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The Case for Title II: Handicapping the Next Network Neutrality Judicial Ruling

Mark Cooper
Fordham University

THE CASE FOR TITLE II

HANDICAPPING THE NEXT NETWORK NEUTRALITY JUDICIAL RULING

If the decision evaluates current technological, economic, and legal conditions and considers the implications for universal service, access for persons with disabilities, privacy, public safety, consumer protection, and nondiscrimination,

CABLE AND TELEPHONE COMPANIES WILL LOSE.

MARK COOPER

Director of Research, Consumer Federation of America
Fellow, Silicon Flatiron, University of Colorado
Fellow, Donald McGannon Center of Communications Research, Fordham University

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The Continuing Donnybrook over Communications Act Principles

For exactly a century telecommunications companies in the U. S. have been explicitly obligated by the law to operate their networks in a nondiscriminatory manner.[1] For three quarters of a century the goal of universal service[2] has been combined with the principle of nondiscrimination in communications to ensure access for all people of the United States to the evolving communications network. The Federal Communications Commission (FCC) extended these principles to data transmission four decades ago[3] and created the policy platform on which the Internet developed into an extraordinarily consumer, innovation and citizen friendly communications environment.

Telecommunication companies resisted these policies at every turn. [4] Notwithstanding the prodigious efforts of the communications companies to eliminate their public interest obligations, until this year they had failed. The recent ruling by the Court of Appeals for the District of Columbia[5] could rob the FCC of the authority to prevent discrimination and to promote universal service and access to telecommunications for people with disabilities, as well as implement policies to protect consumers, privacy and public safety.

These comments provide a view of the background and context for these momentous decisions from the perspective of a public interest group that has participated in the process from the moment that the Internet became a mass-market phenomenon. With extensive involvement in universal service policy after the break up of AT&T,[6] the consumer movement became involved in Internet policy in the late 1980s,[7] when the Internet moved out of the universities and national laboratories and began to penetrate into society at large. Based on the belief that ubiquitous, open communications networks are vital for both commerce and democratic discourse,[8] the Consumer Federation of America, fought against telephone and cable company[9]

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[1] Mann-Elkins Act, ch. 309, 36 Stat. 539, June 18, 1910

[2] Title 47 of the United States Code, 47 U.S.C. § 151et seq.

[3] See e.g. *Computer I Final Decisions,* 28n FCC 2d (1971); *Computer II Final Decision* 77 FCC2d (1980).

[4] Mark Cooper, *Open Architecture as Communications Policy* (Stanford Law School, Center for Internet and Society: 2004).

[5] *Comcast Corp. v. FCC,* 600 F. #d 642(D.C. Cir. 2010)

[6] An early example is Mark Cooper, "In the Matter of the Petition of the State of Michigan Concerning the Effects of Certain Federal Decisions on Local Telephone Service on Behalf of the Consumer Energy Council of America" before the Federal Communications Commission, CC Docket No. 83-788, September 26, 1983

[7] Early examples include: Mark Cooper, *Expanding the Information Age for the 1990s: A Pragmatic Consumer Analysis*, (Washington, D.C.: Consumer Federation of America and American Association of Retired Persons, January 11, 1990); *Developing the Information Age in the 1990s: A Pragmatic Consumer View* (Washington, D. C.: Consumer Federation of America, June 8, 1992; *The Meaning of the Word Infrastructure* (Washington, D. C.: Consumer Federation of America, June 30, 1994).

[8] Mark Cooper, "The Role Of Technology And Public Policy In Preserving An Open Broadband Internet," *The Policy Implications Of End-To-End*, Stanford Law School, December 1, 2000; "Open Access To The Broadband Internet: Technical And Economic Discrimination In Closed, Proprietary Networks," *University of Colorado Law Review*, Vol. 69, Fall 2000; "Open Communications Platforms: They Physical Infrastructure as the Bedrock of Innovation and Democratic Discourse in the Internet Age, *Journal on High Technology Law,* 2(1) , 2003; "The Importance of Open Networks in Sustaining the Digital Revolution," in Thomas M. Lenard and Randolph J. May (Eds.) *Net Neutrality or Net Neutering* (New York, Springer, 2006)

efforts to undermine the remarkably successful cornerstones of communications policy in the U.S.

The threat to these Communications Act principles arises from an esoteric point of law, a decision by the FCC in 2002 to classify high-speed data transmission (broadband Internet access service)[10] as an information service under Title I, rather than a telecommunications service under Title II. By changing the classification the FCC removes the service from Title II and Title II oversight, where virtually all the authority to pursue the goals of the Communications Act is located, as suggested by Exhibit 1.

The FCC did not intend to undercut its authority to implement these fundamental principles of the Communications Act and it repeatedly asserted that it could continue to implement these policies by exercising authority that is "ancillary" to its general authority under Title I. As suggested by Exhibit 2, the exact status of FCC authority has been unsettled for a decade. The recent Appeals Court ruling strongly suggests that it cannot easily exercise "ancillary" authority. Hence, the loss of authority will be an unintended consequence of the 2002 classification decision, radically transforming the essence of communications policy in the U.S. by administrative fiat.

The error is correctible. The classification of mass market, high-speed data transmission as an information service was twice rejected at the Appeals Court level.[11] The Supreme Court reversed by a narrow margin (6-3)[12] based on an equally esoteric theory of administrative law. The agency was "just barely"[13] allowed to exercise discretion in interpreting the law, based on the principle that if the law is ambiguous the courts must defer to agency expertise. Dissenting Justice Scalia called the decision "a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions… reasoning mocks the principle that the statute constrains the agency in any meaningful."[14]

Hundreds of thousands of words will be thrown at these esoteric points of law, but the bottom line question for consumers and citizens is straightforward.

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[9] Early examples include, "Reply Comments Of The Consumer Federation Of America And Consumers Union," before The Federal Communications Commission. In The Matter Of Deployment Of Wireline Services Offering Advanced Telecommunications Capability, Etc., CC Docket Nos. 98-147, 98-11 98-26, 98-32, 98-78, 98-91, CCB/CPD Docket N. 98-15 RM 9244, October 16, 1998. "Petition to Deny of Consumers Union, Consumer Federation of America and Office of Communications, Inc. of the United Church of Christ," *In the Matter of Joint Application of AT&T Corporation and Tele-Communications, Inc. for Approval of a Transfer of Control of Commission Licenses and Authorizations,* CS Docket No. 98-178, October 29, 1998;

[10] High-speed data transmission is the issue. We call it mass market, high speed data transmission to draw attention to the fact that this service was provided to the enterprise market for decades. Cable modem service provided high-speed data transmission broadly to the mss or consumer market.

[11] *AT&T Corp. v City of Portland,* 216F.3d(9th Cir.2000); *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* S. Ct. 2688 (2005),

[12] *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* S. Ct. 2688 (2005), Brand X

[13] Id., Breyer Concurring, p. 1.

[14] Id., Scalia, dissenting, p. 11.

Will communications policy have the tools necessary to actively pursue deployment of a ubiquitous communications network that is accessible and affordable for all people of the United States and operated in a manner that protects consumers, privacy and public safety, or will the availability and operation of the network be determined solely by the economic interests of the companies that own the networks?

The Need for Swift Action to Restore the Authority to Implement the Public Interest Principles of the Communications Act

The FCC has reacted swiftly and appropriately in sounding the alarm.[15] Its analysis in the National Broadband Plan had already demonstrated that the goals of the Communications Act in the broadband era have not been achieved. It concluded that a host of policies is necessary to make progress toward those goals. It now fears that the recent court decision will strip the FCC of the authority to needed to implement those policies.

These brief comments provide a view of the background and context for these momentous decisions from the perspective of a public interest group that has participated in the process from the moment that the Internet became a mass-market phenomenon. These comments show that the 2002 FCC decision to classify mass market, high-speed data transmission as an information service was premature, based on a very short period of experience with the service. The technological and economic assumptions on which the information service classification rested no longer apply, if ever they did (as summarized in Exhibit 3). Thus, what might have looked like an ambiguous situation in 2000-2002 has now become much clearer on legal, policy, technology and economic grounds (as summarized in Exhibit 4). Both of the orders that classified mass market, high-speed data transmission service presumed that the FCC had adequate authority,[16] ancillary to it general authority under Title I of the Act to implement the policies necessary to carry out the purposes of the Act, an assumption that has been called into question by the recent court ruling. Both orders affirmed that policy was necessary,[17] although they devoted almost no attention to those policies.

Compelled to reexamine the classification decision today as a result of the D.C. Appeals Court ruling, the only responsible thing for the FCC to do is to classify mass market, high-speed data transmission as a telecommunications service subject to Title II. We believe the Courts will be compelled to uphold such a decision because it is consistent with the law and policy of the Communications Act and the current state of the technology and economics of mass market, high-speed data transmission (as summarized in Exhibit 5). There is no ambiguity that would

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[15] Federal Communication Commission, *Notice of Inquiry, In Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, June 17, 2010, hereafter NOI. The Notice of Inquiry was adopted one day short of the 100th anniversary of the Mann-Elkins Act, which first subjected the telephone company to federal oversight.

[16] Federal Communication Commission, *Declaratory Ruling and Notice of Proposed Rulemaking,* 17 FCC Rcd 4798, 2002, (Cable Modem Order); para, 75-81;*Report and Order and Notice of Proposed Rulemaking,* 20 FCC Rcd 14853, 2005, Wireline broadband Order) paras. 61-77.

[17] Federal Communication Commission, *Declaratory Ruling and Notice of Proposed Rulemaking,* 17 FCC Rcd 4798, 2002, (Cable Modem Order); para, 108, 110, 111;*Report and Order and Notice of Proposed Rulemaking,* 20 FCC Rcd 14853, 2005, Wireline broadband Order) paras. 61-77.

afford the Commission the discretion to adopt a definition that guts the public policy Congress clearly intended to guide the communications network.

The vigorous efforts by the network owners to prevent the FCC from conducting a thorough examination (pressing Congress and the White House to intervene to stop it) attests to the fatal flaws and weaknesses in the classification of mass market, high-speed data transmission as an information service.

The Unsettled Legal Status of Mass Market, High-Speed Data Transmission

As shown in Exhibit 1, the classification of mass market, high-speed data transmission (broadband Internet access) service as an information service, regulated under Title I of the Communications Act of 1934, has major implications for public policy because most of the authority to implement the public interest principles that govern Communications Act policy are located in Titles II and III of the Act. The authority to promote universal service, access for persons with disabilities, public safety, privacy, consumer protection and nondiscriminatory access, are all specified in Titles II and III of the Act. They are tied to the provision of telecommunications services by common carriers or the holding of an FCC issued license to use the spectrum for radio communications. By defining mass market, high-speed data transmission as a Title I information service, the ability of the FCC to use the Title II and Title III powers is called into question, as was made abundantly clear by a recent decisions by the Court of Appeals for the District of Columbia.

The statute did not compel this classification; the FCC used its discretion to choose it and the Supreme Court upheld it, "just barely." In fact, as shown in Exhibit 2, the classification of mass market, high-speed data transmission service has been up in the air for over a decade. Until the most recent court ruling, the authority to implement policy was affirmed by the lower courts or assumed by the FCC.

The issue was first litigated before the Ninth Circuit Court of Appeals in 1999, in Portland v. AT&T, when Portland attempted to impose conditions of nondiscrimination on cable modem service. The court concluded that the underlying service was a telecommunications service that should be subject to the nondiscrimination provisions of the Act.

Later that year, the Federal Trade Commission imposed open access requirements on Time Warner as a condition of approving the AOL-Time Warner merger, affirming the problem of bottleneck access providers.

In 2002, the FCC issued it Cable Modem declaratory ruling, which declared mass market, high-speed data transmission an information service, in contradiction to the Ninth Circuit decision.

Brand X, a small, non-facilities based Internet Service Provider (ISP), appealed the decision to the Ninth Circuit, which affirmed its earlier conclusion that high-speed data transmission is a telecommunications component of the service.

While the Supreme Court review of Brand X was pending, the FCC engaged in two acts that seemed intended to quiet fears that classifying high-speed data transmission would undermine the principle of nondiscrimination in telecommunications.

First, Chairman Michael Powell, a vigorous defender of the information service classification, declared that there were four Internet freedoms that should be preserved. These were later turned into a policy statement of the Commission and were proposed as part of a new Open Internet rule. Second, the FCC brought an enforcement action against a small telephone company for blocking Voice over Internet Protocol, an Internet application that competed with its voice service. In the consent decree, Title II authority was invoked twice – section 201 (a) in the introduction and section 208, in the body of the consent decree.[18] In other words, three weeks before the oral argument in the Brand X case and less than four months before the ruling, the FCC was using its Title II authority to prevent undue discrimination in access to the telecommunications network. Two years later, the FCC found a cable operator had violated the nondiscrimination policy of the Commission.[19]

The Narrow Margin of a Decision with Broad Implications

The reversal of the Ninth Circuit ruling was an even closer call than the vote count indicates. In his concurrence Justice Breyer emphasized the closeness of the decision saying, "I join the Court's opinion because I believe that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority – though perhaps just barely."[20] The dialogue between the Justices foreshadowed the controversy that continues to this day.

While defending agency discretion, Justice Breyer went on to point out that agency discretion might not apply in cases where "Congress may have intended not to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say where an unusually basic legal question is at issue."[21] In a second concurrence Justice Steven pointed out that overturning an Appeals Court for second-guessing the agency "would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity."[22] Substance trumps process. If the Supreme Court's interpretation of a law clears up the ambiguity in a way that supported the Appeal court, it would not be bound to overturn the Appeals Court on procedural grounds. The nature of the underlying law and the nature and the extent of the ambiguity are critical considerations.

Scalia's dissent argued the substance and reached a conclusion that supported the Ninth Circuit. "After all is said and done, after all the regulatory cant has been translated, and the smoke of agency expertise blown away, it remains perfectly clear that someone who sells cable-

[18] *Madison, River Order,* 20 FCC Rcd 4295.
[19] *Comcast Network Management Practices Order,* 23 FCC Rcd at 13033.
[20] Brand X, Breyer, Concurring, p. 1.
[21] *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* S. Ct. 2688 (2005), Breyer, p. 3.
[22] Id., Stevens Concurring, p. 1.

modem service is "offering" telecommunications. For that simple reason, I would affirm the Court of Appeals."[23]

Most telling, however, was the exchange between Scalia and Thomas, first at oral argument and then in Scalia's dissent, about Title I authority. Scalia took special issue with the suggestion by the FCC and the majority that Title I authority could be used to replace the Title II authority that had been abandoned with the decision to classify the service as a Title I service.

> In other words, what the Commission hath given, the Commission may well take away – unless it doesn't. This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions. The main source of the Commission's regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance by concluding that the definition of "telecommunications service" is ambiguous and does not (in its current view) apply to cable-modem service. It contemplates, however, altering that (unnecessary) outcome, not by changing the law (i.e. its construction of the Title II definitions), but by reserving the right to change the facts. Under its undefined and sparingly used "ancillary" powers, the Commission might conclude that it can order cable companies to "unbundle" the telecommunications component of cable-modem service. And presto, Title II will then apply to them, because they will finally be "offering" telecommunications service! Of course, the Commission will still have the statutory power to forbear from regulating them under section 160 (which it has already tentatively concluded it would do). Such Mobiius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way.[24]

- Given this legal and regulatory history, there should be little surprise that the decision is back before the agency, the Congress and likely the courts.
- Given this history, if the agency believes it needs authority to implement policies to achieve the goals of the Communications Act embodied in Titles II and III, it would be foolish to think a Title I gambit will work.
- Given this history, the Commission should reject the suggestion by several of the network operators[25] that the Commission cobble together the authority to implement the public interest principles by interpreting various sections of the Act in creative and aggressive ways.[26]

Attempting to patch together Title I authority to cover the diverse goals of the Act will be disastrous. Not only has the D.C. Appeals Court raised considerable doubt about this approach,

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[23] Id. Scalia dissenting, p. 11.

[24] Id., pp. 10-11.

[25] These are the same parties who are appalled when it is suggested that the Commission be creative and aggressive in interpreting its Title I authority when it comes to nondiscrimination. These are the same parties who were adamantly opposed to imposing obligations under Title I in pursuit of the other goals of the Act, until the recent D.C. Circuit ruling compelled the Commission to revisit the classification decision.

[26] NOI, paras. 34-38.

but under the ruling most of the argument that would have to be made for exercising the ancillary authority under Title I would have to be made for a Title II or Title III classification. If the Commission can make the case that it needs the authority, which we believe it can, it should defend the Title II and Title III classification. Moreover, trying to justify each of the principles separately invites a lowest common denominator attack, which will demand that consistency require the Commission to impose the lowest level of authority that can be justified for any of the principles.

The Technology and Economics Indicate that Transmission and Applications are not "Inextricably Intertwined"

The Title I information service classification was reached by the agency based on a hearing record that was largely completed in 2000, just four years after the passage of the Telecommunications Act of 1996 and well before mass market, high-speed data transmission service had penetrated widely in the marketplace. As the service penetrated more widely and the market developed, the fundamental technological and economic assumptions on which the decision was based proved to be wrong, as summarized in Exhibit 4.

The argument that high speed data transmission is so "inextricably intertwined" with applications and content that it could not be treated separately never rested on solid ground and recent developments on both the supply and the demand sides of the market make it clear that bundling of data transmission and services has no compelling technological underpinning. It is a strategy to avoid regulation and a marketing strategy to maximize market power and extract consumer surplus.

Supply-side: From the point of view of technology, the distinction between transmission and applications was easy to make. The FCC had made just such a distinction for over three decades under the computer inquiries. The telephone companies had no difficulty making high-speed data transmission available on a stand-alone basis, primarily to the enterprise market. In the years after the cable modem order hundreds of small telephone companies offered plain vanilla high speed data transmission services to their mass market customers for a fee separate from applications and content. It is hard to argue that the much larger network operators, many of whom had plenty of practice, could not figure out how to make high-speed transmission service available to the mass market.

As part of the Bell South merger conditions, AT&T agreed to network neutrality provisions that rested on a technological definition that it could easily implement defined by one of the key functionalities the Commission claimed was inextricably intertwined, routing. Indeed, as part of its agreement, it distinguished specific services for which it wanted the ability to prioritize traffic, thereby affirming the distinction between the underlying transmission of data and the service.

In the BitTorrent case Comcast demonstrated the ability to distinguish transmission from applications by singling out a specific application for discriminatory treatment and, when pressed, quickly came up with a nondiscriminatory alternative.

Independent third party provision of functionalities that the FCC argued were "inextricably intertwined," with transmission, like IP address assignment, DNS, caching, etc. is readily available on a stand-alone basis.

Predictions about the growth of competition from new entrants for mass market, high speed data transmission, like broadband over powerline, proved to be wrong.

Demand-Side: From the point of view of economics and usage, consumers fully understand the difference between data transmission and services, even with respect to the services that the Commission claimed had to be bundled with data transmission.

Thus, the majority of e-mail accounts are with independent service provides who do not bundle transmission and e-mail. Web sites of the top high-speed data transmission service providers are nowhere to be found in the top twenty web sites in general or for specific types of content, like news. Even, if we look at the top video web sites, where one might presume that the cable operators would have particular expertise, we find that Comcast, the largest broadband ISP, ranks 12th and AOL (owned by Time Warner) ranks 13th. Comcast and AOL account for about 2 percent of video views on the web, but they account for close to one-third of all broadband subscribers. Consumers clearly take the data transmission service and use separate applications and content services from independent ISPs.

The claim of an integrated bundle was never a technological issue. It is not even a marketing reality. Cable operators routinely market separate services. Above all, speed is what they sell, but they also differentiate levels of service by additional applications included in the bundle. They even state the market value of the services they are bundling, affirming that they are readily available in the market on a stand-alone basis. Clearly, there is no technological imperative in bundling high-speed data transmission and services of functionalities.

Policy

Throughout the regulatory and judicial review of the classification decision, the full implications for all of the goals of the Act were never fully vetted. Each of the major orders acknowledged that there might be implications for universal service, etc., and each initiated inquiries and notices to investigate those implications, after the fact. Critical information that should have been considered before the classification was determined was pushed off until after the decision was made. The proceedings to investigate the full implications were not completed, which is why each order required another round of proceedings.

The National Broadband Plan, a major report ordered by Congress has done the job that the FCC had previously failed to do. It affirmed that the goals of the Act have not been achieved with respect to Broadband. The Commission is now deeply concerned that it lacks the authority to pursue those goals effectively because of the Court's interpretation of the meaning of the Title I information service classification. These developments underscore the grievous error made in not considering the full implication before the classification decision was made.

Whether one believes that the terrain has shifted dramatically in the past decade, or that the picture the FCC painted of the terrain was based on such early evidence that it was never

accurate, today the FCC and the Courts must reach a different conclusion about mass market, high-speed data transmission. Decisions that affect fundamental values and policies to implement those values are generally made by Congress not administrative agencies (Breyer's point). Technological, economic and legal developments have cleared up any ambiguity, which the Supreme Court could have (Steven's point), rather than rely on the agency expertise approach to administrative practice (Scalia's complaint). As shown in Exhibit 5, technology, economics and policy all point strongly toward a Title II classification. This is a fight the FCC should fight and can win.

Exhibit 1:
The Information Service Classification Undermines the Ability to Pursue the Central Goals of the Communications Act

Principles/Goals	Examples of Major Sections in the Act
Universal Service	§1: To make available, as far as possible, to all people of the United state, without discrimination on the basis of race, color religion, national origin, or sex, a rapid, efficient, nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges. §254: Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section taking into account advances in telecommunications and information technologies and services Consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates there are reasonably comparable to rates charged for similar services in urban areas.
Access for persons with disabilities	§225: In order to carry out the purpose established under §1, to make available to all individuals in the United States a rapid, efficient nationwide communications service… the Commission shall ensure that interstate and intrastate communications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States. §255: A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily available.
Privacy	§222: Every telecommunication carrier has a duty to protect the confidentiality of proprietary information of, and relating to other telecommunications carriers... and customers
Public Safety	§1: for the purpose of national defense… promoting safety of life and property through the use of wire and radio communications §229: The Commission shall prescribe such rules as are necessary to implement the requirements of the Communications Assistance for Law enforcement Act… shall include rules to implement Section 105.... that require common carriers to require appropriate authorization to activate interception of communication or access to call-identifying information and to prevent any such interception or access without such authorization…The Commission shall review the policies and procedures.... and shall order a common carrier to modify any such policy or procedures that he Commission determines does not comply Title III: It is the propose of this Act...to maintain control of the Unites states over all the channels of radio transmission… No person shall use or operate any apparatus for the transmission of energy or communications… except under and in accordance with this act and with a license in that behalf granted and under the provision of this Act.
Consumer Protection	§258: No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange services or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe.
Interconnection and Carriage	§201: It shall be the duty of every common carrier… to establish physical connections with other carriers… through routes and charges… and provide facilities and regulations for operating such through routes… All charges, practices, classifications, and regulations for and in connection with such communications service shall be just and reasonable… 202: It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communications service, directly or indirectly.... or to make or give any undue or unreasonable preference…or to subject any particular person, class of persons or locality to any undue or unreasonable prejudice or disadvantage.

Exhibit 2:
The History of a Close Call
The Regulatory and Judicial Treatment of Mass-Market, High Speed Data Transmission Service has been up in the Air for Over a Decade

Year	Event	Implications for Current Classification Review
1998	Stevens Report	Ambiguous on Classification
1998	Public Interest Groups Petition for Title II Classification	Need for nondiscrimination demonstrated
2000	Portland v. AT&T Cable: 9th Circuit Court of Appeals finds service involves telecommunications is subject to Title II	Title II classification asserted
2000	FTC imposes access condition on AOL-Time Warner	Concern about bottleneck provider expressed
2002	FCC classified cable modem as an Information Service;	Title I Authority Asserted, Need to address Communications Act principles affirmed
2003	Brand X 9th Circuit Court of Appeals affirms its in Portland v. AT&T and overturns Cable Modem order	Information Service rejected; telecommunications affirmed
2004	Chairman Powell declares Four Internet Freedoms	Importance of non-discrimination/ Consumer protection affirmed
2005	FCC uses Title II authority to investigate undue discrimination by Madison River	Importance of non-discrimination affirmed
2005	Supreme Court reverses 9th Circuit (6-3) on procedural grounds, upholds FCC information service classification	Information service upheld, Justices debate Title I authority
2005	FCC extends the Information service definition to services offered by telephone companies.	Title I authority asserted, Need to address Communications Act principles affirmed
2005	FCC turns Four Internet Freedoms into a policy statement	Importance of non-discrimination, consumer protection affirmed
2006	AT&T agrees to network neutrality merger condition	Ability to distinguish service demonstrated
2007	FCC finds Comcast illegally discriminated against peer-to-pee applications.	Need for non-discrimination affirmed Technical ability to offer separate services demonstrated
2010	Open Internet Proceeding initiated	Need for non-discrimination stated, Title I authority asserted
2010	National Broadband Plan	Importance of Communications Act principles affirmed Failure to achieve Communications Act goals documented
2010	D.C. Appeals Court overturns FCC action against Comcast	Title I authority questioned
2010	Broadband Internet Access Notice of Inquiry	Recognizes important of all Communications Act principles Documents failure to achieve goals of the Act.

Exhibit 3:
Technological and Economic Uncertainty has been Reduced, if Not Eliminated
Transmission and Applications are frequently and easily separated, not "Inextricably Intertwined"

The argument that high speed data transmission is so closely tied to applications and content that it cannot be treated separately was always dubious and recent developments on both the supply and the demand sides make it clear that bundling of data transmission and services has no compelling technological underpinning. It is a strategy to avoid regulation and a marketing strategy to leverage market power and extract consumer surplus.

Supply-side

The FCC had made just such a distinction for over three decades under the Computer Inquiries. The telephone companies had no difficulty making high-speed data transmission available on a stand-alone basis, primarily to the enterprise market (T-1 service), and continue to do so.

In the years after the cable modem order hundreds of small telephone companies offered plain vanilla high speed data transmission services to their mass market customers for a fee separate for applications and content and continue to do so.

AT&T agreed to network neutrality provisions that rested on a technological definition that it could easily implement. Indeed, as part of its agreement, it distinguished specific services for which it wanted the ability to prioritize traffic, thereby affirming the distinction between the underlying transmission of data and the service.

In the BitTorrent case Comcast demonstrated the ability to distinguish transmission from applications by singling out a specific application for discriminatory treatment and, when pressed, quickly came up with a nondiscriminatory alternative.

Independent third party provision of functionalities that the FCC argued were "inextricably intertwined," with transmission, like IP address assignment, DNS, caching, etc. are readily available on a stand-alone basis.

Predictions about the growth of competition from new entrants like broadband over powerline proved to be wrong.

Demand-Side

Consumers understand the difference between data transmission and services, even with respect to the services that the Commission claimed had to be bundled with data transmission.

The majority of e-mail accounts are with independent service provides who do not bundle transmission and e-mail

When it comes to content sites, the disparity is even greater. No web site of an ISP affiliated with a network operator ranks in the Web sites of the top high speed data transmission service providers are nowhere to be found in the top twenty web sites; none ranks in the top 20 news web sites.

Even if we look at the top video web sites, we find that Comcast, the largest broadband ISP ranks 12th and AOL (owned by Time Warner) ranks 13th. Comcast and AOL account for about 2 percent of video views on the web, but they account for close to one-third of all broadband subscribers. Consumers clearly take the data transmission service and use separate applications and content services from independent ISPs.

Cable operators routinely market separate services.

Exhibit 4:
Careful Consideration of all the Communications Act Principles and all the Decision Factors Strongly Favors a Telecommunications/Title II Classification

Based on a short period of experience with mass market, high speed data transmission legal ambiguity and technological uncertainty opened the door to the exercise of agency discretion to classify the service as an information service, but subsequent developments remove the ambiguity and uncertainty and a full consideration of the policy implications indicates that a classification as a telecommunications service is superior.

Factors causing change in non-discrimination/information service classification

The Cable Modem Declaratory Order was a rush to judgment. To the extent there was legal ambiguity or technological uncertainty, these have been cleared up since the order was issued.

Technology:	**Claim of technological integration was always dubious and separation of transmission and content has become more evident: Hundred of carriers offer wholesale high speed data transmission service, functionalities are widely available from 3rd party services user patterns and company marketing indicate consumers and producers know the difference between transmission and service**
Economics:	**Discriminatory practices repeatedly occur threatening competition in applications and content Competition has failed to develop as predicted (e.g. broadband over powerline, satellite).**
Law:	**Title II classification was supported by history at least as much as Title I. Title I authority had been used and it was assumed to be available to prevent undue discrimination and the other policy goals of the Act, but the Title I safety net has now been called into question.**
Policy:	**The National Broadband Plan supercedes the Universal Service (Stevens) Report**

Basis for concluding that the other Communications Act Principles support Title II telecommunications classification

There were never any grounds for Chevron discretion to classify high-speed data transmission service as anything but a Title II (or title III) service with regard to these principles.

Technology:	**There is no technological complexity that would allow the FCC discretion to alter or abandon these goals and authorities.**
Economics:	**These goals have not been achieved and the increasing importance of high-speed data transmission makes them all the more important and urgent (per the National Broadband Plan). Competition ha not achieved the levels hoped for by the Congress and the FCC.**
Law:	**These issues were never addressed in the rulemakings or court proceedings that dealt with nondiscrimination. There is no legal ambiguity that would allow the FCC discretion to alter or abandon the clear language of the statute**
Policy:	**The National Broadband Report establishes a firm evidentiary basis for immediate implementation of policies to accomplish these goals, but the uncertainty about FCC authority hampers its ability to do so. Weakening the tools available to achieve these goals would be contrary to clear Congressional intent.**

Exhibit 5:
Legal Ambiguity and Technological Uncertainty Opened the Door to Agency (Chevron) Discretion in 2002, But Recent Developments Show the Decision was a Premature, Rush to Judgment