that maximize users' control over what information they receive. Again, this policy is quite relevant in Comcast's BitTorrent throttling, which seeks the exact opposite: to remove its users' input, preferences, and control over the types of video content and other media they seek. Ancillary jurisdiction under Title I is necessary to prevent Comcast and other broadband Internet

123. *Id.*
124. 47 U.S.C. § 230(b)(1).
125. *Id.* § 230(b)(3).
126. *Id.* § 230(a)(3).
127. *Id.* § 230(a)(4) (emphasis added).
128. *See, e.g.*, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (reaffirming the FCC's goal of diversity in finding a "diversity index" used by the Commission to weigh cross-ownership of radio, television and newspapers employed several "irrational assumptions and inconsistencies").
129. *Free Press Letter*, *supra* note 88, at 30–31.

providers from blocking or degrading particular applications used to provide particular content—policies which do not maximize user control.[130]

Overall, the Internet policies enacted by Congress in Section 230, and their approval and reinforcement in the FCC's Internet Policy Statement, provide the requisite "regulatory goals," congressional intent, and statutory basis upon which to base Title I ancillary jurisdiction.[131] Congress clearly intended, as evident in its findings and policymaking, to foster the open, competitive exchange and free market that the Internet continues to offer. Therefore, regulation over broadband Internet, under Title I, to remedy both an ISP's discriminatory access and promote competition online, is proper.

While critics charge that the FCC's use of Section 230 will enable it to regulate any aspect of the Internet that it wishes,[132] the limited policies outlined in the provision, when read in light of the Supreme Court's "regulatory goals" test for ancillary jurisdiction, appropriately restrict any FCC regulation of broadband Internet to those specific goals outlined in Section 230. The medium is not open for unfettered regulation simply because the provision's subject matter includes the Internet, and such an interpretation of the FCC's Comcast Report is similarly misguided. In this instance, the Commission may regulate Comcast's network throttling because such regulation is ancillary to the congressional policies of ensuring a competitive market, promoting the continued development of the Internet, and allowing users to control the information they receive with the applications they chose. However, nothing in section 230 suggests that the FCC can regulate an ISP's *reasonable* network management practices.

5. The History of Section 230 in the Communications Decency Act Does Not Minimize Its Role as a Basis for Ancillary Jurisdiction

Admittedly, Section 230 was passed as part of the Communications Decency Act ("CDA") or Title V of the 1996 Telecommunications Act—a law whose primary purposes were to regulate indecency and obscenity on the Internet and to provide immunity for operators of Internet services regarding the potentially defamatory or obscene speech of their users.[133] In this context, the provision forbids any treatment of such inter-

130. *Id.* at 25.

131. *See Internet Policy Statement*, *supra* note 4.

132. *FCC Report*, *supra* note 2, at 13090 (Comm'r McDowell, dissenting) ("Under the analysis set forth in the order, the Commission apparently can do anything so long as it frames its actions in terms of promoting the Internet or broadband deployment.").

133. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (reviewing the history and intent of Section 230 of the 1996 Act).

active computer service providers as publishers, and removes any liability as long as they attempt to screen offensive material in good faith.[134] While the policies and findings of Section 230 speak to broad goals for the Internet, such as maintaining a competitive market, some have argued that this language has only meant that "walled gardens like the former AOL ('online service providers,' in the language of Section 230) that provide content as well as Internet access, or content providers generally (in the language of the cases under Section 230) should not be treated like publishers. Congress wanted to avoid making companies like AOL or eBay liable for every posting of their users," and the intent of Section 230 was merely to foster such competition by preventing the myriad lawsuits that would predictably beleaguer these services if they were treated as publishers.[135]

Though this argument certainly has merit, and while it is likewise fair to conclude that "Section 230 itself had nothing to do with whether telephone companies or cable companies providing access to the Internet should or should not be burdened with nondiscrimination requirements,"[136] the plain meaning of the statute—alongside Congress' unwillingness to restrict its statutory grants and policies solely to the technologies that existed at the time—provide more than adequate justification for the FCC's use of Section 230 as a foundation for ancillary jurisdiction in this context.

First, nowhere does Section 230, or any provision of the Telecommunications Act, restrict the Act's Internet policies to the domain of "Internet publisher liability" or specifically prevent the FCC from implementing nondiscrimination policies. The statute plainly outlines a series of general findings and furthers them with five specific goals, only two of which specifically relate to obscenity or the other stated purposes of the CDA.[137] On its face, then, Section 230 provides the only source of congressional Internet policies in the entire Act. Not only does it also fail to restrict those policies to the Internet publisher context, but it would be improper to conclude that simply because Congress' Internet policies happened to be included in a section entitled "Protection for Private Blocking and Screening of Offensive Material"[138] that such broad, sweeping policies were entirely limited to providing ancillary jurisdiction for the FCC's

134. 47 U.S.C. § 230(c) (2006).

135. Susan Crawford, *Transporting Communications*, 89 B.U. L. REV. (forthcoming 2009) (manuscript at 37 n.120, on file with author).

136. *Id.*

137. *See* 47 U.S.C. § 230(b)(4) (encouraging "blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material"); *id.* § 230(b)(5) ("ensur[ing] vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer").

138. *Id.* § 230.

narrow responsibility of protecting content providers from defamation liability.

Second, and more importantly, throughout the Supreme Court's history with ancillary jurisdiction, it has consistently held that Congress did not intend to freeze the Act in time and prevent the FCC from expanding its regulatory goals to other appropriate technologies through Title I.[139] Instead, by allowing the FCC to regulate new technologies like cable television[140] and information-services[141] through its ancillary authority, the Supreme Court acknowledged the broad principles of FCC-deference and the extension of existing statutory goals and language to new areas and contexts in the Act. In this context, it would be improper to find that Congress somehow restricted its Internet policy goals in Section 230 to one specific circumstance—ISP publisher liability—while at the same time left its other policy goals and statutory grants of authority open to new applications through Title I. More specifically, if Congress allowed the FCC to regulate cable television under the umbrella of broadcast television goals, then it seems unreasonable that Congress would prohibit the FCC from regulating protocol discrimination over broadband Internet while allowing it to regulate the types of defamation claims actionable against content providers over that same broadband Internet.

Moreover, Section 230's specific goals of improving competition and the development of applications and services are acutely applicable in both the Internet publisher context and the bandwidth throttling context. By removing the virtually endless litigation that would ensue if content providers were open to defamation suits based on the content their users provide, Section 230 appropriately encourages the growth of the Internet and competition among such providers.[142] Likewise, by eliminating the types of anticompetitive behavior Comcast sought to introduce with its protocol throttling, jurisdiction based on Section 230 would similarly ensure that the Internet remains both a hotbed for development and a competitive environment by removing barriers to entry and success.

As outlined above, any application of statutory policy goals—like those found in Section 230—as a basis for Title I ancillary jurisdiction must be specifically limited to those stated "regulatory goals" and

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139. *See supra* Part III.B.1; United States v. Sw. Cable Co., 392 U.S. 157, 177–78 (1968) ("*Southwestern*") (noting Congress' "recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors").

140. *See Southwestern*, 392 U.S. at 157; United States v. Midwest Video Corp., 406 U.S. 649 (1972) ("*Midwest I*"); FCC v. Midwest Video Corp., 440 U.S. 689 (1979) ("*Midwest II*").

141. *See Verizon Comments*, at exhibit D, *supra* note 48.

142. *See* Crawford, *supra* note 33, at 704–05.

implicit congressional intent.[143] This appropriate limitation underpinning any proposed FCC regulation under Title I prevents the Commission from broadly regulating *anything* related to the Internet under the auspices of Section 230's Internet policies—a fact that the FCC Report does not recognize in its broad statement of authority[144] and a concern Commissioner McDowell appropriately notes in his dissenting opinion.[145] However, Section 230 certainly applies to the FCC's regulation of an ISP's protocol-specific bandwidth throttling, as it violates the specific regulatory goals of promoting competition (like that between Comcast and Vuze), encouraging application and service development (such as the use and advancement of the BitTorrent protocol in delivering higher quality video content), and promoting consumer choice in how those consumers wish to receive content (such as providing a delivery service other than Comcast's Fancast). Comcast argues that the FCC "cannot exercise jurisdiction over its interference with peer-to-peer TCP connections . . . because such authority must be 'ancillary' to something, but here it is not clear what that something might be."[146] Again, however, Section 230 lays out five specific, narrow policy goals that define exactly what that "something" is and appropriately limit the FCC's use of Title I over the Internet.

IV. Conclusion

While the Internet has enjoyed a history of deregulation—and rightly so—nothing in the Telecommunications Act prevents the FCC from exercising its ancillary jurisdiction over unreasonable broadband Internet protocol throttling. The Supreme Court held that Title I provides a direct grant of authority, and that the FCC may exercise that authority as long as it grounds it in some stated congressional policy or goal, regardless of whether that goal is related to one of the Act's three specific grants of statutory authority. Though Section 230 of the Telecommunications Act was passed in the Communications Decency Act, the provision's plain language, inclusion in the Telecommunication Act, and the Supreme Court's policy of FCC deference regarding new technologies all weigh against the notion that Section 230 should be limited to the specific context of content publisher liability. Overall, Section 230 outlines specific policies upon which ancillary jurisdiction over an Internet Service Provider's discriminatory throttling of one specific, popular, and

143. *See supra* note 68 and accompanying text.
144. *See FCC Report*, *supra* note 2, at 13033.
145. *See id.* at 13090.
146. *Id.* at 13035.

developing protocol can reasonably be based, and in this context the FCC can, and must, act if it seeks to fully promote those policies of competition and development over broadband Internet.