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## Neutering Net Neutrality: What Verizon v. F.C.C. Means for the Future of the Internet

Alexander Hurst

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# Neutering Net Neutrality: What *Verizon v. F.C.C.* Means for the Future of the Internet

by ALEXANDER HURST\*

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## I. Introduction

Few things are as ingrained in Americans' daily lives as the Internet. The Internet, a one-stop source for information, communication, and entertainment, has supplanted the old media that came before it such as books, telephones, fax machines, and television for many people. Yet the Internet is an incredibly nebulous thing, a network of various private networks the regulation of which is currently even more amorphous. A recent decision of the D.C. Circuit, which has national effect, has rendered the traditional model of the Internet subject to upheaval. The fundamental principle in question, so-called "net neutrality," stands for the idea that Internet providers must treat all traffic equally. Blocking and preferential treatment of certain Internet content providers (websites) was disallowed under the now-vacated regulatory regime of the Federal Communications Commission ("F.C.C.")'s *Open Internet Order*. Now, however, Internet providers are essentially free to force various services and websites like Netflix and even Google to pay a fee if they want to be made available for subscribers of the Internet provider's service, a cost that is likely to be passed on to consumers.

The purpose of this Article is to explore the reasoning behind the holding in *Verizon v. F.C.C.* and examine whether the absence of net neutrality or an open Internet is good public policy. Part II of the Article provides a brief summary of the facts and holding of the case, followed by an explanation of the legal background and context of the regulation in question. Part III provides an in-depth analysis of the court's reasoning and how that reasoning differed between the majority and the dissent. Part IV analyzes the court's holding, first from a technical legal standpoint and second from a public policy standpoint. The analysis invokes questions of administrative statutory authority, the appropriate nexus of administrative regulation and antitrust, whether the absence of mandated net neutrality is good public policy in terms of potential anti- and pro-competitive effects, and what the future may hold for the Internet. The Article takes the position that the court's decision was appropriate in its result for legal reasons, yet nevertheless opens the door to potential market failures in the future.

## II. *Verizon v. F.C.C.* Marks the End of an Era

Telecommunications behemoth Verizon Communications, Inc. (“Verizon”) brought this petition for judicial review and notice of appeal of the F.C.C.’s *Open Internet Order* of 2010<sup>1</sup> (“*Order*”).<sup>2</sup> Verizon sought to vacate the *Order*, which imposes anti-blocking, anti-discrimination, and disclosure requirements on providers of broadband Internet service.<sup>3</sup> The Commission’s stated intent was to preserve the practice of “net neutrality”<sup>4</sup>—referred to as “Internet openness” in the Commission’s terminology—whereby broadband Internet service providers must treat all information that passes over their networks equally without discriminating or censoring based on source or content.<sup>5</sup> Although heard before an appellate court, this was a case in which the U.S. Court of Appeals for the District of Columbia Circuit exercised its unique original jurisdiction and authority of direct review over the orders and regulations of federal independent agencies, and therefore there was no lower court disposition.<sup>6</sup> Verizon challenged the *Open Internet Order* on multiple grounds, namely that the Commission had exceeded its allotted statutory authority, that the rules imposed were “arbitrary and capricious” because they were not supported by substantial evidence, and, most significantly, that the *Order* was in contravention of “statutory provisions [that] prohibit[ed] the Commission from treating broadband providers as common carriers.”<sup>7</sup>

The court found that the Commission had established valid affirmative authority to enact measures such as the one at bar encouraging the deployment of broadband infrastructure.<sup>8</sup> Moreover, the majority found the Commission had reasonably interpreted Section 706 of the Telecommunications Act of 1996 as giving the Commission authority to regulate how broadband providers treat Internet traffic. It also found that the Commission’s justification for the rules, namely that they would facilitate the continued innovation driving the explosive growth of the

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1. In the Matter of Preserving the Open Internet Broadband Indus. Practices, 25 F.C.C. Rcd. 17905 (2010).

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

3. *Id.*

4. This term was coined by Columbia Law Professor Tim Wu and is the term most commonly used by the media (and this Article) for the Commission’s concept of “internet openness.” Jeff Sommer, *Defending the Open Internet*, N.Y. TIMES (May 10, 2014).

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

6. See 47 U.S.C. § 402(a),(b) (2012) (delegating judicial review authority of F.C.C. orders and decisions to the D.C. Circuit).

7. *Verizon*, 740 F.3d at 634.

8. *Id.* at 628.

Internet, as similarly reasonable and “supported by substantial evidence.”<sup>9</sup> However, even though the majority found that the Commission was authorized to make these rules, the *Order* contravened one of the Commission’s earlier rulings that expressly exempted information service providers from treatment as common carriers.<sup>10</sup> The authorizing statute granted the Commission the authority to impose antidiscrimination rules on only those providers that could be classified as common carriers, and because the Commission had previously made the determination that broadband Internet Service Providers (“ISPs”) were not common carriers but instead were information service providers, the Commission was estopped from nevertheless treating them as common carriers.<sup>11</sup> Accordingly, the court vacated the antidiscrimination and anti-blocking portions of the *Open Internet Order*.<sup>12</sup>

### III. A History of the Internet and Its Regulation

Part III will provide the necessary background to understand the issues and parties at hand in this dispute, including an overview of how the intricate yet amorphous group of interrelated networks called the Internet operates. It also looks at the level of deference normally given to administrative interpretations of statutory authority, gives a brief history of F.C.C. Internet regulation, and provides a detailed look at the *Open Internet Order* being challenged.

#### A. The Internet Marketplace

Judge Tatel’s opinion in *Verizon v. F.C.C.* summarizes the parties involved in the Internet as backbone networks, broadband providers (i.e. those that provide the “last mile” network over which end users access information, like Verizon or Comcast), edge providers (i.e. content providers like Google or Facebook), and end users.<sup>13</sup> Using what he admits to be an oversimplified example, Judge Tatel describes the nexus of these parties as such:

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9. *Id.* Senior Circuit Judge Silberman wrote a separate opinion concurring in part and dissenting in part that took issue with the supposedly substantial evidence the Commission put forth purporting to show that such regulation was necessary to promote the development of broadband and prevent a harmful market failure, dismissing the claims as “sheer speculation.” *Id.* at 663 (Silberman, J., dissenting).

10. *Id.* at 628.

11. *Id.* at 655–56.

12. *Id.* at 628.

13. *Id.*

when an edge provider such as YouTube transmits some sort of content—say, a video of a cat—to an end user, that content is broken down into packets of information, which are carried by the edge provider’s local access provider to the backbone network, which transmits these packets to the end user’s local access provider, which, in turn, transmits the information to the end user, who then views and hopefully enjoys the cat.<sup>14</sup>

This example illustrates how the ISPs and backbone providers act as intermediaries between end-user subscribers and content sources (feline-oriented and otherwise). It is this relationship between broadband providers and content providers that concerns advocates of net neutrality.

The standard by which Internet service can be considered “broadband” has evolved over the years as technology has progressed.<sup>15</sup> The 1996 Telecommunications Act defined broadband as Internet service furnished with sufficient speed to enable users to “originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”<sup>16</sup> In 1999, the Commission defined the minimum threshold for meeting this requirement as 200 kilobytes per second (“kbps”)—fairly slow by today’s standards.<sup>17</sup> Shortly before implementing the *Order* in 2010, the Commission determined that 200 kbps was inadequate for the modern needs of consumers, who often stream high-quality video while also browsing the web.<sup>18</sup> Accordingly, the Commission raised the minimum threshold for broadband to four megabytes per second (“mbps”) for downloads and one mbps for uploads.<sup>19</sup>

## B. The APA and the Chevron Test of Administrative Deference

The disposition on whether a regulation is valid inevitably involves a question of administrative deference. There are two separate but overlapping authorities to which a court may look when determining whether a federal agency’s regulation is a valid use of the agency’s statutory authority: the Administrative Procedures Act (“APA”)<sup>20</sup> and the test outlined by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural*

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14. *Id.* at 629.

15. *Id.* at 640.

16. 47 U.S.C. § 1302(d)(1) (2012).

17. *Verizon*, 740 F.3d at 640.

18. *Id.* at 640–41.

19. *Id.* This increased minimum threshold made the *Order* easier to justify because it meant that a smaller percentage of Americans could be considered to have access to broadband. See *infra* notes 81–83 and accompanying text.

20. 5 U.S.C. § 706(2) (2012).

*Defense Council, Inc.*<sup>21</sup> The APA instructs courts reviewing the validity of regulations to determine whether the promulgating agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>22</sup> The *Chevron* inquiry involves asking whether Congress has directly spoken on the precise issue and, if it has not or if the statute is ambiguous, to determine whether the agency's answer of that question is a permissible construction of the statute.<sup>23</sup>

### C. Jurisdiction and Regulations of the F.C.C.

The Communications Act of 1934 created the F.C.C. with the purpose of executing and enforcing federal communications law and regulating interstate communication without discrimination based on the traditionally protected classes, among other considerations.<sup>24</sup> The enacting legislation states that the provisions of the chapter "shall apply to interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communication or such transmission by radio."<sup>25</sup> Title II of the Communications Act also sets forth regulations for any carrier or transmitter of communications that could be considered a common carrier.<sup>26</sup>

Common carriers are defined somewhat circularly as "any person [or entity] engaged as a common carrier for hire, in . . . communication by wire or radio" except those expressly excluded and not including radio broadcasters.<sup>27</sup> Classification as a common carrier is accompanied by an affirmative duty "to furnish such communication service upon reasonable request therefor," and also a requirement that "all charges, practices, classifications, and regulations for and in connection with such communications service . . . be just and reasonable."<sup>28</sup> In other words, a telecommunications provider that the Commission deems to be a common carrier may not discriminate between users of its service and must charge reasonable prices. For example, a phone company given common carrier status cannot refuse to complete the calls of some customers, but not others; it must treat all phone traffic equally.

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21. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

22. *Verizon*, 740 F.3d at 635 (quoting 5 U.S.C. § 706(2)(A) (2012)).

23. *Chevron*, 467 U.S. at 842-43.

24. 47 U.S.C. § 151 (2012) (expressly providing protection from "discrimination on the basis of race, color, religion, national origin, or sex").

25. 47 U.S.C. § 152 (2012).

26. 47 U.S.C. §§ 201 et seq. (2012).

27. 47 U.S.C. § 153(11) (2012).

28. 47 U.S.C. § 201 (2014).

Although Congress undoubtedly did not contemplate the massively complex system that is the modern World Wide Web when it enacted the legislation in 1934, it seems clear that the Internet falls within the Commission's stated jurisdiction encompassing all "interstate and foreign communications by wire or radio."<sup>29</sup> Indeed, since the Internet's inception, the Commission has promulgated regulations over the various players in the Internet marketplace.<sup>30</sup>

One of the first such efforts to govern the Internet came in 1980, when the Commission adopted what would be called the *Computer II* regime.<sup>31</sup> The *Computer II* rules drew a distinction between "basic" and "enhanced" services, with the former subject to common carrier regulation and the latter given no such restrictions.<sup>32</sup> Basic services were defined as those that involved the pure or bare transmission of customer-supplied information (e.g., telephone service), while enhanced services were defined as those which involved computer processing applications for deciphering transmitted applications.<sup>33</sup> Thus, because connecting an end user to the Internet clearly requires computer-processing applications, under the *Computer II* regime, ISPs were providing "enhanced" services and were not subject to regulation as common carriers.<sup>34</sup>

The next era of Internet regulation and classification began in the mid-1990s with the enactment of the Telecommunications Act of 1996.<sup>35</sup> The 1996 Act replaced the basic versus enhanced services distinction with a parallel distinction between telecommunications carriers—equivalent to basic carriers and subject to common carrier regulation—and information-service providers equivalent to enhanced-service providers not subject to common carrier regulation.<sup>36</sup> Beyond merely altering the Commission's nomenclature, the 1996 Act also extended common carrier regulation to Digital Subscriber Line ("DSL") services, at least as to the transmission facilities used.<sup>37</sup>

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29. *Verizon*, 740 F.3d at 640 (quoting 47 U.S.C. § 152(a)).

30. *See id.*

31. *Id.* at 629.

32. *See In re* Amend. of Sec. 64.702 of the Commission's Rul. and Regs., 77 F.C.C. 2d 384, 387 ¶¶ 5–7 (1980) ("Second Computer Inquiry").

33. *Verizon*, 740 F.3d 623 at 629–630 (citing Second Computer Inquiry, 77 F.C.C.2d at 420 ¶¶ 96–97).

34. *Id.*

35. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

36. *Verizon*, 740 F.3d 623 at 630.

37. *Id.* DSL services furnish broadband over telephone wires. *Id.* at 630. DSL providers could exempt their Internet access services from common carrier restrictions as being separate



And yet, when the Commission was faced with the equivalent question of whether cable broadband providers could be considered information service providers four years later, it found in the affirmative.<sup>38</sup> This was true even where cable providers operated the “last-mile” transmission facilities, because the Commission reasoned that the cable companies were providing “single, integrated information service[s].”<sup>39</sup> This finding, ostensibly incongruent from the Commission’s classification of DSL providers, completely exempted cable broadband operators from common carrier regulation.<sup>40</sup> The Commission later harmonized treatment of all broadband providers however, declaring them to be information services not subject to common carrier regulations.<sup>41</sup> Even so, the Commission maintained it had the right to intervene with broadband providers’ network management even in the absence of common carrier status if it saw ISPs violating the Commission’s stated intention of preserving and promoting the “open and interconnected nature of the public Internet.”<sup>42</sup>

In 2008, the Commission exercised this power in the form of an order dictating bandwidth management practices and disclosure to cable broadband provider Comcast after several of the company’s subscribers complained that Comcast was interfering with customer’s ability to use certain peer-to-peer networking applications such as BitTorrent.<sup>43</sup> While the Commission claimed to be invoking the “ancillary jurisdiction” afforded to it to execute the functions of the Communications Act, the D.C. Circuit Court rejected this justification, finding that the Commission had failed to identify any “grant of statutory authority to which the *Comcast Order* was reasonably ancillary.”<sup>44</sup> Accordingly, the Commission’s order

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from the transmission facilities themselves if and only if they operated them through a separate affiliate or quasi-independent ISP. *Id.* at 631.

38. *Id.*

39. *Id.*; see also *In Re Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, 17 F.C.C. Rcd. 4798, 4824 ¶ 41 (2002). This apparent inconsistency in treatment between DSL and cable broadband providers was challenged before the Supreme Court in 2005, and the Court upheld the classification, reasoning that the Commission was entitled to deference in its interpretation of an ambiguous statute. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 981 (2005); see also 47 U.S.C. § 153(53) (2012).

40. *Verizon*, 740 F.3d 623 at 631.

41. *Id.*

42. *Id.* at 631–32 (quoting *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14986, 14988 ¶ 4 (2005)).

43. *Id.* at 632 (citing *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008)).

44. *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 661 (D.C. Cir. 2010).

was vacated.<sup>45</sup> It was in the wake of this defeat that the Commission adopted the *Open Internet Order* that became the subject of Verizon's challenge.

#### D. The Open Internet Order

The *Open Internet Order*, adopted in 2010, set forth various prophylactic rules on broadband providers for the stated purpose of "incorporat[ing] longstanding openness principles that are generally in line with current practices."<sup>46</sup> Some of the requirements applied to both fixed broadband providers (traditional DSL and cable broadband employing fixed endpoints and stationary equipment) and mobile broadband (e.g., 4G Internet service for smartphones), while some applied only to fixed ISPs.<sup>47</sup> The requirements were threefold: public disclosure and transparency mandates for both types of providers, anti-blocking proscriptions on both types of providers, and anti-discrimination prohibitions on fixed providers only.<sup>48</sup>

The disclosure requirements assured that the public would have access to information regarding network management practices, performance, and commercial terms of the company's Internet service.<sup>49</sup> The anti-blocking requirements prevented broadband providers from blocking lawful applications and content—or content that competes with the broadband provider's other services—subject to "reasonable network management."<sup>50</sup> Lastly, the antidiscrimination requirements imposed on fixed broadband ISP's, but not mobile operators, forbade unreasonable discrimination in transmitting lawful Internet traffic.<sup>51</sup>

The Commission averred that it had authority to make these regulations by citing a provision of the 1996 Telecommunications Act that directed the Commission to encourage the deployment of broadband.<sup>52</sup> With what Verizon characterized as a "triple cushion shot,"<sup>53</sup> the

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45. *Id.*

46. 25 F.C.C.R. at 17907 ¶ 4.

47. *Verizon*, 740 F.3d 623 at 633.

48. *Id.*

49. *Id.*

50. *Id.* (explaining that "reasonable network management" is defined as "practices designed to ensure network security and integrity, address traffic that is unwanted by end users, and reduce or mitigate the effects of congestion on the network").

51. *Id.*

52. *Id.* at 634; *see also* 47 U.S.C. § 1302(a), (b) (2014).

53. *Id.* at 659. The "triple cushion shot" metaphor refers to a particularly convoluted trick shot in billiards whereby the cue ball rebounds off three different cushions before hitting its target.

Commission reasoned that net neutrality would spur investment among content providers, which in turn would lead to increased demand for broadband, thus encouraging increased investment in broadband infrastructure and ultimately leading to further innovation by content providers.<sup>54</sup> The Commission feared that a lack of regulation would allow broadband providers to disrupt this “virtuous cycle of innovation” by preventing end users from accessing all content providers and vice versa, thus stifling the content provider’s ability to innovate.<sup>55</sup> Compelling as this question of public policy is, it was largely sidestepped by the majority in *Verizon*.<sup>56</sup>

#### IV. The Reasoning Behind the *Verizon v. F.C.C.* Decision

The court averred that its task was not to assess the wisdom of the rules, but rather to assess whether the Commission could demonstrate “that the regulations fall within the scope of its statutory grant of authority.”<sup>57</sup> The court organized its opinion to first address Verizon’s argument that the Commission lacked affirmative statutory authority to assert the *Open Internet Order* and further that the rules were arbitrary and capricious.<sup>58</sup> Next, the court turned to Verizon’s argument that, by treating a type of service provider the Commission had previously determined not to be a common carrier as a common carrier, the Commission contravened a statutory mandate.<sup>59</sup> Finally, in a concurrence in judgment and dissent in part, Judge Silberman detailed the authority inquiry within an antitrust framework.<sup>60</sup>

##### A. A Question of Statutory Authority

In dismissing Verizon’s argument that the Commission lacked statutory authority to promulgate the regulations, the court looked to Section 706 of the 1996 Telecommunications Act, which provides that the Commission should encourage the deployment of advanced telecommunications capability (i.e., broadband) to all Americans and use

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54. *Id.* at 634.

55. *Id.* at 644–50. Whether this fear was justified remains to be seen; two of the F.C.C.’s commissioners even dissented to the imposition of the *Order* based in part on the belief that the regulations might actually stifle innovation rather than encourage it. *Id.* at 634.

56. *Id.* at 628–59.

57. *Id.* at 634–35.

58. *Id.* at 635.

59. *Id.* at 649.

60. *See id.* at 659.

regulating methods that remove barriers to investment.<sup>61</sup> This section further provides that if the Commission finds broadband is not being deployed to all Americans in a reasonable and timely manner, it may take immediate action to accelerate deployment by removing barriers to infrastructure investment and promoting competition.<sup>62</sup> Verizon contended that these provisions of the 1996 Act should be considered mere congressional statements of policy and, alternatively, that even if the provisions did grant the Commission authority, the particular regulations were not reasonable.<sup>63</sup>

In determining whether the *Order* fell within the Commission's jurisdiction, the court looked to both the APA<sup>64</sup> and the test outlined by the Supreme Court in *Chevron*<sup>65</sup> governing the deference given to federal agencies when they interpret an ambiguous statutory provision.<sup>66</sup> The court observed that if the Commission's interpretation of the statute represented a reasonable resolution of statutory ambiguity, then under *Chevron* the court must defer to that interpretation, even if that interpretation involves an agency determining the scope of its own jurisdiction.<sup>67</sup>

The court next discussed Verizon's contention that the *Order* represented an unreasonable departure from prior policy, and in doing so discussed the *Advanced Services Order*, which was vacated by the court in the earlier *Comcast* decision.<sup>68</sup> Under the APA, an administrative agency normally must acknowledge and advance reasons for a change in policy.<sup>69</sup> Nonetheless, the court found it had no reason to find that the Commission had ignored its prior interpretation of the relevant statute or had failed to provide a reasoned explanation for its changed interpretation.<sup>70</sup> As prior cases had observed,<sup>71</sup> a new interpretation of a statute that is contrary to an agency's initial interpretation cannot be rejected simply because it is new.<sup>72</sup> Instead of dwelling on past interpretations, the court chose to focus on whether the Commission's current interpretation of Section 706(a) as a

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61. 47 U.S.C. § 1302(a) (2012).

62. *Verizon*, 740 F.3d 623 at 635; 47 U.S.C. § 1302(d)(1) (2012).

63. *Verizon*, 740 F.3d 623 at 635.

64. 5 U.S.C. § 706(2) (2012).

65. *Chevron*, 467 U.S. 837 (1984).

66. *Verizon*, 740 F.3d 623 at 636.

67. *Id.* at 635.

68. *Id.* at 636.

69. *Id.* (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

70. *Id.* at 636–37.

71. *See, e.g.*, *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 697 (2005).

72. *Verizon*, 740 F.3d at 636.

grant regulatory authority was reasonable and answered in the affirmative that it was.<sup>73</sup>

The Act's language, encouraging the deployment of broadband and removal of barriers to infrastructure investment, could easily be interpreted as a mere congressional statement of policy as Verizon suggested, but could just as easily be read to grant the Commission actual authority.<sup>74</sup> In finding the Commission's interpretation reasonable, the court observed that the 1996 Act was passed against the backdrop of the Commission's long history of subjecting ISPs to common carrier regulation.<sup>75</sup> Likewise, the court found it had no reason to believe from the legislative history that Congress would not have delegated such decisions to the Commission.<sup>76</sup> While recognizing that Congress would likely not have intended to grant the Commission limitless authority, the court nevertheless concluded that the requirement that the provisions be proven to fulfill a specific statutory goal was a sufficient limitation.<sup>77</sup>

The court next turned to the question whether Section 706(b) of the Act granted the Commission authority to take action.<sup>78</sup> Deferring to the Commission's interpretation, the court found that it did.<sup>79</sup> In a departure from its previous conclusions, the Commission made the necessary determination that broadband was not being deployed to all Americans in a reasonable and timely manner in 2010.<sup>80</sup> The catalyst for this determination, however, was sparked by the Commission's own decision to raise the minimum threshold for what constitutes "broadband."<sup>81</sup> Although the court recognized the timing of this raised threshold and subsequent determination that broadband was not reaching enough Americans was "suspicious," the timing alone did not render it unreasonable or arbitrary.<sup>82</sup> Once this determination had been made, it was not unreasonable, in the court's view, for the Commission to exercise its apparent authority under

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73. *Id.* at 637.

74. *Id.* at 637–38.

75. *Id.* at 638.

76. *Id.* at 639.

77. *Id.* at 640.

78. *Id.*

79. *Id.*

80. *Id.* Section 706(b) requires the Commission to find that "broadband deployment to all Americans is not reasonable and timely" as a prerequisite to invoking the section's grant of authority to take immediate action to accelerate the deployment of broadband. *Id.*

81. *Id.* at 641. *See also supra* notes 17-19 and accompanying text.

82. *Id.* at 642.

Section 706(b).<sup>83</sup> In a related query, the court similarly rejected *Verizon's* alternative theory that, even if the Commission did have authority, the specific rules exceeded that authority's scope.<sup>84</sup>

The court further discussed how broadband providers have both the incentive and the means to discriminate between content providers.<sup>85</sup> The court agreed with the Commission's observation that broadband providers, which often also operate cable television and telephone services, do have an incentive to block or otherwise interfere with third-party Internet services that could compete with them in those other arenas.<sup>86</sup> Likewise, ISPs have incentives to accept fees from content providers for either granting them prioritized access to end users or for blocking other competing content providers, and Verizon did not contest that it had the technical and economic ability to carry out such blocking and discrimination.<sup>87</sup> Finally, the court recognized that because end users typically receive broadband from a single provider, that provider "functions as a terminating monopolist with power to act as a 'gatekeeper' to [content] providers."<sup>88</sup> While this does leave consumers with the option of merely switching broadband providers, they may be reluctant to do so given high switching costs or other considerations.<sup>89</sup> Moreover, the majority found that the number of providers to which a dissatisfied consumer may switch is extremely limited in most parts of the country.<sup>90</sup>

Verizon's final contention as to the public policy wisdom of these regulations was that any benefit they give to content provider innovation and consequential demand for broadband infrastructure would "be outweighed by the diminished incentives" broadband providers would have to invest in infrastructure as result of the limitation in business models ISPs may use.<sup>91</sup> The court decided that there was insufficient information to settle the regulatory issue, and thus it was up to the Commission to exercise its judgment based on the available information to make a policy conclusion.<sup>92</sup> The court found that the Commission had offered a rational

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83. *Id.* at 641.

84. *Id.* at 642-44 (explaining the court did not believe the regulations strayed too far beyond the "paradigm case" likely contemplated by Congress when it supposedly granted such authority).

85. *Id.* at 645.

86. *Id.*

87. *Id.* at 645-46.

88. *Id.* at 646.

89. *Id.* at 646-47.

90. *Id.* at 647.

91. *Id.* at 649.

92. *Id.*

connection between the available facts and the choice made and accordingly deferred to the Commission's judgment.<sup>93</sup> In summary, the court found that the Commission not only had the authority to regulate in this arena, but also that the regulations themselves were reasonably tailored to meet the statutory objective of promoting broadband deployment and removing barriers to infrastructure innovation.

### B. The Common Carrier Problem

Although the opinion thus far had been highly favorable and deferential to the Commission, this would change when the court addressed the common carrier classification issue. In the court's view, regulating broadband and mobile Internet providers as common carriers clearly violated the Communications Act, given that the Commission was bound by its own classification of broadband providers as "information services" rather than common carrier telecommunications services.<sup>94</sup> Yet, as Verizon contended, by subjecting broadband providers to anti-blocking and anti-discrimination requirements, the Commission was nevertheless treating broadband providers with the same standard of regulation they would have received if the Commission had classified them as common carriers in the first place.<sup>95</sup>

After examining the history of what the term "common carrier" actually meant, the court considered the Commission's explanation of how the regulations were not, in fact, treating broadband providers as common carriers.<sup>96</sup> The Commission's primary reasoning was that with respect to content providers, broadband ISPs were not "carriers" at all because the customers at issue were the end users, not the content providers.<sup>97</sup> Under the Commission's theory, because broadband ISPs could still make individualized decisions in determining the terms of a subscriber's Internet service under the *Order*, the broadband providers were not engaged in common carriage.<sup>98</sup> In other words, the Commission's view was that if the Commission did not restrict broadband ISPs' ability to deal on individualized terms with their subscribers, the Commission was not regulating the ISPs as common carriers.<sup>99</sup> The court disagreed.<sup>100</sup>

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93. *Id.*

94. *Id.* at 650.

95. *Id.*

96. *Id.* at 651.

97. *Id.* at 653.

98. *Id.*

99. *Id.*

100. *Id.*

Rather, the court relied on an earlier Supreme Court decision, *Midwest Video II*.<sup>101</sup> Like the broadband providers' customers in the case at bar, the cable operators' primary customers in *Midwest Video II* were subscribers, and like broadband providers under the *Open Internet Order*, the cable operators were obligated to carry third-party content to customers that the cable operators otherwise would have been permitted to block.<sup>102</sup> Given these similarities, it appeared that broadband providers were being treated as common carriers; a rose by any other name is, of course, still a rose.<sup>103</sup> Failing in this argument, the Commission offered little else to justify its treatment of such providers as common carriers.<sup>104</sup>

In summation, because the majority determined that the *Open Internet Order's* treatment of broadband providers in terms of the anti-discrimination and anti-blocking requirements relegated the providers to common carrier status *pro tanto*, those requirements were vacated. At the same time, the disclosure provision was upheld because it did not impose common carrier obligations on the providers and the provision was severable. The majority left open the possibility that the Commission could modify the regulations in a permissible way to preserve the status quo of net neutrality. In contrast, Senior Circuit Judge Silberman wrote a separate opinion concurring in part and dissenting in part, whereby he acknowledged that the *Open Internet Order's* treatment of broadband providers as common carriers was impermissible, yet took the majority's opinion a step further by averring that the F.C.C. had no authority to impose such regulations on broadband providers at all under Section 706 and the A.P.A.<sup>105</sup>

### C. Judge Silberman's Dissent

Judge Silberman concurred with the majority in many respects, such as concluding that Section 706 is a positive grant of regulatory authority.<sup>106</sup> Likewise, Silberman agreed with the majority that *Chevron* deference to the Commission's interpretation of the statutory language was warranted,

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101. 440 U.S. 689 (1979) (dealing with whether cable operators should be treated as common carriers).

102. *Verizon*, 740 F.3d at 654.

103. *Id.*

104. *Id.* at 655. Interestingly, the Commission never made any attempt to differentiate the *Order's* prohibition on unreasonable discrimination from the nondiscrimination standard, which, by statute, applies to common carriers. *Id.* at 656. As a final inquiry, the court considered and rejected Verizon's argument that the disclosure requirements were not severable from the other, stricken protections of *Order*. *Id.* at 659.

105. *Id.* (Silberman, J., dissenting).

106. *Id.* at 660.



yet nonetheless opined, based on a dissection of Section 706's language, that the authority could not be stretched as far as it had been.<sup>107</sup> Ultimately, Silberman determined that the Commission's treatment of broadband providers was impermissible.<sup>108</sup>

Silberman concluded that the Section's operative words granting regulatory authority were that the Commission may implement "measures that promote competition in the local telecommunications market *or* other regulating methods that remove barriers to infrastructure investment."<sup>109</sup> Silberman accused both the Commission and the majority of conflating the two clauses though they have distinct functions, with the former requiring regulations that promote competition on price and quality among telecommunications providers and the latter not bearing any such requirement.<sup>110</sup> Silberman's view was that the *Order* must stand or fall on the "removing barriers" clause, because, by the Commission's own theory, if it could spur demand for broadband the resulting increased investment in infrastructure would occur irrespective of competition.<sup>111</sup> Vitaly, however, the Commission had never once identified a specific practice of broadband providers that could be considered a barrier to investment.<sup>112</sup>

Silberman argued that the regulation, resting on the "triple cushion shot"<sup>113</sup> theory, had not been designed to promote increased competition in the broadband market, but rather had the stated objective of "protecting consumer choice, free expression, end-user control, and the ability to innovate without permission," an objective that falls outside the scope of Section 706's statutory authority.<sup>114</sup> Silberman's main critique of the majority's opinion was that it was predicated on the idea that an open Internet would spur demand for broadband infrastructure.<sup>115</sup> Yet, Silberman observed "any regulation that, in the FCC's judgment might arguably make the Internet 'better,' could increase demand."<sup>116</sup> To Silberman's mind, the majority's reading of the statute would essentially

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107. *Id.* ("Chevron is not a wand by which courts can turn an unlawful frog into a legitimate prince.") (quoting *Assoc. Gas Distrib. v. F.E.R.C.*, 824 F.2d 981, 1001 (D.C. Cir. 1987)) (internal quotations omitted).

108. *Verizon*, 740 F.3d at 667.

109. *Id.* at 660 (emphasis supplied).

110. *Id.*

111. *Id.* at 660–661.

112. *Id.* at 661.

113. *See supra* note 53 and accompanying text.

114. *Verizon*, 740 F.3d at 661–662.

115. *Id.* at 662.

116. *Id.*

“free the Commission of its congressional tether” by being overbroad because almost any regulation could be interpreted to advance the statutory requirement that regulations must encourage broadband deployment, thus making the requirement illusory.<sup>117</sup>

Silberman’s dissent next turned to the assertion that, even assuming valid authority, the *Order* was arbitrary and capricious in light of the fact that the Commission’s findings were not supported by substantial evidence.<sup>118</sup> Contrary to the majority, Silberman did not believe the Commission had ever made any legitimate finding that broadband providers would or even could (technologically and economically) engage in discrimination and blocking of content providers were it not for the open Internet requirements.<sup>119</sup> To illustrate this, Silberman stated that the Commission’s proffered evidence consisted primarily of “may” and “might” conclusory statements speculating how Internet providers would behave in the absence of net neutrality.<sup>120</sup> Silberman concluded that the “triple cushion shot” theory rests on a faulty factual premise—that broadband providers have the economic clout to profitably engage in such discrimination and blocking as “gatekeepers” to end consumers.<sup>121</sup> Silberman’s view was that a consumer dissatisfied with degraded Internet service could simply switch to another provider with relative ease.<sup>122</sup>

While the Commission asserted why such switching would be difficult, Silberman posited that such a rationale implies that broadband providers have market power in the industry, without actually examining whether they do.<sup>123</sup> The Commission pointed to only four possible instances of blocking and discrimination conduct.<sup>124</sup> Silberman concluded that “the Commission’s failure to conduct a market power analysis [was] fatal to its attempt to regulate, because it [meant] that there [was] inadequate evidence to support the lynchpin of the Commission’s economic theory.”<sup>125</sup> Likewise, the Commission had not alleged that broadband

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117. *Id.* The majority claimed there was a limitation via the Commission’s subject matter jurisdiction, yet Silberman dismissed this too as being an illusory restriction. *Id.*

118. *Id.*

119. *Id.* at 663.

120. *Id.*

121. *Id.*

122. *Id.* at 664.

123. *Id.*

124. *Id.* at 664–65.

125. *Id.* at 665. Such an inquiry would necessitate a delineation of both the product and geographic markets in which the broadband provider is competing before making a determination that the market is concentrated. *Id.* A determination of the product market would not necessarily be limited to those companies that provide “broadband” as it is defined by the Commission;

providers were dividing territory and avoiding head-to-head competition; in some areas the opposite seemed to be true.<sup>126</sup> Lastly, Silberman noted that the Justice Department had previously warned the Commission that unless the Commission focused its regulations on market power, any regulation might actually discourage broadband development.<sup>127</sup>

## V. The Domino Effect of a Legally-Defensible Decision

The questions *Verizon v. F.C.C.* raised concern issues from administrative stare decisis to statutory authority, antitrust market power analysis, and, most importantly, overall public policy. While the judges in this case interpreted the letter of the law correctly (or at least reasonably), it is far more significant that the public is left to wonder how a lack of net neutrality may impact the Internet provider industry and its now potentially vulnerable consumers in the years to come.

This section first addresses the concurrence in the opinion as to the Commission's impermissible treatment of broadband providers as common carriers. Next, this section analyzes the disagreement between the majority and dissent as to whether the Commission had affirmative statutory authority to implement the *Open Internet Order*. Later, this section addresses whether a net neutrality regime is in the best interests of consumers and the market as a whole. As a final matter, this section speculates on the likely outcome of the *Verizon* decision and the Commission's—and broadband providers'—likely next move.

### A. Stare Decisis and the Common Carrier Commonality

As an almost perfunctory matter, it bears mentioning that the conclusion that the *Order* was invalid as a technical matter was reasonable. Both the majority and Judge Silberman concluded that the Commission's treatment of broadband providers as common carriers—after it had already made the determination that such providers were not common carriers—was impermissible.<sup>128</sup> The majority's opinion explains that the statutory

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substitute products such as slower Internet service and mobile Internet service would have to be included because the products affect a broadband provider's ability to raise prices. *Id.*

126. *Id.* at 666.

127. *Id.* Judge Silberman also raised the argument that the *Order* granted an economic preference providing protection from market forces to a powerful group of constituents: Internet content providers. *Id.* at 668. Section 706 requires the Commission to identify an actual threat to competition or barrier to infrastructure investment, supported by evidence that such a threat or barrier exists, and if such a requirement was not met, the Commission lacked the authority to promulgate the regulation in the first place. *Id.* at 667–68. This theory was moot, however, because Silberman agreed that the *Order* was invalid on other grounds. *Id.* at 667.

128. *Id.* at 650, 667.

definition stipulates that a telecommunications carrier may be treated as a common carrier only to the extent that it is providing “telecommunications services.”<sup>129</sup> This was problematic, given that the Commission previously determined<sup>130</sup> that broadband carriers are instead providing information services.<sup>131</sup> The terms of the *Order* prevent disparate treatment of traffic in substantially the same way that common carriers are prevented from discrimination in rendering service.<sup>132</sup> Therefore, even though the Commission never expressly stated it was attempting to treat broadband ISPs as common carriers, it becomes clear that the *Order* represents a *de facto* violation of the nexus of the statutory and administrative definitions involved because it treats broadband providers as common carriers by necessary implication.<sup>133</sup>

The court’s opinion never once uses the terms “stare decisis” or “estoppel,” but those are the legal principles being employed. While the Commission is not necessarily bound by its own decisions as a matter of stare decisis,<sup>134</sup> the Commission is bound to abide by its own definitions that are still in effect, which means that imposing common carrier obligations in broadband providers was unwarranted.<sup>135</sup> An agency may not simply disregard rules or categorical delineations that are still on the books.<sup>136</sup>

The principle that the Commission *could* change its policy to define broadband providers as telecommunications providers, subject to the constraints of the A.P.A. and the “arbitrary and capricious” standard, was also discussed at length in the opinion in relation to the change of interpretation of the Commission’s own statutory authority when it implemented the *Order*.<sup>137</sup> The Commission would merely need to acknowledge and explain the reasons for reclassifying ISPs as telecommunications services.<sup>138</sup> One motivation the Commission may

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129. *Id.* at 650; *see also* 47 U.S.C.A. § 153(51) (2012).

130. *See In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C.R. 14853, 14862 ¶ 12 (2005).

131. *Verizon*, 740 F.3d at 650–58.

132. *Id.*

133. *Id.*

134. *See generally* Honeywell Int’l., Inc. v. Nuclear Regulatory Comm’n, 628 F.3d 568 (D.C. Cir. 2010).

135. *Verizon*, 740 F.3d at 650–58.

136. 5 U.S.C. § 706(2) (1966); *see also* NetCoalition v. S.E.C., 615 F.3d 525, 536 (D.C. Cir. 2010).

137. *Verizon*, 740 F.3d at 635–36.

138. *Id.* at 636.

have had to avoid such a reclassification was that it had previously faced opposition to the proposal of reclassifying broadband providers as common carriers.<sup>139</sup> Besides industry opposition to common carrier regulation, forty-eight members of Congress had requested that the Commission leave any such change in policy to the legislature in a 2010 congressional resolution.<sup>140</sup>

By declining to officially reclassify broadband providers as common carriers, yet nevertheless treating them as such, the Commission found an inconspicuous way to treat ISPs as it desired without inviting the immediate ire that an outright reclassification would bring. It is clear from the reasons outlined in the *Verizon* opinion that this arguably somewhat devious approach to regulation was invalid.<sup>141</sup> The better question is whether the Commission had the authority to impose antidiscrimination and anti-blocking rules in the first place, a matter over which the majority and Judge Silberman disagreed.<sup>142</sup>

#### **B. Affirmative Statutory Authority and the Antitrust Antithesis**

It seems fairly clear that Section 706 of the Telecommunications Act did make an implicit grant of statutory authority to the Commission to regulate within this arena.<sup>143</sup> It is also not contested that the granted statutory authority has limitations, although the majority's explanation of the extent of those limitations is somewhat unsatisfactory.<sup>144</sup> Saying that the Commission is limited to its subject matter jurisdiction and that any regulation must encourage deployment of advanced telecommunications ability is indeed no limitation at all other than an illusory one.<sup>145</sup> The Commission could shoehorn just about any telecommunications regulation into this jurisdictional scope. This is not entirely a bad thing, however, since the Commission is the appointed expert on the Internet and therefore is better equipped to make nuanced decisions about its regulation than is Congress. An alternative argument would be that although the Commission may have stretched the scope of its authority too far, the real

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139. H.R. Con. Res. 311, 111th Cong., 2d Sess. (July 30, 2010).

140. John Eggerton, *48 Members of Congress Tell FCC To Back Off Broadband Action* (July 30, 2010, 5:35 PM), available at <http://www.broadcastingcable.com/news/washington/48-members-congress-tell-fcc-back-broadband-action/57788>.

141. See *Verizon*, 740 F.3d at 650–658.

142. See *id.* at 660–667 (Silberman, J., dissenting).

143. See *id.* at 638 (majority opinion).

144. *Id.* at 662 (Silberman, J., dissenting).

145. See *id.*

problem is that the Commission was simply not given enough authority to regulate effectively.

A key component of the dissent's counterargument in this case was that the Commission may have overstepped its limited authority in the *Open Internet Order* because the regulation was arguably made without the validation of substantial evidence that there were significant barriers to infrastructure investment, thus rendering the regulation "arbitrary and capricious."<sup>146</sup> As to the lack of supporting evidence of any real problem supporting the *Order's* provisions, Judge Silberman remarks in his dissent that the Commission never once identified any current practice of broadband providers that was an actual barrier to investment.<sup>147</sup> The Commission did purport to show that, absent regulation, barriers to infrastructure and market failures might result, however.<sup>148</sup> For example, the Commission stated that a broadband provider:

may have economic incentives to block or otherwise disadvantage specific edge providers[,]  
might use this power to benefit its own or affiliated offerings at the expense of unaffiliated offerings[,]  
may act to benefit edge providers that have paid it to exclude rivals[,]  
may have incentives to increase revenues by charging edge providers[, and]  
might withhold or decline to expand capacity in order to 'squeeze' non-prioritized traffic[.]<sup>149</sup>

As the dissent was quick to point out, these all amount to speculation, rather than actual evidence.<sup>150</sup> Although these certainly represent valid concerns, it may be true that the evidence was too anemic to support such a sweeping regulation based on the current statutory authority allotted to the Commission.<sup>151</sup> Specifically, if Internet providers do in fact have the "technical and economic" ability to impose restrictions on content

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146. See generally Hon. Maureen K. Ohlhausen, *Net Neutrality vs. Net Reality: Why An Evidence-Based Approach to Enforcement, and Not More Regulation, Could Protect Innovation on the Internet*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 81 (2013).

147. *Verizon*, 740 F.3d at 661 (Silberman, J., dissenting).

148. *Id.* at 663.

149. *Id.*

150. *Id.*

151. See Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767, 811–16 (2012).

providers—the lynchpin of the Commission’s theory—why had they not done so before the *Order*’s implementation?<sup>152</sup>

Surely broadband providers do have some incentives to engage in blocking and discrimination.<sup>153</sup> One reason they may decline to do so is because of a lack of economic clout or market power. This raises questions of antitrust, a body of law that often finds itself intertwined and occasionally adverse to administrative regulation.<sup>154</sup> Judge Silberman argued that because the Commission had not conducted a market power analysis prior to implementing the *Order*, its findings were invalid.<sup>155</sup> The Commission and majority both declared that ISPs represent a “terminating monopoly” over Internet content because Internet users tend to access the Internet via just one fixed provider.<sup>156</sup> The content thus becomes inaccessible to them entirely when the ISP decides to act as a gatekeeper of specific content.<sup>157</sup> The extent to which this represents actual market power depends upon the availability of other local providers, however.<sup>158</sup>

In the earlier years of the Internet, the last-mile service of the Internet was something of a “natural monopoly” like that of public utility companies, but today it is more common for consumers to have options among ISPs, at least in nonrural areas.<sup>159</sup> Whereas the majority followed the Commission’s belief that consumers are unlikely to respond to discrimination and blocking of content by switching ISPs,<sup>160</sup> the dissent broadly criticized this conclusion on the grounds that switching would only

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152. *See generally id.* (providing a thorough analysis of this question).

153. *See infra* Part V(C).

154. *See generally* Babette E. L. Boliek, *FCC Regulation versus Antitrust: How Net Neutrality Is Defining the Boundaries*, 52 B.C. L. REV. 1627, 1629 (2011). The authority to regulate and enforce antitrust threats granted to the Federal Trade Commission and the Department of Justice does alleviate the F.C.C. from bearing the sole responsibility for ensuring that a lack of net neutrality does not result in some sort of catastrophic market failure. *See id.* at 1628.

155. *Verizon*, 740 F.3d at 665. That said, the Commission is not the expert in ascertaining what constitutes impermissible market power, and therefore any antitrust-focused attempt at regulation might encroach on the authority of the Federal Trade Commission. *Id.*

156. Many, if not most, users access the Internet via both a single wireline broadband provider and over a separate mobile provider on smartphones. Still, some content, such as Netflix, is more valuably used via wired broadband.

157. *Verizon*, 740 F.3d at 646.

158. *See id.* (“If end users could immediately respond to any given broadband provider’s attempt to impose restrictions on edge providers by switching broadband providers, this gatekeeper power might well disappear.”).

159. *See id.* at 666.

160. *Id.*

be difficult if the ISPs had real market power.<sup>161</sup> The majority's assertion that consumers would not switch providers because they would be unaware of such blocking or discrimination is somewhat dubious, at least as to major content providers like Netflix, Sykpe, Google, and Facebook.<sup>162</sup> Surely, in the case of one of those giants, any such degradation or blocking would sooner or later be covered by the media, and as a result, consumers could easily find out if a service had been blocked as opposed to, say, having been shut down. This is less true as to smaller content providers, the degradation or blocking of which would be more likely to go unnoticed. Yet because the portion of the *Order* that requires disclosure of network management practices remains intact, an ISP's blocking of content could never truly be secret—just inconspicuous.<sup>163</sup>

At the same time, Judge Silberman makes an equally dubious argument when he implies that consumers would have an easy time switching between providers, thus rendering market power and concentration weak.<sup>164</sup> This ignores the reality that in many areas consumers' choices of full-fledged broadband service are quite limited.<sup>165</sup> One recent F.C.C. study in 2010 found that "approximately 96% of the population has [access to] at most two wireline providers" of Internet service.<sup>166</sup> And while—given the increasing coverage and quality of mobile high-speed Internet—this may be based on a faulty definition of the relevant product market that is arguably too narrow, it is an alarming reality nonetheless. Taken to its most extreme, there are some Americans who have only one option for wired Internet, period. For example, citizens of America's Pacific island territory of Saipan, CNMI, have only one Internet provider and have suffered monopolistic pricing issues as a result, a clear

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161. *Id.* at 664.

162. *See accord*, Andrew Orłowski, *Almost everyone read the Verizon v. FCC net neutrality verdict WRONG*, THE REGISTER (Jan. 18, 2014), [http://www.theregister.co.uk/2014/01/18/why\\_almost\\_everyone\\_got\\_the\\_net\\_neutrality\\_verdict\\_wrong/](http://www.theregister.co.uk/2014/01/18/why_almost_everyone_got_the_net_neutrality_verdict_wrong/).

163. Anyone motivated enough to seek it out this information could conclusively determine whether a content provider was, in fact, being blocked or degraded.

164. *See Verizon*, 740 F.3d at 663–64 (Silberman, J., dissenting).

165. *Id.* at 665. Silberman's view that slower Internet providers and mobile providers reduce broadband providers' market power has some flaws as well, dependent on what the specific consumer plans to do with his or her Internet connection. For example, if the consumer's sole reason for wanting wired Internet access is to engage in online gaming on networks such as Xbox Live, either substitute service provides no value, and thus does not affect the fixed-line broadband provider's ability to raise prices or tamper with price structures.

166. *Connecting America.: The Nat'l Broadband Plan*, 2010 WL 972375 (F.C.C. Mar. 16, 2010). The Commission cited a 2009 statistic that seventy percent of households were in areas where only one or two broadband providers were available when it defended its implementation of the *Order* as being supported by evidence. *Verizon*, 740 F.3d at 665.



indication of market power.<sup>167</sup> Anywhere an Internet provider can flex its market power in this way is an area in which a provider could also censor content without economic backlash. In any case, even Americans who live in areas not quite as remote suffer from a limited number of providers: If only two fixed broadband providers are available<sup>168</sup> and they both independently or collusively decide to block and degrade certain content, the effect is exactly the same. Similarly, consumers could also face barriers to exit in the form of early termination fees from their old provider and initial connection fees from any new provider, either of which might serve to deter switching.

In summation, Judge Silberman's objection to the Commission's failure to establish the market power of broadband providers is a valid one. However, because the market for broadband Internet service is highly concentrated for many consumers, the *Order* addressed a legitimate concern. In other words, even though the Commission may have exceeded its authority with the *Order*, or at the very least did not implement it properly with prior-established evidence, the *Order*'s mandate of net neutrality may yet be sound because it addresses a number of potential market failures.

### C. Problematic Public Policy?

Looking at the technical and textual statutory authority and stare decisis issues at hand, the court's decision in this case seems wholly proper. Regardless of the wisdom of the regulation, it was the court's task to affirm or vacate the *Order* based on its legal validity.<sup>169</sup> That said, the court's opinion does little to address the far more compelling question at hand: whether net neutrality is good public policy. Throughout its young existence, the Internet has proved to be an admirably level playing field where small start-ups often supplant established players (i.e., Facebook replacing MySpace). In a regulatory scheme that allows for paid prioritization, start-ups—and particularly bandwidth-intensive start-ups—will likely find themselves unable to put forth the capital necessary to

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167. Telephone Interview with Ghassan Harb, Consumer Counsel at the Att'y Gen.'s Off. of the Commonwealth of the N. Mar. I. (Feb. 24, 2014). As an aside, this and other U.S. island territories such as American Samoa are areas where telecommunications infrastructure investment is currently severely lacking. Michael Calabrese et. al., *The Most Expensive Internet in America*, SLATE: FUTURE TENSE (May 24, 2012), [http://www.slate.com/blogs/future\\_tense/2012/05/24/internet\\_access\\_and\\_cost\\_in\\_american\\_samoa\\_northern\\_marianas\\_islands\\_guam\\_.html](http://www.slate.com/blogs/future_tense/2012/05/24/internet_access_and_cost_in_american_samoa_northern_marianas_islands_guam_.html).

168. The presence of mobile broadband changes the market power analysis to mean such a scenario is not quite a duopoly, yet there are still services for which mobile broadband access is ineffective. See *supra* note 165.

169. *Verizon*, 740 F.3d at 634–35.

obtain a level of service similar to that of established competitors and therefore may never get off the ground.

Content providers are concerned that in the absence of an open Internet their content will be blocked or degraded, that it will encourage ISPs to further vertically integrate into content and applications, and that it will contribute to the diminution of free speech on the Internet.<sup>170</sup> At the heart of this debate is that ISPs essentially want a “piece of the pie” from any content provider making money on the Internet via the ISP’s network.<sup>171</sup> If cable companies can charge video aggregators like Netflix, YouTube, and Hulu, or communications providers like Skype, a fee in order to avoid being blocked or degraded (a sort of now-legal extortion), those companies will respond by passing along costs to the consumer or inserting even more advertisements than they already do.<sup>172</sup>

Netflix publicizes the performance speeds it receives from various broadband providers, and upon examination the graphical data does seem to indicate that the streaming service is being forced via degraded service into making special paid arrangements with ISPs.<sup>173</sup> To be fair, streaming video providers comprise some of the most expensive content for broadband providers to carry because they are invariably bandwidth intensive. Netflix alone was reported to account for roughly thirty percent of downstream Internet traffic.<sup>174</sup> Likewise, if broadband providers continue to be forced to abide by open Internet practices, they might simply begin charging more for their own services, meaning that added costs arising out of the increasingly bandwidth-intensive ways in which the average consumer uses the Internet are somewhat unavoidable.<sup>175</sup> Still, there are other, more worrying, potential market failures here.

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170. Ohlhausen, *supra* note 146 at 81.

171. *Colbert Report: Interview with Tim Wu* (Comedy Central television broadcast Jan. 23, 2014), available at <http://www.colbertnation.com/the-colbert-report-videos/432449/january-23-2014/end-of-net-neutrality—tim-wu>.

172. *See id.*

173. Last Week Tonight with John Oliver, *Ep. 5: Net Neutrality* (HBO broadcast June 1, 2014), available at <http://www.hbo.com/last-week-tonight-with-john-oliver/episodes/01/5-june-1-2014/video/net-neutrality.html#/> (“[The cable company’s treatment of Netflix] has all the ingredients of a mob shake-down.”).

174. Tracey Lien, *Why a Deal Between Netflix and Comcast Matters to Gamers*, POLYGON (Mar. 13, 2014, 9:30 AM), <http://www.polygon.com/2014/3/13/5483184/why-a-deal-between-netflix-and-comcast-matters-to-gamers>.

175. See Gary Kim, *Globally, Bandwidth Consumption Continues to Double Every Two Years*, TECHZONE360 <http://www.techzone360.com/topics/techzone/articles/2012/07/18/299247-globally-bandwidth-consumption-continues-double-every-two-years.htm> (July 18, 2012) (explaining global bandwidth demand roughly doubles every two years).

Some commentators have argued that cable companies in particular may have a more nefarious reason to want to degrade or block content, and especially video streaming content: eliminating competition. In many ways video aggregators like Netflix and Hulu Plus are formidable rivals to cable companies.<sup>176</sup> An increasing number of Americans have switched off cable, finding entertainment in online video sources instead.<sup>177</sup> Hulu in particular, a joint venture of three of the major broadcast television networks,<sup>178</sup> could be perceived as a threat because it offers much of the same content people pay to view on cable with the added convenience of being on demand and usually available the morning after a show airs.<sup>179</sup> Likewise, many cable providers offer their own on-demand video services, sometimes for a fee.<sup>180</sup> Moreover, some cable companies already pay additional fees to cable networks to ensure that only cable subscribers can view certain content on those networks' websites,<sup>181</sup> indicating a willingness to cut deals with video content providers. That said, while it is one thing to say that cable companies providing broadband *could* block or degrade competing video aggregators and other sources of streaming video, it is another thing to say that they actually *would*, given market pressures and the potential that gains from blocking might be offset by losses in demand for the provider's Internet service.<sup>182</sup>

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176. Aaron Taube, *Proof That Netflix is Destroying Cable TV*, YAHOO FINANCE (Apr. 16, 2014, 7:07 PM), <https://finance.yahoo.com/news/proof-netflix-destroying-cable-tv-000400548.html> (noting subscribers to Netflix and Hulu Plus were reported to be three times as likely to not have a cable subscription).

177. Richard Davies, *More Consumers Cut the Cable Cord*, ABC NEWS (Mar. 20, 2014, 9:01 AM), <http://abcnews.go.com/blogs/business/2014/03/more-consumers-cut-the-cable-cord/> (stating that 2013 marked the first year ever that pay-TV operators reported an annual decline in the number of subscribers, indicative of the consumer trend of "cord cutting").

178. These are NBC Universal, News Corp. (Fox), and Walt Disney Co. (ABC). See Boliek, *supra* note 154 at n. 248.

179. Associated Press, *Hulu names Fox exec as CEO*, NEW YORK POST (Oct. 17, 2013, 10:04 PM), <http://nypost.com/2013/10/17/hulu-names-fox-exec-as-ceo/>.

180. One such example is Xfinity Streampix, a paid service offered by Comcast that is meant to compete with Netflix, Amazon Instant Video, and Hulu. Trefis Team, *The Latest Deal With Sony Pictures Highlights Comcast's Efforts To Push Its On-Demand and Streaming Services*, FORBES (Mar. 3, 2014, 1:47 PM), <http://www.forbes.com/sites/greatspeculations/2014/03/12/the-latest-deal-with-sony-pictures-highlights-comcasts-efforts-to-push-its-on-demand-and-streaming-services/>.

181. Dorothy Pomerantz, *ESPN Tries To Have It Both Ways*, FORBES (Jan. 27, 2014, 4:43 PM), <http://www.forbes.com/sites/dorothypomerantz/2014/01/27/espn-tries-to-have-it-both-ways/>.

182. See Boliek, *supra* note 154, at n. 243. It is also worth noting that if blocking did induce people to unsubscribe from a cable company's Internet service, it could also induce them to switch television providers at the same time, resulting in further losses.

The same possible market failure exists with cable and DSL broadband providers vis-à-vis an alternative communications service like Skype, which competes with traditional phone services typically provided by those same companies. Given that the residential landline telephone is falling into near irrelevance,<sup>183</sup> however, this is a somewhat petty concern. A more compelling concern would be about how mobile broadband providers might want to block Skype because its voice and video service competes with the original use of the cellular telephone. The evidence would suggest that on the contrary, mobile carriers have embraced Skype, however.<sup>184</sup>

The anticompetitive argument proposed by net neutrality advocates, which is not without its faults,<sup>185</sup> may be magnified when it comes to one broadband provider in particular: Comcast. The company recently vertically integrated to acquire NBC Universal (owner of NBC and a host of cable networks) from General Electric and thus faces competition from streaming video available online in more ways than usual.<sup>186</sup> Net neutrality was, not surprisingly, a key inquiry in the F.C.C.'s review and eventual approval of that acquisition.<sup>187</sup> Additionally, Comcast later made a bid to acquire Time Warner Cable, which could make the company the broadband provider for roughly one third of American households.<sup>188</sup> Comcast is a powerful player not just in the market, but politically too; the company spent an astonishing \$18,810,000 on lobbying during 2013.<sup>189</sup> This would seem to make Comcast a particularly frightening potential abuser of market power. However, under a consent decree related to its acquisition of NBC

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183. Just 71% of households had a landline telephone in 2011, a number that has likely declined further since then while cell phone ownership has soared and does not speak to how much those landlines are actually used. Jeffrey Sparshott, *More People Say Goodbye to Their Landlines*, WALL ST. J. (Sept. 5, 2013, 7:32 PM), <http://online.wsj.com/news/articles/SB10001424127887323893004579057402031104502>.

184. See Ryan Singel, *Verizon Embraces Skype on Smartphones*, WIRED (Feb. 16, 2010, 1:36 PM), <http://www.wired.com/2010/02/verizon-embraces-skype-on-smart-phones/>.

185. Indeed, there is a fairly cogent argument that the *ex post* "wait and see" approach of antitrust law is a far more efficient market control measure than is *ex ante* regulation, because regulation runs the risk of forbidding not just anti-competitive but also pro-competitive practices and may stifle innovation. Boliek, *supra* note 154, at 1681–82.

186. In the Matter of Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc., 26 F.C.C. Rec. 4238, 4352-53 (2011).

187. *Id.* at 4351.

188. Dawn C. Chmielewski, *Comcast-Time Warner Cable deal may heighten calls for net neutrality*, L.A. TIMES (Feb. 13, 2014, 4:42 PM), <http://articles.latimes.com/2014/feb/13/entertainment/la-et-ct-comcast-merger-net-neutrality-20140213>.

189. Robert Reich, *Antitrust in the New Gilded Age*, HUFFINGTON POST (Apr. 17, 2014, 9:20 AM), [http://www.huffingtonpost.com/robert-reich/comcast-time-warner\\_b\\_5166292.html](http://www.huffingtonpost.com/robert-reich/comcast-time-warner_b_5166292.html).

Universal, Comcast agreed to abide by net neutrality principles until 2017, an agreement that remains in place even though the Open Internet Order was struck down.<sup>190</sup> So at least for the next few years, Comcast's subscribers (and Time Warner's subscribers if the deal goes through) will have their worries about the outcome of the *Verizon* case mitigated, although the agreement has not stopped Comcast from entering a streaming deal with Netflix.<sup>191</sup>

Although evidence of broadband providers actually blocking competing content is somewhat scarce, for evidence that they might engage in such practices if permitted one need look no further than the smartphone application blocking that has been done by Verizon itself in the past. In 2012, Verizon accepted a \$1.25 million settlement with the F.C.C. after it impermissibly blocked various "tethering" applications that competed with the carrier's own mobile hotspot service.<sup>192</sup> Likewise, cable networks and cable providers are no stranger to arranging for a type of permissible blocking of their own.<sup>193</sup> Cable television networks have worked with cable companies to ensure that the videos provided on many cable channel's websites and apps do not cannibalize one of their primary revenue sources—the fees collected from cable providers to carry the network. The networks do this by requiring online viewers to authenticate that they have a cable subscription with a participating cable company before they are allowed to watch.<sup>194</sup>

In the wake of its victory in *Verizon v. F.C.C.*, Verizon publically stated that it has been and remains committed to an open Internet and that the court's decision had not changed this.<sup>195</sup> But if Verizon did not want to operate outside the rules of net neutrality, why would it have bothered with the trouble and expense of this lawsuit in the first place? Indeed, Verizon expressly told the court in this proceeding that if it were not for the open Internet rules, "[it] would be exploring . . . commercial arrangements [with

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190. *Id.*

191. See *infra* notes 215-17 and accompanying text.

192. Peter Svendsen, *Verizon Can't Block Tethering Apps Says FCC; Carrier Pays to Settle Probe*, HUFFINGTON POST (July 31, 2012, 4:19 PM), [http://www.huffingtonpost.com/2012/07/31/verizon-cant-block-tethering-apps\\_n\\_1725466.html](http://www.huffingtonpost.com/2012/07/31/verizon-cant-block-tethering-apps_n_1725466.html).

193. See, e.g., Dorothy Pomerantz, *ESPN Tries to Have It Both Ways*, FORBES (Jan. 27, 2014, 4:43 PM), <http://www.forbes.com/sites/dorothypomerantz/2014/01/27/espn-tries-to-have-it-both-ways/>.

194. *Id.* ESPN's strategy is to charge cable companies that want their subscribers to have access to its app an extra fee. *Id.* Note that ESPN is already the most expensive channel for cable companies to carry. *Id.*

195. Edward Wyatt, *Rebuffing F.C.C. in 'Net Neutrality' Case, Court Allows Streaming Deals*, N.Y. TIMES, Jan. 15, 2014, at B1, available at <http://nyti.ms/1cjrF1t>.

services like Netflix],”<sup>196</sup> and it since has.<sup>197</sup> Verizon claimed to the public that it merely wanted to manage its network in the way it saw fit.<sup>198</sup> In a press release, Verizon further stated that the decision would allow “broadband providers to offer new and innovative services to their customers,” that it would allow “more room for innovation,” and that it would keep the Internet “a of hub of innovation.” This prompted talk show host Stephen Colbert to sarcastically quip, “See, net neutrality’s only been dead a week, and already three innovative uses of the word ‘innovation.’”<sup>199</sup> The innovation of which Verizon spoke presumably means new billing practices, a shift that has the potential to spell bad news for consumers.

Another possible shortfall of the new regulatory scheme, or lack thereof, is that it could result in degradation beyond just those services that involve streaming video. Although it is sheer speculation, the majority theorized that an Internet provider could accept payment from content rivals to degrade a competitor,<sup>200</sup> e.g., degrading or blocking Bing if Google paid it to do so. This concern becomes even more relevant in light of the vertical integration that has already taken place in the industry.<sup>201</sup> Google recently vertically integrated to make the foray into providing Internet service via Google Fiber.<sup>202</sup> On the one hand, the emergence of Google as a provider softens cable and DSL broadband providers’ potential market power.<sup>203</sup> On the other hand, Google has incentive to degrade the service of a competitor like Bing, or the competitor of any one of its various services, like Google Plus and its thus-far inauspicious attempt to compete with Facebook.<sup>204</sup> Likewise, Comcast now owns NBC Universal

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196. *Id.*

197. Several months later, Netflix begrudgingly agreed to a paid peering deal with Verizon. Sam Gustin, *Netflix Pays Verizon in Streaming Deal, Following Comcast Pact*, TIME (Apr. 28, 2014), <http://ti.me/1pHVPrT>.

198. *Id.*

199. Stephen Colbert, *End of Net Neutrality*, COLBERT REPORT (Comedy Central broadcast Jan. 23, 2014).

200. *Verizon*, 740 F.3d at 629.

201. *See, e.g.*, Rick Busciglio, *Comcast acquires 100 percent of NBC Universal*, Examiner.com (Feb. 13, 2013), <http://www.examiner.com/article/comcast-acquires-100-percent-of-nbc-universal>.

202. *Id.*

203. *See id.*

204. *See* Daniel Sparks, *Facebook Inc. Isn't Overvalued: Here's Why the Doubters Are Wrong*, THE MOTLEY FOOL (Apr. 3, 2014), <http://www.fool.com/investing/general/2014/04/02/a-closer-look-at-facebook-incs-greatest-competitiv.aspx>.

and therefore is also a part owner of MSNBC,<sup>205</sup> and without net neutrality it could, in theory, block or degrade the websites of competing firms such as Fox News or CNN. At that point, the issue starts to evolve into one of free speech and censorship.<sup>206</sup> In any case, a lack of net neutrality represents at best a “mixed bag” practice and at worst a potentially massive market failure should the fears of net neutrality advocates actually come to pass.

#### D. An Uncertain Future

Contrary to the expectations of many, the Commission ended up deciding not to appeal the *Verizon v. F.C.C.* case to the Supreme Court.<sup>207</sup> F.C.C. chairman Tom Wheeler had previously said the Commission might appeal the decision at the time it was released, although he may not have ever planned to do so, given that he had previously voiced support for the idea of allowing Internet providers to experiment with new business models.<sup>208</sup> Wheeler, a former telecommunications industry insider, said at the time that the Commission would be developing new rules to replace the *Order*.<sup>209</sup> The Commission did later propose a new set of net neutrality regulations several months later in May 2014, albeit a fairly anemic set that allowed for so-called “Internet fast lanes” where content providers could pay ISPs for preferential treatment.<sup>210</sup>

The post net neutrality marketplace is still very much nascent, but some evidence of newly-permitted practices by ISPs have already emerged. Comcast recently inked a deal with Netflix to allow faster, smoother streaming.<sup>211</sup> Netflix had previously complained that streaming speeds on Comcast were starting to lag behind those on other ISPs, sparking

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205. Mike Segar, *Comcast buys Microsoft stake in MSNBC.com*, REUTERS (July 16, 2012), <http://www.reuters.com/article/2012/07/16/us-msnbc-microsoft-idUSBRE86F04W20120716>.

206. If successful, a merger of Comcast and Time Warner would yield a disturbing amount of influence over speech coming from movie studios, television producers, and news organizations, given that all those industries would have to rely on the combined organization to get their messages to the general public. Reich, *supra* note 189.

207. James P. Tuthill, *FCC throws in the towel, but public has right to know why*, SFGATE (Feb. 25, 2014), <http://www.sfgate.com/default/article/FCC-throws-in-the-towel-but-public-has-right-to-5267613.php>.

208. Edward Wyatt, *Rebuffing F.C.C. in 'Net Neutrality' Case, Court Allows Streaming Deals*, N.Y. TIMES, Jan. 15, 2014, at B1, available at <http://nyti.ms/1cjrF1t>. This represents a shift from Wheeler's predecessor, who implemented the *Open Internet Order*. *Id.*

209. Tuthill, *supra* note 207.

210. See Protecting and Promoting the Open Internet NPRM, FCC 14-61 (2014) (available at <http://www.fcc.gov/document/protecting-and-promoting-open-internet-nprm> (last visited Oct. 26, 2014)).

211. Chloe Albanesius, *Comcast, Netflix Ink Deal to Improve Streaming Speeds*, PC MAGAZINE (Feb. 23, 2014), <http://www.pcmag.com/article2/0,2817,2453878,00.asp>.

accusations that Comcast was deliberately stifling Netflix traffic to extort payment from the video aggregator.<sup>212</sup> The deal requires Netflix to pay for use of Comcast's network and presumably allows Comcast subscribers to view Netflix's new Ultra High Definition content, a service that Netflix so far has only provided to ISPs that participate in its Open Connect Network.<sup>213</sup> That network allows Netflix to connect directly to ISPs or embed its content servers inside an ISP's network, thus eliminating middleman backbone networks.<sup>214</sup> Comcast has said that Netflix will still not receive preferential network treatment, as doing so would violate its consent decree,<sup>215</sup> but the arrangement and others like it—such as the one recently inked by Verizon<sup>216</sup>—are nonetheless suspect.<sup>217</sup>

## VI. Conclusion

It is certainly rare for a Circuit Court case over an administrative order within the telecommunications industry to invoke such strong feelings on either side of the debate,<sup>218</sup> yet *Verizon v. F.C.C.* is no ordinary case because net neutrality is no ordinary issue.<sup>219</sup> The ways in which this decision could spell bad news for consumers are myriad. Content providers may start paying fees for preferred service, which in turn would result in higher costs for those services passed on to the consumer. Furthermore, net neutrality previously allowed anyone to become a content producer by leveling the playing field, which is pivotal to ensuring innovative newcomers are not boxed out by established content providers

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212. See Lien, *supra* note 174.

213. Albanesi, *supra* note 211.

214. *Id.*

215. See *supra* note 190 and accompanying text.

216. See Gustin, *supra* note 197.

217. Lien, *supra* note 174 (“Netflix is conceding they have to do this, that they cannot survive as an Internet content provider without paying the cable companies a fee.”).

218. Indeed, talk show host John Oliver made light of the disinterest most people have for things like the minutiae of F.C.C. regulations when he did a segment on his show about net neutrality and its recent shake-up, theorizing that net neutrality's esoteric nature had shielded it from greater public outcry. Last Week Tonight with John Oliver, *Ep. 5: Net Neutrality* (HBO broadcast June 1, 2014), available at <http://www.hbo.com/last-week-tonight-with-john-oliver/episodes/01/5-june-1-2014/video/net-neutrality.html#/> (“The cable companies have figured out the great truth of America: If you want to do something evil, put it inside something boring.”).

219. It would seem that the public, once educated on the issue, is quite opinionated about Net Neutrality and the F.C.C.'s new proposed rules. The Commission received over a million comments to its proposed rules, a record number and a volume so high it caused the F.C.C.'s website to crash. See Elise Hu, *One Million Net Neutrality Comments Filed, but Will They Matter?*, National Public Radio, <http://www.npr.org/blogs/alltechconsidered/2014/07/21/332678802/one-million-net-neutralitycomments-filed-but-will-they-matter> (last accessed Oct. 26, 2014).



who see them as a threat. Simply put, the Internet was not broken before, and yet it may be now.

At the same time, despite the sensationalist speech on this issue being disseminated to the public,<sup>220</sup> one must be careful not to overreact. It may be that many of those notions of a dystopian future for cyberspace are unlikely to come to pass in most areas due to normal market pressures and the still-present and potent force that is federal antitrust law. Indeed, prophylactic authority in this arena is actually somewhat dispersed: the protections put in place by the F.T.C. and Department of Justice that guard against market failures are unaffected by this decision, meaning the market is not completely vulnerable. Perhaps this window of opportunity for broadband providers to experiment with “innovative” business models—which will be open at least until the Commission approves a new set of rules in accordance with the court’s decision—is a good thing because it could partially settle the net neutrality debate. Conversely, if the Commission ultimately fails to adopt another net neutrality regulation, this interim period of free experimentation could become permanent, for better or worse.

The seminal question is an age-old one that is raised whenever there is a potential for market failures: whether the laissez-faire open market or effective regulation is the means to an optimally efficient result. It may very well be true, as some have posited, that addressing any market failures from an absence of net neutrality is more efficiently left to the “wait and see” approach of antitrust law than *ex ante* regulation.<sup>221</sup> Moreover, one may argue that it is inefficient and unavailing to attempt to closely regulate such a rapidly changing industry where technological innovations routinely alter the competitive landscape. Indeed, the Commission should be cautious about forming regulations based on concerns of undue market power because it is not the designated expert in that field.<sup>222</sup> The answer to the question of what solution is optimal will take time to flesh out if it is ever reached at all. In the meantime, however, the future of the Internet—which is itself a symbol and embodiment of the principles of future progress, innovation, and competitive fair play—hangs in the balance.

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220. This includes predictions of a populist revolt. See, e.g., Ron Fournier, *Net Neutrality’s Death Could Spark Populist Revolt*, NATIONAL JOURNAL (May 6, 2014), available at <http://www.nationaljournal.com/tech/net-neutrality-s-death-could-spark-populist-revolt-20140506?ocid=msnnws> (suggesting Comcast or Verizon might be this generation’s Standard Oil).

221. See Boliek, *supra* note 154 at 1681–82.

222. See generally *id.*