FEDERAL AND STATE AUTHORITY FOR BROADBAND REGULATION

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ABSTRACT

Verizon’s challenge to the Federal Communications Commission’s 2010 Open Internet Order voided the substance of those rules. But even as the Commission lost the authority to enforce those rules, it gained substantial new regulatory powers. The D.C. Circuit expressly affirmed the Commission’s interpretation of section 706 of the Telecommunications Act of 1996, granting it general regulatory authority to promote the deployment of broadband infrastructure. The significance of this power can hardly be understated. The Commission has relied on this authority to preempt state statutes, to subsidize broadband deployment, and even to support, together with Title II of the Communications Act, new network neutrality rules. And the reach of section 706 extends beyond the federal commission and into state regulatory bodies: The statute explicitly vests state commissions with the authority to encourage the deployment of broadband to all Americans. Like the FCC, the states have pounced on this authority, using it to engage in substantive merger reviews, and to impose regulatory requirements on telecommunications companies.

This concurrent grant of jurisdiction to the FCC and to state commissions thus has important implications for the unique brand of federalism that has dominated telecommunications regulation. Section 706’s dual grant of authority to federal and state regulators embraces an experimentalist approach to telecommunications regulation, allowing states to serve as laboratories of regulatory experiments, while empowering the FCC to generalize their successes.

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INTRODUCTION

The Federal Communications Commission has engaged in an extended dialogue with the D.C. Circuit regarding network neutrality regulation.1 In Comcast v. FCC, the court held that the FCC failed to articulate a jurisdictional basis for its ruling against Comcast.2 The Commission responded by issuing a set of rules supported by a new source of statutory authority—section 706 of the Telecommunications Act. The court’s decision in Verizon v. FCC affirmed the FCC’s view of its jurisdiction—but nevertheless struck down those rules as exceeding the bounds of that authority.3

This ruling will hardly be the last chapter. Before the ink had dried on Verizon, the White House urged the FCC to “vindicate the notion of a free and open internet,”4 and the Commission launched another network neutrality

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2. Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010).
proceeding, inviting public input and proposals for regulations. Nearly four million citizens, corporations, and public interest organizations offered their views, forcing the FCC to confront a record larger than had ever before been amassed in its history. The Commission concluded that proceeding by promulgating rules largely similar to those it had previously issued. This time, however, it also invoked its authority to regulate common carriers under Title II of the Communications Act. And the Commission’s conversation with the courts may not yet be over: as before, broadband carriers and trade organizations have sued to strike down the FCC’s regulations.

Although the Commission’s 2015 Open Internet Order relies on its authority under Title II and section 706, one of its initial proposals focused on rules based on section 706 alone. A closer look suggests that section 706 gives the Commission the power to promulgate regulations that are only slightly narrower than the rules it issued through the 2015 Open Internet Order. Stated more generally, section 706 gives the FCC broad authority to regulate broadband internet access service, including the authority to issue network neutrality-like rules.

Perhaps even more significant than the breadth of authority granted to federal regulators is the new power conferred to state utility commissions. Section 706 of the Telecommunications Act, properly read, endows state commissions with federal power. An unintended effect of Verizon’s challenge to the Commission’s 2010 Open Internet Order is thus the broad delegation of federal authority to local regulators. This new authority to use virtually any means to promote investment in broadband infrastructure has significant implications for the model of “cooperative federalism” that has governed federal and state relations in telecommunications regulation.

In this Essay, I elaborate on the implications of the authority now vested in federal and state regulators by section 706. I begin by describing the Federal Communications Commission’s history with network neutrality regulation in particular, starting with the proceedings that gave rise to the Comcast decision and through the assertion of its authority to regulate common carriers under Title II of the Communications Act.

10. See infra Part III.
This Essay’s second part describes how section 706 alone can support a set of rules designed to enforce many basic network neutrality norms. To be sure, the rules that combine the Commission’s section 706 authority with its Title II powers are broader. But an examination of an alternative, though purely hypothetical, set of rules that rely on section 706 alone helps to demonstrate the vast scope of authority endowed by the statute.12

Lastly, I survey the effects of section 706 on the relationship between federal and state regulators. Drawing predominantly from two examples—state regulation of infrastructure necessary for broadband deployment, and federal preemption of state laws limiting broadband competition—I show how the striking breadth of section 706’s jurisdictional grant alters the already novel scheme of federalism that is built into telecommunications regulation. Section 706 supersedes state law limitations on the jurisdiction of state commissions, and gives them the authority to regulate where the FCC has declined to do so. Moreover, federal regulators can use section 706 as a source of preemptive authority, enabling the FCC to supersede decisions typically subject to state and local discretion. Section 706 thus has substantial implications for the model of federalism that has dominated telecommunications regulations.

I. NETWORK NEUTRALITY AT THE FCC

A. Network Neutrality Before Verizon

The FCC has a lengthy tradition of network neutrality regulation, beginning in the 1960s.13 The most recent chapter of this legacy features a dialogue between the FCC and D.C. Circuit over the Commission’s regulatory jurisdiction. In 2007, the Associated Press, along with internet policy advocates, discovered that Comcast was selectively interfering with the traffic

12. See Wu, Network Neutrality, supra note 1, at 142 (“Government regulation . . . invariably tries to help ensure that the short-term interests of the owner do not prevent the best products or applications becoming available to end-users.”)

13. A significant history predates the story told here, beginning with the FCC’s three Computer Inquiries. See Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958 (1987) (report and order); Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384, 417-423 (1980) (final decision); Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 28 F.C.C. 2d 267, 269 (1971) (final decision and order); see also 2010 Open Internet Order, supra note 7, at 18,045 (Copps, Comm’r, concurring) (referring to the Computer Inquiries). These proceedings are also described in more detail in Tejas N. Narechania & Tim Wu, Sender Side Transmission Rules for the Internet, 66 FED. COMM. L.J. 467 (2014). For present purposes, I fast-forward to 2007, noting only that this lengthy history is relevant to D.C. Circuit’s analysis of Verizon’s argument invoking FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). See infra note 55 and accompanying text (describing Verizon’s argument that relies on Brown & Williamson).
of some of its customers. According to these investigations, Comcast was purposely “throttling” traffic associated with peer-to-peer networks, despite lacking any indication that the traffic was illicit or harmful to Comcast’s network. The Commission investigated the matter and, after a period of public comment, issued an order asserting authority over Comcast’s broadband service and deemed Comcast’s practices illegal as contrary to a Commission Policy Statement.

By the time the Commission was contemplating the Comcast Order, it had, in a decision upheld by the Supreme Court in Brand X, classified the transmission of broadband internet traffic as an “information service” rather than as a “telecommunications service.” This decision had the significant consequence of limiting the Commission’s authority to regulate broadband. In particular, the “information service” designation disabled the Commission from relying on its authority under Title II of the Communications Act to regulate broadband carriers as common carriers.

The Commission thus needed an alternative jurisdictional basis for the Comcast Order. It thought it had found one in its “ancillary authority.” That is, the FCC conceded that although the Comcast Order did not fall within any of its express statutory mandates, it was nevertheless “reasonably ancillary” to the “effective performance” of its other statutory responsibilities.

Specifically, the Commission argued that the Comcast Order was ancillary to the policies contained within section 706 of Telecommunications Act of

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16. Peer-to-peer traffic is sometimes associated with copyright infringement. In the Comcast case, however, the complainants tested Comcast’s network practices with materials that were out of copyright, such as The Bible and open-source software. See Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications (Comcast Order), 23 FCC Rcd. 13028, 13051-052 & n.192 (2010) (memorandum opinion and order).
17. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities (Internet Freedoms Policy Statement), 20 FCC Rcd. 14986 (2005) (policy statement); see also Comcast, 600 F.3d at 644.
18. Nat’l Cable and Telecomm. Ass’n v. Brand X Internet Serv’s, 545 U.S. 967, 974 (2005) (affirming FCC order finding “cable companies that sell broadband Internet service do not provide ‘telecommunications service[s]’ as the Communications Act defines that term, and hence are exempt from mandatory common-carrier regulation under Title II”); see also High-Speed Access to the Internet Over Cable and Other Facilities (Cable Modem Order), 17 FCC Rcd. 4798, 4802 (2002).
19. 47 U.S.C. § 153(51) (2014) (“A telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services.”). See also Brand X, 545 U.S. at 997.
22. Comcast, 600 F.3d at 646 (quoting American Library Ass’n v. FCC, 406 F.3d 689, 691 (D.C. Cir. 2005)).
Section 706(a), for example, directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” and authorizes it to use a variety of regulatory approaches to achieve this end. Likewise, section 706(b) asks the Commission to “take immediate action” whenever it finds that broadband is not being deployed to “all Americans in a reasonable and timely fashion.” Altogether, section 706 of the Telecommunications Act of 1996 embodies the heart of Congress’s policies favoring broadband deployment.

The Commission argued that the Comcast Order promoted these statutory objectives in two discrete ways. First, the Commission determined that degrading the consumer broadband experience “effectively . . . limit[ed]” the deployment of broadband because it imposed artificial restrictions on existing network capability. Second, and more importantly, the Commission found that “prohibiting network operators from blocking or degrading consumer access to desirable content and applications on-line will result in increased consumer demand for high-speed Internet access and, therefore, increased deployment to meet that demand.”

The D.C. Circuit was unpersuaded by the Commission’s assertion of regulatory authority. To be sure, the court held open the possibility that the Commission had accurately described the causes and effects of consumer demand for broadband. But the court ruled that a provision that did not itself grant regulatory power could not serve as a basis for ancillary authority. Section 706 could be read as a grant of agency jurisdiction, the court suggested, but the Commission had previously interpreted the statute as not granting any regulatory authority. Thus, the court ruled that the Commission

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24. § 1302(a). The breadth of the regulatory tools the Commission is authorized to use include “price cap regulation, regulatory forbearance,” and, more generally, “other regulating methods.” Furthermore, “[a]dvanced telecommunications capability” refers to broadband internet access. Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 14 FCC Red. 2398 n.20 (1999).
27. Id. at 13038-039.
28. Id.
29. Comcast Corp. v. FCC, 600 F.3d 642, 658 (D.C. Cir. 2010) (“[S]ection 706 does contain a direct mandate . . . .”). Indeed, as I describe infra Part I.B, the court seems to think that this is the better reading of the statute. Verizon Commc’ns Inc. v. FCC, 740 F.3d 623, 637 (D.C. Cir. 2014) (new interpretation is “more logical”).
30. The Commission vigorously contended this reading of its previous order, Deployment of Wireline Services Offering Advanced Telecommunications Capability (Advanced Services Order), 13 FCC Red. 24012 (1998) (memorandum opinion and order), arguing that it did “not opin[e] more generally on the effect of section 706 on ancillary
could not now issue the Comcast Order as ancillary to its section 706 authority—authority that the Commission had itself disavowed. 31

This view of section 706 proved to be critical to the Commission’s second attempt at enforcing network neutrality norms. As the FCC forged a path forward from the Comcast decision, it noted that most observers “had focused on two principal options.” 32 First, many suggested that the FCC stay the course and “adapt its policies to the restrictions announced by the Comcast court.” That is, the Commission could attempt to rely on its ancillary authority and miscellaneous sources of agency jurisdiction to issue rules governing broadband service. Alternatively, the Commission could “reclassify broadband internet access services as telecommunications services,” subjecting them to the full board of common carrier regulations that apply under to Title II of the Telecommunications Act. 33

Neither option seemed satisfactory to the FCC. The first faced continuing “risks of failure in court” and “would involve a protracted, piecemeal approach to defending essential policy initiatives.” 34 The second would “subject the providers of broadband communications services to extensive regulations,” some of which seemed to be “ill-suited to broadband.” 35

The FCC found a third option in section 706. 36 In December 2010, the

authority.” Comcast, 600 F.3d at 658-59. The Commission tried to cabin its prior reading of section 706 to one that was limited to the question whether the statute supported forbearance authority—rather than statutory authority more generally. Id. This disagreement informs an extended dialogue between the Commission and the court that extends all the way into the Verizon decision. See infra notes 46, 50.

31. Comcast, 600 F.3d at 659.


33. Third Way Legal Framework, supra note 32.

34. Third Way Chairman Statement, supra note 32.

35. Id.

36. The Commission initially considered using section 706 as authority to forbear from applying some common carrier regulations after reclassifying the transmission of broadband traffic as a telecommunications service, while applying other rules to ensure network neutrality. Third Way Legal Framework, supra note 32; see also 47 U.S.C. § 160 (2014) (additional authority for forbearance). But the FCC’s strategy evolved over time, and this shift in strategy was the subject of some consternation. E.g., Press Release, Free Press, Is FCC Peddling Fake Net Neutrality? (Dec. 1, 2010), http://www.freepress.net/press-release/2010/12/1/fcc-peddling-fake-net-neutrality (The FCC “abandon[ed] [its] prior commitment to make new rules under Title II of the Communications Act, instead pursuing rules under the more legally precarious Title I.”). These reservations notwithstanding, section 706 played a foundational role in the Commission’s 2010 Open Internet Order, as described infra.
Commission adopted the 2010 Open Internet Order,\textsuperscript{37} which contained three principal rules.\textsuperscript{38} First, the Order requires that broadband providers “disclose accurate information regarding the network management practices, performance, and commercial terms” of its service offering.\textsuperscript{39} Second, the Order prevented broadband providers from “block[ing] lawful content, applications, services, or non-harmful devices.”\textsuperscript{40} Finally, the Order required that providers “not unreasonably discriminate in transmitting lawful network traffic.”\textsuperscript{41} Elaborating on the third rule, the Commission noted that use-agnostic discrimination would be “likely reasonable,” whereas “a commercial arrangement . . . [to] favor some traffic over other traffic . . . (i.e., ‘pay-for-priority’) would raise significant cause for concern.”\textsuperscript{42}

In describing its authority to issue these rules, the Commission relied principally on section 706. The Commission carefully explained its position that section 706(a) “necessarily invested the Commission with the statutory authority” necessary to promote the deployment of broadband.\textsuperscript{43} Furthermore, it argued that section 706(b) required the Commission to take action to promote “infrastructure investment” and “competition” in the broadband market.\textsuperscript{44} As in the Comcast Order, the Commission found that the 2010 Open Internet Order was tethered to these statutory goals because it encouraged broadband deployment by “enabl[ing] a self-reinforcing cycle of investment and innovation in which new uses of the network lead to increased adoption of broadband, which drives investment and improvements in the network itself.”\textsuperscript{45} But, unlike its previous attempt in Comcast, the FCC explicitly disavowed its earlier reading of section 706, asserting that the statute affirmatively granted authority to regulate.\textsuperscript{46}

\textsuperscript{37} Although the Order was adopted in December 2010, the rules did not go into effect until after publication in the Federal Register. Federal Register publication was delayed until September 23, 2011, and the rules became effective on November 20, 2011. Preserving the Open Internet, 76 Fed. Reg. 59192 (FCC Sept. 23, 2011) (codified at 47 C.F.R. § 8.1 et seq.).

\textsuperscript{38} 2010 Open Internet Order, supra note 7. These rules are based in part on the Commission’s 2005 Policy Statement. See Internet Freedoms Policy Statement, supra note 17. Notably, the rules varied slightly in their application to providers of broadband service over mobile (cellular) networks. See 2010 Open Internet Order, supra note 7, at ¶¶ 99-104; infra notes 40-41.

\textsuperscript{39} 2010 Open Internet Order, supra note 7, at ¶ 54. This rule is still in effect. Verizon Commc’ns Inc. v. FCC, 740 F.3d 623, 659 (D.C. Cir. 2014) (upholding transparency rule).

\textsuperscript{40} 2010 Open Internet Order, supra note 7, at ¶ 63; see also id. at ¶ 99 (different scope for mobile broadband).

\textsuperscript{41} Id. at ¶ 68; see also id. at ¶ 104 (rule not applicable to mobile broadband).

\textsuperscript{42} Id. at ¶¶ 73, 76.

\textsuperscript{43} Id. at ¶ 120.

\textsuperscript{44} 47 U.S.C. § 1302(b) (2014); see also infra note 56 (describing section 706(b)).

\textsuperscript{45} 2010 Open Internet Order, supra note 7, at ¶ 3.

\textsuperscript{46} In this second part of an ongoing conversation between the Commission and the D.C. Circuit, supra note 30, the Open Internet Order does explicitly “reject” any “reading of
B. Verizon v. Federal Communications Commission

The 2010 Open Internet Order did not go unchallenged. In July 2012, Verizon sought review of the Commission’s Order in the D.C. Circuit, arguing that the rules were unlawful for two primary reasons; first, because the rules “effectively” imposed a common carriage regime, they exceeded the Commission’s authority to regulate any service not classified as a telecommunications service; and second, because the Commission lacked the jurisdiction to adopt the regulations.

The Commission prevailed on its jurisdictional argument. To be sure, the D.C. Circuit noted that the Commission had previously tried (and failed) to rely on section 706(a) for the “authority to regulate broadband providers.” But because the Commission had reconsidered its interpretation of the statute and had “offered a reasoned explanation for its changed understanding,” the court found “the Commission’s current understanding of section 706(a) as a grant of authority” to be “a reasonable interpretation of an ambiguous statute.” As it originally suggested in Comcast, the court explained that the language of the statute can bear a reading that grants agency authority. Furthermore, the court found the legislative history, which refers to section 706 as a “necessary fail-

the statute” that does not view section 706 as a grant of authority. 2010 Open Internet Order, supra note 7, at ¶ 119 n.370. In doing so, however, it did not quietly acquiesce to the D.C. Circuit’s reading of the Advanced Services Order, supra note 30. Instead, the Commission doubled-down on the reading of its prior order that it advanced in the Comcast case, explicitly stating that the “Advanced Services Order is ... consistent with our present understanding” that the statute acts as a grant of regulatory jurisdiction. 2010 Open Internet Order, supra note 7, at ¶ 119. But see Framework for Broadband Internet Serv., GN Docket No. 10-127, at ¶ 36 (FCC June 17, 2010) (notice of inquiry), https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-114A1.pdf (seeming to accept the D.C. Circuit’s conclusion in Comcast and seeking comment “on whether the Commission should revisit and change its conclusion that section 706(a) is not an independent grant of authority”).

48. Id. at 21.
49. Verizon, 740 F.3d at 636. Recall that the FCC had previously relied on Section 706(a) not as a stand-alone source of authority, but rather as a crutch for ancillary authority.
50. Id. In this last chapter of the ongoing dialogue between the FCC and the D.C. Circuit, the court notes the Commission’s “palpable reluctance” to accept the D.C. Circuit’s reading of the Advanced Services Order, supra note 30. Id. at 636; see also supra notes 30, 46. In fact, the court suggests that the Commission, in the 2010 Open Internet Order, “inaccurately describes” its own previous interpretation of section 706 (as the court so characterized it in Comcast). Verizon, 740 F.3d at 637. The court forgives the Commission for its “pride,” however, and concludes that the Commission’s more recent conclusion regarding section 706 was “more logical” than its first one, Verizon, 740 F.3d at 637, and defers to its interpretation. infra notes 51-55 and accompanying text.
51. Verizon, 740 F.3d at 637.
52. Verizon, 740 F.3d at 637-38. Interestingly, Judge Tatel wrote the opinion in both Comcast and Verizon, as well as Celco Partnership v. FCC, 700 F.3d 534 (D.C. Cir. 2012), discussed infra notes 75, 78, 85 and accompanying text.
safe,” to support such a reading:53 “[I]t would be odd to characterize section 706 as a fail-safe that ensures the Commission’s ability to promote advanced services if it conferred no actual authority:”\(^54\) And the court concluded that the revised interpretation of the statute is consistent with the Commission’s lengthy history of regulating internet traffic.\(^55\)

The court’s decision in Verizon thus awarded the Commission an important victory by validating its jurisdictional approach.\(^56\) Of course, as has been detailed elsewhere at length,\(^57\) the court accepted Verizon’s arguments that the rules are nevertheless void because they exceed the Commission’s authority to regulate information service providers.\(^58\) That is, the Commission attempted to issue rules tantamount to common carrier regulation without revisiting its classification decision. But that the court specifically addressed the FCC’s jurisdictional argument signals the extent to which it holds the general authority to regulate internet traffic under section 706.

\(^{53}\) S. REP. NO. 104-23, at 50-51 (1995); see also Verizon, 740 F.3d at 639 (citing Senate Report).

\(^{54}\) Verizon, 740 F.3d at 639 (quoting Open Internet Order at ¶ 120).

\(^{55}\) More specifically, the court found FDA v. Brown & Williamson, 529 U.S. 120 (2000), to be inapplicable. Unlike the FDA, which “had not only disclaimed any authority to regulate tobacco products, but had done so for more than eighty years, and Congress ha[d] repeatedly legislated against this background,” the FCC had a lengthy history of regulating network data traffic. This history is noted in note 13, supra, and recounted in more detail in Narechania & Wu, supra note 13.

\(^{56}\) In addition to affirming the Commission’s view of section 706(a), it is worth noting that the court also validated the Commission’s reading of section 706(b). Section 706(b) provides the Commission with jurisdiction only conditionally: if the Commission finds that broadband is not “being deployed to all Americans in a reasonable and timely fashion,” then the Commission must “take immediate action to accelerate [such] deployment.” 47 U.S.C. § 1302(b) (2014).

In July 2010, after revising its definition of broadband from data transfer speeds of 200 kilobits per second (kbps) up to 4 megabits per second (mbps), the Commission—for the first time in over ten years of issuing such reports—concluded that the section 706(b) condition was not met. Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 25 FCC Rcd. 9556 (2010) (memorandum opinion and order). The “suspicious” timing of the Commission’s conclusion notwithstanding, the D.C. Circuit concluded that the Commission’s “new threshold” for broadband was “more appropriate to current consumer behavior and expectations.” Verizon, 740 F.3d at 641-42. It therefore concluded that the Commission has reasonably interpreted section 706(b) to empower it to take steps to accelerate broadband deployment.” Id. at 641.


\(^{58}\) Verizon, 740 F.3d at 649.
C. Network Neutrality After Verizon

The reaction to Verizon was swift. The White House almost immediately called on the FCC to begin a process to promulgate new network neutrality rules, and the FCC issued a Notice of Proposed Rulemaking within only a few months. Notably, the FCC’s initial proposal focused primarily (though not exclusively) on the authority conferred by section 706. Ultimately, the FCC—at the urging of the Obama Administration—revisited its 2002 classification decision and ruled that broadband service is a form of “telecommunications service” subject to common carrier regulation, thereby enabling the Commission to issue rules that were substantially similar to those that the D.C. Circuit struck down in Verizon. In particular, the FCC issued rules that:

1. Prohibit broadband carriers from “block[ing] lawful content, applications, services, [and] non-harmful devices;”
2. Prohibit broadband carriers from “impair[ing] or degrad[ing] lawful Internet traffic;”
3. Prohibit broadband carriers from “favor[ing] some traffic” either “in exchange for consideration” or “to benefit an affiliated entity;” and that
4. Require broadband carriers to “publicly disclose accurate information regarding the network management practices, performance, and commercial terms.”

II. A PATH NOT TAKEN: SECTION 706 (ALONE)

Although the Commission ultimately invoked the authority granted by Title II of the Communications Act to support its 2015 Open Internet Order, that regulatory choice is hardly a comment on the breadth of the jurisdiction conferred by section 706 of the Telecommunication Act. The FCC itself suggested, in its 2014 Notice of Proposed Rulemaking, that the statute can support rules that secure many of the norms of network neutrality. Indeed, one measure of the breadth of the authority granted by section 706 is the extent to which it can support rules that overlap with those that the FCC ultimately approved. Stated simply: What can section 706, standing alone, not provide?

In Verizon, a majority of the court agreed that “openness [as understood in the 2010 Open Internet Order] is integral to achieving the statutory objectives

60. 2015 Open Internet Order, supra note 6.
63. 47 C.F.R. § 8.9 (2015)
64. 47 C.F.R. § 8.3 (2015)
set forth in section 706. The majority was also persuaded that a broadband carrier’s position as a “terminating monopolist,” or as a “gatekeeper,” accords it a unique ability to restrict internet traffic. Altogether, the majority credited the “Commission’s prediction that the 2010 Open Internet Order regulations will encourage broadband deployment.”

If the 2010 Open Internet Order’s rules are consistent with the statutory aims of section 706, but exceeded the limits on the FCC’s ability to impose common carrier-style regulation on information services, what could the Commission have done? The decision to exercise its authority under Title II

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65. Verizon, 740 F.3d at 645. But see Verizon, 740 F.3d at 663 (Silberman, J., dissenting) (The Commission’s reasoning is based on “sheer speculation” and not grounded in “logic and evidence.”).

66. On this point, it is important to draw a distinction between a traditional bottleneck and a gatekeeper (a term that the dissent accused the majority of “largely invent[ing].”) Id. at 663 (Silberman, J., dissenting). A true bottleneck arises when a monopolist controls the single point of entry, thereby controlling access to that facility, as well as other products and services that use the facility. Howard A. Shelanski, Information, Innovation, and Competition Policy for the Internet, 161 U. PA. L. REV. 1663, 1676 n.55 (2013) (citing STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 942-43 (3d ed. 2012)). Gatekeeper, on the other hand, refers to an entity with control over an intermediate facility (like a point of entry) that is significantly important—potentially so much so as to affect the ability of upstream products and services to enter—but that may not be a monopolist. In most contexts, the term refers to an intermediate retailer with buying power. See Warren S. Grimes, Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomic Seller, 72 ANTITRUST L.J. 563, 578 n.45 (2005) (citing FED. TRADE COMM’N, WORKSHOP ON SLOTTING ALLOWANCES AND OTHER MARKETING PRACTICES IN THE GROCERY INDUSTRY 58 (2001), https://www.ftc.gov/sites/default/files/documents/reports/report-federal-trade-commission-workshop-slotting-allowances-and-other-marketing-practices-grocery/slottingallowancesreportfinal_0.pdf) The court (via the Commission), however, adopts a more flexible use of the term, using it to refer to a broadband provider’s status as an intermediary between a consumer and an upstream seller that can “impose restrictions” on the upstream seller without having the consumer be “fully responsive” to the restriction. Verizon, 740 F.3d at 646-48; see infra note 117 (example of such incomplete responsiveness).

67. Verizon, 740 F.3d at 646 (“The Commission also convincingly detailed how broadband providers’ position in the market gives them the economic power to restrict edge-provider traffic . . . .”). But see Verizon, 740 F.3d at 663-64 (Silberman, J., dissenting) (“[G]atekeeper[]” and “so-called terminating monopoly” are terms that have been “largely invented,” and the Commission did not “establish the economic power [such a position] would supposedly afford all broadband providers against all edge providers.”). Judge Silberman would require the Commission to show that broadband providers have market power. Verizon, 740 F.3d at 664 (Silberman, J., dissenting). Scholars have noted how the policies and regulations of broadband carriers have important implications for access to media. See, e.g., Jack M. Balkin, Media Access: A Question of Design, 76 GEO. WASH. L. REV. 933, 942 (2008) (“Telecommunications regulation—and, in particular, the debate over open access and network neutrality—has important consequences for media access.”); see also Jack M. Balkin, Old School/New School Speech Regulation, 127 HARV. L. REV. 2296 (2014).

68. Verizon, 740 F.3d at 644 (The Commission’s predictions are “both rational and supported by substantial evidence.”)
certainly seems to have provided the Commission with its most secure set of regulatory options. But if, in a counterfactual world, the Commission chose not to revisit the question of the proper classification of consumer broadband internet access, its authority under section 706 would have allowed it to promulgate a revised set of network neutrality-like protections. Most importantly, section 706, standing alone, enables the Commission to issue rules that capture the critical essence of its policies while focusing their application on the most competitively harmful conduct, sanctioning conduct that “favor[ed] some traffic . . . to benefit an affiliated entity” (but excluding conduct that favored traffic “in exchange for consideration”). The extensive overlap between the rules issued under Title II and the hypothetical rules described below suggests that section 706 endows the Commission with an impressive breadth of regulatory authority.

A. Blocking, Transparency, and Throttling

Ensuring that broadband providers do not block access to content and applications has been critical to every iteration of the Commission’s network neutrality policies. The Policy Statement underlying the Commission’s enforcement action in Comcast explicitly stated that consumer are “entitled” to “run applications,” “use services,” and “connect . . . devices” of their own choice.69 The “no blocking” rule was easily the most forceful prohibition in the 2010 Open Internet Order. And the rule remains a mainstay of the 2015 Open Internet Order.

Although Verizon voided the Commission’s rule against “block[ing] lawful content, applications, services, or non-harmful devices,”70 the decision gave strong hints that section 706 nevertheless gave the Commission the authority to issue this rule under a modified legal theory. According to the court, the “no-blocking” provision, which prevented broadband providers from denying subscribers access to “lawful content, applications, services, or non-harmful devices” altogether,71 “appear on their face to impose per se common carrier obligations” because they “requir[e] all [content] providers receive [a] minimum level of access for free.”72

Despite the court’s inclination towards this facile reading of the rule, it was persuaded by an argument raised at oral argument: What if the no-blocking rule merely established a baseline level of broadband service, but providers were free to “negotiate different levels [of service] with different people” over-and-above that baseline?73 That is, the Commission was free to require that

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69. Internet Freedoms Policy Statement, supra note 17.
70. 2010 Open Internet Order, supra note 7, at ¶ 63.
71. Id.
72. Verizon, 740 F.3d at 658.
73. Id.
broadband providers offer content providers “access to their subscribers generally,” so long as there was an opportunity to offer forms of premium service. But because the blocking and discrimination provisions operated in tandem, the rules amounted to an illegal “zero-price rule.” 74 The blocking provision can stand, however, if severed from a blanket proscription on prioritized service. 75

Because oral argument was the first time such an argument was raised, the court declined to uphold the rule by severing it from the rest of the Order. 76 But the court did explicitly state that a no-blocking rule that merely “establish[ed] a lower limit” of access would “not . . . run afoul of the statutory prohibitions on common carrier treatment.” 77 So long as the rule against blocking was not coupled with a rule that proscribed all forms of discrimination, the Commission might have used a rule ensuring basic access to content to define the service that broadband carriers must offer. 78

This rule, together with the disclosure and transparency rules that survived review in Verizon, would give rise to a set of regulatory protections that equal those of the proscriptions against blocking and throttling issued in the 2015 Open Internet Order. By treating each of a broadband provider’s commercial relationships in the two-sided market as distinct—the delivery service to content providers; and the access subscriptions to retail consumers 79—the Commission might have required consumer access to any content to be, at minimum, consistent with the commercial terms of the service sold, including the expected performance of the service (e.g., download bandwidth of 4 mbps, 50 mbps, etc.). 80

Stated simply, the Commission might strictly enforce the transparency

74. Id.; see also C. Scott Hemphill, Network Neutrality and the False Promise of Zero-Price Regulation, 25 YALE J. ON REG. 135 (2008). I should emphasize that a zero-price rule is not per se illegal. Rather, it is only illegal to the extent that it imposes a common carrier rule on a service not subject to common carrier regulation. See 47 U.S.C. § 153(51) (2014).
75. Cf. Celloo P’ship v. FCC, 700 F.3d 534, 542-43 (D.C. Cir. 2013) (“Verizon argues that the data roaming rule [requiring that wireless carrier offer roaming service] exceeds the bounds of [FCC authority] because instead of merely prescribing the nature of a service, the rule mandates the provision of service. Not so. Like any other entity, Verizon may choose not to provide mobile-internet service. Like other rules that govern Title III services, the data roaming rule merely defines the form mobile-internet service must take for those who seek a license to offer it.”).
76. Verizon, 740 F.3d at 658-59 (“We are unable to sustain the Commission’s action on a ground upon which the agency itself never relied.”).
77. Id. at 658.
78. Celloo, 700 F.3d at 542-43.
79. Verizon, 740 F.3d at 652-54 (“It is true, generally speaking, that the ‘customers’ of broadband providers are end users. But that hardly means that broadband providers could not also be carriers with respect to edge providers.”); Verizon Reply Brief, Verizon, 740 F.3d 623 (D.C. Cir. 2013) (Nos. 11-1355), 2013 WL 210111, at *6-8; see also Narechania & Wu, supra note 13 (explaining two distinct commercial relationships).
80. 47 C.F.R. 8.3; see also 2015 Open Internet Order, supra note 6; 2010 Open Internet Order, supra note 7.
obligations that inhere to the sale of retail consumer broadband subscriptions. Where a provider sells a broadband package offering speeds of “15 mbps,” the Commission could have simply clarified that 15 mbps\(^{81}\) sets the floor for any and all content that a subscriber wishes to access.\(^{82}\) The transparency rule, then, would give teeth to a revised minimum service requirement, and replicates the functions served by the blocking and throttling proscriptions that the Commission issued in the 2015 Open Internet Order.

To be sure, a rule that relies on section 706 alone carries certain complications. First, and most importantly, the minimum service standard could not be set by administrative fiat. The Supreme Court has explicitly noted that a service provider is transformed into common carrier when an access rule transfers control over the use of the facility from its owner—in this case, the broadband carrier—to the content provider.\(^{83}\) Enforcing these minimum standards through the agreements between the retail subscriber and broadband provider would ensure that this control is never divested from the facility owner. To the contrary, it is controlled by the broadband carrier that chooses what types of retail subscriptions to offer consumers.

Similarly, the D.C. Circuit in Verizon drew a distinction between offering content providers “access to . . . subscribers generally” and between offering “access to . . . subscribers at the minimum speed necessary to satisfy the anti-blocking rules.”\(^{84}\) But the Commission would not need to stipulate a minimum speed for the particular transaction between content providers and broadband providers. Rather, it would only have to require both that content providers have access to broadband subscribers generally and that broadband providers honor their consumer agreements to provide consumer service at specified speeds. Altogether, these hypothetical rules would not “mandate[] the provision of service;” instead, the rule would merely “define the form” of each service that is offered if it is offered.\(^{85}\) Facilities owners would remain free to decline to sell broadband subscriptions at all, but would be unable to violate their commitments regarding service quality if they chose to enter the market. And they would have to offer content providers access to those subscribers. But severing these two separate (but related) requirements from a blanket nondiscrimination rule would ensure that providers can offer “individualized” services to both subscribers and content providers.\(^{86}\)

Tacitly enforcing the minimum service standard for content providers through to a broadband provider’s agreement with a retail subscriber would have several additional practical benefits. Such a minimum standard would

\(^{81}\) Fifteen mbps using best efforts under industry standards.
\(^{82}\) Verizon, 740 F.3d at 658.
\(^{83}\) FCC v. Midwest Video Corp. (Midwest Video II), 440 U.S. 689, 700-02 (1979).
\(^{84}\) Verizon, 740 F.3d at 652.
\(^{85}\) Cellco P’ship v. FCC, 700 F.3d 534, 542-43 (D.C. Cir. 2013).
\(^{86}\) Midwest Video II, 440 U.S. at 700-02; Verizon, 740 F.3d at 658; Cellco, 700 F.3d at 542.
allow service benchmarks to evolve naturally over time, in response to consumer demand and new technology, and without the need for affirmative regulatory intervention. And this regulatory approach would also ensure that each standard is responsive to the particular physical capabilities and engineering limitations of a particular network, thereby allowing for differentiation across providers. Furthermore, a hypothetical combination of the transparency rule and a minimum service standard could leverage the Commission’s substantial broadband measurement infrastructure for enforcement purposes. 87

Viewed together, tying a minimum service standard to the promised performance of a retail broadband subscription would allow a provider to define its own commercial offerings while protecting against the risk that providers will be tempted to degrade consumer experiences. That is, the combination of the minimum service and transparency rules that can be sustained by section 706 alone would ensure that broadband carriers do not block or throttle consumer access to lawful content.

B. Anticompetitive Discrimination

Importantly, the court in Verizon seemed amenable to such a proscription against blocking and throttling only to the extent that it was severed from a universal anti-discrimination rule. But section 706 alone gives the Commission the ability to craft a slightly circumscribed rule against discrimination, even when paired with a minimum service standard.

The 2010 Open Internet Order’s anti-discrimination rule required that providers “not unreasonably discriminate in transmitting lawful network traffic.”90 In particular, that order announced ex ante that any “pay-for-priority” arrangement would be “significant cause for concern.” 89 Weighing this arrangement against Supreme Court precedent defining the nature of common carrier regulations,90 the Verizon court ruled that the provision “compels [broadband] providers to hold themselves out to ‘serve the public indiscriminately’”91 by forcing them to “carry the content th[at] edge providers

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88. 2010 Open Internet Order, supra note 7, at ¶ 68.
89. Id. at ¶ 76.
91. Verizon, 740 F.3d at 656.
desire to transmit.”92 Thus, it violated the proscription on treating information service providers as common carriers.93

The court was especially concerned that the caution against “pay-for-priority” transactions eviscerated any space required for the sort of “individualized bargaining” that was the hallmark of private carrier service.94 Critically, the court could find no way to differentiate “the Open Internet Order’s ‘no unreasonable discrimination’ standard . . . from the nondiscrimination standard applied to common carriers generally.”95 After excluding prioritized service from the scope of reasonableness, the Court found practically nothing left, and certainly not enough to uphold the rule.

The challenge, under section 706, is to craft a rule against discrimination that would leave adequate room for “individualized bargaining” so as to fall short of the common carrier standard of nondiscrimination, while still ensuring robust competition among network applications.96 Once again, the opinion in Verizon might be read to hint at the scope of a permissible rule. Section 706 provides the Commission with the authority to prevent specific forms of discrimination that bring about a discrete competitive harm.97 That is, rather than proscribe all forms of discrimination, the Commission could have used its section 706 authority to prevent anticompetitive discrimination. Most notably, the Commission would have wide flexibility to define the nature of anticompetitive conduct under this hypothetical standard.

Citing to the 2010 Open Internet Order, the D.C. Circuit identified at least three cases in which broadband carriers “utilize[d] their gatekeeper ability to restrict edge-provider traffic:” “[1] a mobile broadband provider blocking online payment services after entering into a contract with a competing service; [2] a mobile broadband provider restricting the availability of competing [voice-over-IP (VoIP)] and streaming applications; [and 3] a fixed broadband provider blocking VoIP applications . . . .”98 In each of these examples, the broadband carrier’s actions were directed at a competitor of an adjacent service.99 The provider sought to restrict an independent application that

92. Verizon, 740 F.3d at 655 (citing Midwest Video II, 440 U.S. at 700).
93. 47 U.S.C. § 153(51) (2014) (“A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . . .”).
94. Verizon, 740 F.3d at 657 (citing Cellco P’ship v. FCC, 700 F.3d 534, 548 (D.C. Cir. 2012)).
95. Id. at 656.
96. E.g., Wu, Network Neutrality, supra note 1 (The “interest [that] animates the promotion of network neutrality [is] preserving a Darwinian competition among every conceivable use of the Internet so that the only the best survive.”).
98. Verizon, 740 F.3d at 648 (D.C. Cir. 2013).
99. The first and second examples explicitly refer to competitors. The court’s
competed directly with an affiliated service. Further examples of such "network nepotism" have since proliferated. Such conduct echoes in antitrust cases like United States v. Microsoft, where Microsoft leveraged its dominance over a desktop platform, Windows, to restrict competitors to its own Internet Explorer, such as Netscape Navigator. And they resemble other non-common-carrier regulatory description of the third example contains a missing detail: the broadband provider at issue was a subsidiary of a traditional telephone company, 2010 Open Internet Order, supra note 7, at ¶ 35 (citing Madison River Commc'ns, LLC, 20 FCC Rcd. 4295 (2005) (consent decree)), and so the VoIP offering is best seen as competing with the parent corporation's traditional telephony product.

100. These examples highlight an often overlooked dichotomy in open internet proposals. See Hemphill, supra note 74, at 146-50 (drawing distinction between (1) extraction, which functions as a toll on content providers, and (2) exclusion, which "favor[s] rival content in which the access provider has an economic interest").


102. The most high-profile example involves Verizon’s blocking of so-called “tethering applications” (applications that allow a user to use her phone’s wireless data connection on another device). Cellco P’ship, 27 FCC Rcd. 8932 (2012) (order & consent decree) (“Verizon Wireless asked an Application Store Operator to filter from its Application Store eleven tethering Applications that customers could use to tether without paying Verizon Wireless’s monthly tethering fee.”). Another example involves allegations that AT&T’s restrictions (that have since been lifted) on the use of Apple’s FaceTime application unduly favored its own voice and video products. Press Release, Free Press, Free Press Concerned About AT&T Plan to Charge for FaceTime (July 17, 2012), http://www.freepress.net/press-release/98878/free-press-concerned-about-att%E2%80%99s-plan-charge-facetime (expressing concern at plan to restrict competing voice and video application). Another example suggests that the mobile carriers that have entered into a joint venture named ISIS to build a mobile payment application (e.g., store and use credit cards directly from a cell phone) and are now blocking competitors to ISIS. E.g., Karl Bode, It's Clear Verizon Is Blocking Google Wallet Anti-Competitively, DSLREPORTS (Dec. 21, 2012), http://www.dslreports.com/shownews/Its-Clear-Verizon-Is-Blocking-Google-Wallet-AntiCompetitively-122513. There are also other similar examples. See, e.g., infra note 109.

103. United States v. Microsoft Corp., 253 F.3d 34, 64-65, 96-97 (D.C. Cir. 2001). To be sure, the precise nature of the conduct in Microsoft differs from the conduct described in the Open Internet Order, as the Order does appear to consider broadband providers’ actions as driven to exclude potential future competitors (whereas Microsoft treated Navigator as a competitor not only to Internet Explorer but also as a future competitor to Windows). But cf. Drew Fitzgerald & Daisuke Wakabayashi, Apple Quietly Builds New Networks, WALL ST. J. (Feb. 3, 2014), http://www.wsj.com/articles/SB1000142405270230485110457936120165365302 (suggesting that content providers are beginning to dive down into facilities markets, and thereby compete with existing facilities owners). Nevertheless, in Microsoft as well as the examples cited in the Order, culpability (to the extent it exists) flows from actions taken to exclude an unaffiliated, platform-agnostic platform user by the platform owner. Whether and when a platform owner’s action to exclude unaffiliated complements is efficient continues to be the subject of debate in the antitrust literature. See, e.g., Joseph Farrell & Philip J. Weiser, Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age, 17 HARV. J.L. & TECH. 85, 133-34 (2003). Regardless of the standard in antitrust, communications regulations has staked out a position on the merits of such exclusionary behavior. The CTCPCA, for example, requires that the
programs at the FCC, including the Commission’s program carriage rules.

The program carriage regime was promulgated according to the Commission’s authority under the Cable Television Consumer Protection and Competition Act of 1992 (CTCPCA), which required that the FCC issue rules to prevent a cable TV operator (for example) “from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation.”\(^\text{104}\) In other words, the rules are designed to prevent a company like Comcast, for example, from unfairly restraining an independent TV channel from competing with a Comcast-owned channel in the markets for viewership and advertising revenue.\(^\text{105}\) With regard to these rules, the Second Circuit noted that where “cable operators maintain significant shares [and] vertical integration remains pervasive . . . . the FCC could reasonably conclude that cable operators continue to have the incentive and ability to favor their affiliated programming vendors in individual cases, with the potential to unreasonably restrain the ability of an unaffiliated programming vendor to compete fairly.”\(^\text{106}\)

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106. Time Warner Cable Inc. v. FCC, 729 F.3d 137, 162 (2d Cir. 2013). The threat of foreclosure by cable TV operators is not merely theoretical. See, e.g., Tasneem Chipty, Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry, 91 Am. Econ. Rev. 428, 429 (2001) (surveying market evidence and finding empirically that integration does result in some degree of market foreclosure). Operators who own premium services offer, on average, one fewer premium service and one to two fewer basic services than do other operators. In particular, operators who own premium movie services are less likely to carry the rival basic movie service, American Movie Classics (AMC). In addition, TCI and Comcast, two operators who own the basic shopping service QVC, are less likely to carry rival shopping service Home Shopping Network (HSN), and they are less likely to carry both QVC and HSN. These results are statistically significant and establish that premium operators and certain basic operators are less likely to carry rival services. See also Austan Goolsbee, Vertical Integration and the Market for Broadcast and Cable Television Programming 31 (2007), http://ballbss.fcc.gov/edocs_public/attachmatch/DA-07-3470A10.pdf ("[V]ertically integrated cable systems are more likely to carry their own channels except in places where there is sufficient competition . . . ").
Broadband carriers, like cable TV operators, similarly dominate local markets. These carriers also offer a variety of vertically-integrated packages: In addition to broadband, they sell television, voice, and home security services—among other offerings. Each of these services is typically provisioned over the same infrastructure as the one used by competing independent services. Services like Aereo, as well as Netflix and Amazon Video, all compete with traditional linear television service.

Section 706 gives the Commission the authority to issue rules that sanctions conduct favoring Comcast’s (for example) own applications at the expense of these competitors. Indeed, the D.C. Circuit expressly identified such conduct as a “limit” to openness that could depress demand for—and the concomitant deployment of—broadband.

The Commission would have wide discretion to define the nature of “anticompetitive” conduct under such a hypothetical rule. In particular, the
Commission could use a provider's status as a "gatekeeper" as evidence of sufficient "economic clout to restrict edge-provider traffic." Given this indicia of economic power, the Commission could, under section 706 alone, proscribe any conduct that disadvantages unaffiliated competitors to a provider's own content, and would be free to challenge and terminate conduct that is based on affiliation. That is, the FCC could apply a standard similar to the one applicable in the program carriage context—and consistent with the 2015 Open Internet Order proscribing conduct "favor[ing] some traffic ... to benefit an affiliated entity"—without recourse to Title II. Regulation targeted at conduct by facilities owners to disadvantage competitors to its vertically affiliated content preserves the critical network neutrality goal of ensuring robust competition among network applications, and is consistent with the Commission's long-held regulatory aims in the computing and networking industries.

This standard for targeting discriminatory conduct under a section 706 regime has several discrete benefits. Relying on a provider's status as a gatekeeper would account for the substantial economic power wielded by last-mile service providers against upstream content providers while easing to impose a judicial doctrine" under the antitrust laws).

In all, requiring antitrust scrutiny here also takes an overly restrictive view of the FCC's authority under the CTCPCA. The House Report accompanying Section 616 of the CTCPCA states that the statute "provides new FCC remedies and does not amend, and is not intended to amend, existing antitrust laws." H.R. Rep. No. 102-628, at 111 (1992) (emphasis added); cf. McLean Trucking Co. v. United States, 321 U.S. 67, 85-87 (1944) (ICC had responsibility to consider the effect of motor carriers mergers on transportation policy, but need "not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws."); Nat'l Broad. Co. v. United States, 319 U.S. 190, 223-24 (1943) ("While many of the network practices raise serious questions under the antitrust laws, ... it is not [the FCC's] function to apply the antitrust laws as such."); Goldwasser v. Ameritech Corp., 222 F.3d 390, 399 (7th Cir. 2000) ("The fundamental fallacy in the plaintiffs' theory is that the duties the 1996 Act imposes on ILECs are coterminous with the duty of a monopolist to refrain from exclusionary practices. They are not.").

But even if one adheres to the view that the program carriage rules must be applied according to the standards of antitrust because the language of the CTCPCA demands it, the Commission faces no such statutory command in section 706(a). There is no antitrust term of art in that statute.

112. Verizon, 740 F.3d at 646-49; supra note 66 (explaining gatekeeper).

113. But see supra note 111 (need not apply standards of antitrust law).

114. Regulatory & Policy Problems Presented by the Interdependence of Computer & Commnc's Serv's & Facilities, 28 F.C.C. 2d 267, ¶ 10 (1971) (final decision & order) (maintaining decision reached in its tentative decision. See 28 F.C.C.2d at ¶¶ 33, 36 (describing Commission goal to prevent carriers from "favor[ing] their own data processing activities by discriminatory services, cross subsidization, [and] improper pricing"); see also Narechania & Wu, supra note 13; Wu, Network Neutrality, supra note 1, ("Government regulation ... invariably tries to help ensure that the short-term interests of the owner do not prevent the best products or applications becoming available to end-users. The same interest animates the promotion of network neutrality: preserving a Darwinian competition among every conceivable use of the Internet so that the only the best survive.")
administrability concerns. The possibility for intermodal competition—
competition between cable, telephone, and fiber providers—might be seen as
inconsistent with the existence of a true “bottleneck.” But two-thirds of U.S.
households have, at most, two options for broadband. 115 And even where
consumers are served by duopoly or oligopoly, providers can engage in
“abusive exercises” of their gatekeeper power. 116 In particular, so long as
switching costs (among other costs) remain high, broadband providers retain
the ability to discriminate against unaffiliated content—even including content
that consumers strongly prefer. 117 A “broadband providers’ ability to impose
restrictions on edge providers simply depends on end users not being fully
responsive to the imposition of such restrictions.” 118 Altogether, a provider’s
status as a gatekeeper endows it with the potential to “obstruct others in
competitive sectors, with an eye to gaining for themselves a large enough
market share” in those adjacent markets, thereby making it an ideal candidate
for regulatory intervention. 119

115. FCC, WIRELINE COMPETITION BUREAU, INTERNET ACCESS SERVICES: STATUS AS OF
JUNE 30, 2011, at 8 fig.3(a), http://transition.fcc.gov/Daily_Releases/Daily_Business
116. Weiser, Next Generation, supra note 103, at 73 (“[T]here are instances in which a
platform provider may use its gatekeeping role to ‘hold up’ the deployment of applications,
thereby giving itself an additional source of revenue and deterring future innovation.”); cf.
Grimes, supra note 66, at 563-64 (“Abusive exercises of retailers’ gatekeeper power can
occur even if a retailer has a market share of 10 percent or less . . . .”).
117. See Verizon, 740 F.3d at 663 n.7 (Silberman, J., concurring in part and dissenting
in part) (“[A] consumers’ willingness to switch to another available supplier depends on the
prospective benefit measured against the transactions costs.”). Cf. Shelanski, supra note 66,
at 1682-84. This might be seen as generating a perverse incentive to raise switching costs, in
order to raise the “prospective benefits” that any competitor would have to offer to justify
the switch. Furthermore, such an analysis aggregates benefits of different forms to a
consumer, without regard to the varying harms to an upstream supplier. Consider, for
example, a slight incremental consumer preference for Gmail over a locally-provisioned
[provider].net email address. If Gmail is blocked altogether (or slowed considerably), the
user might switch to the bundled email service. This generates revenue for the broadband
provider, diminishes a consumer’s return by an amount not substantial enough to justify
the switch, and imposes substantial aggregate losses on Google. Verizon, 740 F.3d at 648
(“Broadband providers’ ability to impose [such] restrictions . . . simply depends on end
users not being fully responsive to the imposition of such restrictions.”).
118. Id. at 648.
119. This is especially true if we treat gatekeeper power as analogous to bottleneck
power. Stephen G. Breyer, Antitrust, Deregulation, and the Newly Liberated Marketplace,
75 CALIF. L. REV. 1005, 1042-43 (1987) (Telecommunications bottlenecks “seem more
amenable to regulatory control” than antitrust scrutiny because an agency can “supervise”
their pricing behavior and “scrutiniz[e] their conduct to ensure that they do not take unfair
advantage” of that power.); see also Brett M. Frischmann & Barbara van Schewick, Network
Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo,
47 JURIMETRICS 383, 415-16 (2007) (“Discrimination will be a profitable strategy so long
as it results in a higher number of sales of the complementary product.”); Weiser, Next
Generation, supra note 103, at 73, 74-78 (proposing an “antitrust-like” burden shifting
framework for FCC regulation). But see Howard A. Shelanski, Justice Breyer, Professor
Kahn, and Antitrust Enforcement in Regulated Industries, 100 CALIF. L. REV. 487 (2012)
Adopting this regulatory presumption would also ease administrative costs. Compared with the alternative of antitrust litigation, a regulatory presumption that affiliation-based discrimination by a gatekeeper has anticompetitive effects—a presumption that is consistent with both theory and observed effects—obviates the need to engage in lengthy, complicated, and expensive antitrust litigation that may not even bear fruit, focusing instead in each violation of the hypothetical rule on the specific question of discrimination on the basis of affiliation.

("The conclusions of Breyer’s CLR article [that regulation is preferable to antitrust for bottlenecks] are subject to debate.").

120. supra notes 115-119 and accompanying text; see also, e.g., Barbara van Schewick, Towards an Economic Framework for Network Neutrality Regulation, 5 J. TELECOMM. & HIGH TECH. L. 329, 378 (2007) ("[I]t will often be profitable to exclude only those complementary products that directly compete with one of its own complementary products."); Weiser, Next Generation, supra note 103, at 73 ("[A] platform provider may use its gatekeeping role to 'hold up' the deployment of applications, thereby giving itself an additional source of revenue and deterring future innovation."); Wu, Network Neutrality, supra note 1.

121. supra notes 98-102 and accompanying text; see also Verizon, 740 F.3d at 648 (gatekeeper effects not just "merely theoretical").


123. Hemphill, supra note 74, at 159; Weiser, Next Generation, supra note 103, at 73, 78 (under proposed framework, requiring that a party alleging violation provide a "provide a reasonably plausible theory" for the "purportedly anticompetitive conduct"); cf. Comcast Corp. v. FCC, 717 F.3d 982 (D.C. Cir. 2013) ("[T]he Commission has not provided evidence that Comcast discriminated against Tennis [Channel] on the basis of affiliation," under the
Furthermore, such a rule would be specifically directed at section 706’s specific aim to "encourage the deployment" of broadband. Since Comcast and through Verizon, the Commission has repeatedly argued a robust and competitive content market will drive broadband deployment, and has thereby justified a rule that both protects competition in that market and subsidizes content creation. Critics have noted that the subsidy for content comes by way of the facilities provider’s inability to charge for carriage, and have questioned whether a rule that keeps money out of the hands of facilities providers can be squared with section 706’s goal of spurring investment in broadband infrastructure. The D.C. Circuit has been willing to defer to the Commission’s judgment on this issue, and under the narrower rule against anticompetitive discrimination hypothesized here, these critiques have even less force. Given the option to impose a rule focusing on anticompetitive conduct, the relevant inquiry is whether new infrastructure deployment would be more likely through the investment of additional capital earned anticompetitively, or by growth in demand for broadband spurred by competitively priced content. The choice has no clearly superior alternative, and depends on the Commission’s reasonable judgment about the tradeoff.

124. For example, Frischmann & van Schewick, supra note 119, at 404-05, argue in favor of the subsidy ("[N]ondiscrimination is a rather blunt broad subsidy for users (uses) that produce positive externalities and it is justified in part by the difficulty in directing targeted subsidies to those user-producers."), and argue that the rule protects competition at 409 ("Calls for network neutrality regulation are based in part on the concern that, in the absence of such regulation, network providers will discriminate against unaffiliated providers of complementary products or exclude them from their network."). See also Robin S. Lee & Tim Wu, Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality, 23 J. ECON. PERSP. 61 (2009).


126. Verizon, 740 F.3d at 644-45.

127. Proponents of the Commission’s earlier rule will note that the narrower rule proposed here loses the subsidy for content creation. Two points bear mentioning. First, D.C. Circuit clearly held that the aspects of the rule that provided for the subsidy—a strict prohibition on blocking, coupled with a universal non-discrimination regime—are outside of the Commission’s authority to regulate information service providers. Verizon, 740 F.3d at 657-58. Second, viewed from the perspective of section 706, a prohibition on only anticompetitive conduct seems more narrowly tailored to the Commission’s statutory authority to encourage new infrastructure investment. While the content subsidy has other positive effects—effects that may even justify the imposition of such a rule—the argument that this broad rule leads directly to further broadband deployment may seem tenuous when compared to the argument that the narrower rule does so. Cf. Hemphill, supra note 74, at 160.

128. Cf. Nicholas Economides & Benjamin E. Hermalin, The Strategic Use of Download Limits by a Monopoly Platform, 46 RAND J. ECON. 297 (2015) (finding that monopoly platforms have incentives to set download limits lower than would be welfare maximizing, that setting limits increases incentives to invest broadband infrastructure, but deferring on analysis when the monopoly platform provider is also a content provider).
iterations of the rule are consistent with the aims of section 706, then a rule targeting only anticompetitive conduct would also surely be within its authority.129

Finally, this standard is analogous to existing non-common-carrier regulatory programs, including the CTCPCA,130 and is thereby consistent with the Commission’s authority to use “other regulating methods” in service of the statutory aims of section 706.

Thus, section 706, standing alone, enables the Commission to sanction conduct that favors affiliated content providers at the expense of competitors. Notably, this standard encompasses a significant portion of the FCC’s 2015 rule against paid prioritization. Relying on Title II, the FCC proscribed conduct that prioritizes internet traffic on the basis of payment or on the basis of affiliation.

Altogether, section 706, standing alone, confers the authority to issue rules that are largely—but not completely—coterminous with the rules the Commission in fact promulgated under its Title II authority to regulate common carriers. Table 1 suggests that the only rule that section 706 cannot support—and the rule that proved to be critical in Verizon—is a general total proscription against prioritizing content in exchange for payment or other consideration.131 But beyond this limitation, section 706 could support rules against blocking, throttling, and prioritization on the basis of affiliation.

Table 1.

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<tr>
<th>Conduct Rule</th>
<th>Issued Under Title II</th>
<th>Supported by 706 Alone</th>
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<tr>
<td>Mandated Transparency</td>
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<tr>
<td>No Blocking</td>
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<td>No Throttling</td>
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<tr>
<td>No Prioritization</td>
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<td>on the basis of payment</td>
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<tr>
<td>on the basis of affiliation</td>
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129. Even taking a narrow view of when vertical integration is anticompetitive, the Commission seems able to choose a slightly over-inclusive prophylactic rule, such the one proposed here, so long as the effect of the rule does not amount to common carrier regulation.


131. Furthermore, the Commission has indicated that might be amenable to waiving this rule for certain arrangements, such as for zero-rating certain classes of applications. 2015 Open Internet Order, supra note 6, at ¶¶ 151-53. Taking these exceptions into account, the space between the rule the FCC in fact issued under Title II, and the rules the section 706 could hypothetically support, narrows even further.
C. Interconnection

The 2010 Open Internet Order focused on preserving the norm of non-discrimination over the “access network” that connects an individual broadband subscriber to the rest of the internet. But this particular focus set aside issues related to the interchange of traffic between the various networks that comprise the Internet, as the Commission expressly excepted “existing arrangements for network interconnection, including existing paid peering arrangements” from the scope of those rules. The Commission’s 2015 Open Internet Order, however, bridges this gap by applying a general conduct standard to network interconnection. While the Commission’s rule relies on section 201 (a Title II provision) to support this rule, section 706 also provides similar authority.

Interconnection disputes in the form of disagreements over “peering” arrangements have become increasingly common. In 2010, for example, a backbone provider, Level 3, was hired by a content provider, Netflix, to deliver video traffic to customers at various locations. Stated simply, Netflix would arrange to deliver bits to Level 3, and would pay Level 3 to carry them the rest of the way. In this example, the identity of the content provider is critical: Netflix is responsible for roughly one-third of all downstream (i.e., sent to broadband subscribers) traffic in North America. As a result, once Level 3

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132. E.g., Kevin Werbach, Only Connect, 22 BERKELEY TECH. L.J. 1233, 1251-52 (2007) (describing “two types of internet networks”). “Access network” refers here to the networks owned by carriers that serve retail broadband subscribers. A simple example may help illustrate. User A wishes to connect to User B’s server. A is Comcast’s customer, B is Verizon’s customer. When A sends a request over the Internet, it begins on Comcast’s network, is (usually) transferred to Operator X’s backbone network, may then be transferred to the backbone network of Operator Y’s backbone network (and, also perhaps, Operator Z and so on), and is then finally transferred to Verizon’s network for delivery to B. Any response from B to A might traverse the same path in reverse, or it may choose an alternate route. For present purposes, we can safely ignore the different algorithms that determine how traffic is routed. It suffices to note that these algorithms usually take account of two key factors: the technical question of the extent to which a particular provider is available or congested, and the economic cost to traverse a particular provider’s backbone network.

133. See Tom Wheeler & Stacey Higginbotham, Tom Wheeler on Internet Policy, C-SPAN 17:45-18:00 (Jan 28, 2014), http://www.c-spanvideo.org/program/InternetCon (statement of Tom Wheeler, Chairman of the FCC) (“A lot of people seem to think that the whole peering and interconnection issue is the same as net neutrality. It’s not. It’s a different issue. It’s a cousin; maybe a sibling.”).

134. 2010 Open Internet Order, supra note 7, at ¶ 67 n.209.

135. 2015 Open Internet Order, supra note 6.

136. See id.; Wheeler & Higginbotham, supra note 133, at 13:30-14:00 (referring to “studies” noting an increase in interconnection issues over “the last twelve months”).

137. This might be accomplished in any number of ways. Netflix could use another provider to send content over the Internet to a Level 3 destination. Alternatively, Netflix might locate a content server within a Level 3 facility.

assumed responsibility for Netflix traffic, it began “sending” far more traffic than it received. Comcast, which was connected directly to Level 3, became concerned by this new balance of traffic. According to Comcast, “where Network B sends traffic to Network A that is significantly out of balance with the traffic it receives from Network A . . . Network B is expected either to remedy the situation or to pay something to Network A to compensate for that imbalance.” After a public spat, Level 3 and Comcast eventually reached a commercial accord. But a similar dispute broke between Verizon, an access network, and Cogent Communications, a backbone provider, among others. These disputes have real impacts on the broadband subscriber experience, and may therefore operate to undermine demand for—and concomitant investment in—new broadband infrastructure.

A notable feature of these disputes is that they typically arise between an access network and a backbone provider, rather than between two backbone providers. That is, these disputes seem to be increasingly common where two features are prevalent: First, disputes are more likely where the traffic is less likely to be balanced. Second, disputes appear where there is no “route-around” option. Where one backbone network connects with another backbone, those interconnection points are more likely to be balanced and, if one refuses to carry the traffic, other options are typically available. By contrast, access networks that serve individual broadband users have traditionally imported more traffic than they exported: Broadband subscribers have consumed more content than they have produced. And, most importantly, access networks


140. Id.


144. Werbach, supra note 132, at 1287 (“[C]ompetition and custom” have generally been “sufficient to produce an effective interconnection regime.”). But see id. (recent trends undermining the stability of interconnection); see also supra note 143 (examples of interconnection breakdowns leading to disruptions).

145. See Mishra et al., supra note 143, at 61.
serve as a gatekeeper, controlling the sole available path to the user requesting that content. That is, if a user purchases broadband service from Verizon, then Verizon is responsible for carrying content, such as Netflix content, across the “last mile” to that user.

The justifications for regulating interconnection agreements between an access network and the rest of the internet, then, seem similar to those that support a targeted rule proscribing anticompetitive discrimination. Indeed, the minimum service, transparency, and affiliation-based discrimination rules described above can be made to apply easily not only to traffic travelling across a provider’s network but also to traffic that comes into its network.

For example, Netflix and Comcast recently reached a high-profile interconnection accord. While the Commission has, after reclassification, asserted its authority to examine such agreements under the general conduct standard of Title II, the authority granted by section 706 might also enable the Commission to scrutinize such arrangements. After all, a rule that requires a broadband provider to meet a baseline standard of service demands that the provider engineer interconnection points to meet that minimum requirement, and thereby honor its commitments to consumers. That is, where a provider guarantees that consumers will get speeds of 25 mbps, it has an obligation not only to ensure that its access network can sustain those promises, but also to ensure that its interconnection points can as well. Similarly, a rule that protects against discrimination on the basis of affiliation prevents a broadband provider from allowing its own content to travel freely while detaining unaffiliated content at the border.

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The Federal Communications Commission’s adjudication of Comcast’s actions to throttle peer-to-peer traffic began an extended dialogue with the D.C. Circuit regarding the meaning of section 706 of the Telecommunications Act of 1996. In Verizon, the court and the Commission came to an accord, agreeing

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147. Similar conditions might apply to a broadband provider’s own distributed networks of caches and competitors that seek to equally optimize their own content delivery. See, e.g., Overview: Netflix Open Connect, NETFLIX, https://signup.netflix.com/openconnect (last visited May 24, 2015) (“ISPs can directly connect their networks to Open Connect for free. ISPs can do this either by free peering with us at common Internet exchanges, or can save even more transit costs by putting our free storage appliances in or near their network.”).
that the statute conferred wide regulatory powers. Surprisingly, this authority appears to extend to a modestly revised set of network neutrality rules. Returning to a regime in which the transmission of internet traffic is treated as a "telecommunications service" gives the Commission a secure and versatile set of tools to regulate broadband providers. But an approach under section 706 would have allowed the Commission to ensure a broadband subscriber receives, at minimum, her advertised rate of service when trying to access any online content, while simultaneously enabling the Commission to sanction particular anticompetitive conduct.

III. Beyond Net Neutrality: Section 706’s Federalism Implications

Section 706 thus confers the authority to issue rules that are similar, in many respects, to those that the FCC promulgated in its 2015 Open Internet Order. But the extent to which section 706, standing alone, allows the Commission to issue network neutrality-like rules is only one measure of the jurisdiction created by the new reading of the statute.

By interpreting section 706 as an affirmative grant of regulatory jurisdiction, the Commission has given itself—as well as state commissions—wide authority to "promote competition in the local telecommunications market" and to "remove barriers to infrastructure investment." In this Part, I survey two representative policy suggestions against the statutory aims of section 706. The potential for regulatory action on these proposals not only demonstrates the breadth of authority available under section 706, but, more significantly, highlights the substantial implications for the future of federalism in telecommunications regulation.

The full text of section 706(a) provides that:

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

The statute’s reference to state commissions is best understood to

148. Even if these proposed rules are narrower than those the FCC promulgated in the 2015 and 2010 Open Internet Orders, see supra Table 1, it is worth noting that they are consistent with network neutrality proposals that have been considered in other regions around the world. E.g., Press Release, Neelie Kroes, Vice President, Eur’ an Comm’n, Net Neutrality—Safeguarding the Open Internet for All (June 5, 2013) (proposing “a guarantee of access to the full and open internet” by proscribing the “blocking or throttling of competing services” (emphasis added)).


150. Id.
constitute a grant of jurisdiction to both the FCC as well as the state utility commissions that typically regulate intrastate telecommunications. Indeed, the 2010 Open Internet Order adopts such a reading of the statute, stating explicitly that “Section 706(a) authorizes ... state commissions ... to take actions ... that encourage the deployment” of broadband.

In its challenge to the 2010 Open Internet Order, Verizon argued that this reading of the statute was itself proof that section 706 cannot be construed as a grant of agency jurisdiction, contending that “Congress would not be expected to grant both the FCC and state commissions the regulatory authority” that the Commission sought. The D.C. Circuit disagreed, noting that Congress had granted such concurrent jurisdiction elsewhere in the Telecommunications Act, and it was reasonable to conclude that it had “done the same here.” Stated simply, section 706 contains a significant grant of authority to state commissions.

How can such concurrent federal and state regulatory authority be congruently exercised? I begin an initial exploration of this question by examining options for reducing infrastructure barriers to network deployment, and by considering calls for the Commission to preempt state laws that restrain new competition in broadband markets.

A. State Authority: The Case of Pole Attachments

An integral component of deploying new broadband infrastructure, such as fiber optic cable, lies in “the ability to hang this fiber on existing utility poles.” While the matter of attaching cables to utility poles may appear

151. E.g., CAL. PUB. UTIL’S COMM’N, http://www.cpuc.ca.gov/puc (last visited May 24, 2015) (“The CPUC regulates privately owned ... telecommunications... companies [among others].”)

152. 2010 Open Internet Order, supra note 7, at ¶ 119. The full quote reads “Section 706(a) authorizes the Commission (along with state commissions) to take actions, within their subject matter jurisdiction and not inconsistent with other provision of law, that encourage the deployment of advanced telecommunications capability.” The particular choice of “along with” rather than, for example “as well as” might be read as requiring that state action be consistent with Commission prerogative. That question is explored further infra notes 180-184 and accompanying text. See also AT&T Corp. v. Iowa Util’s Bd., 525 U.S. 366, 385 (1999).


154. Id. (citing 47 U.S.C. § 251(f) (2014) (state commission authority to exempt rural carriers from certain obligations imposed on other incumbents); 47 U.S.C. § 252(e) (2014) (requiring state commission approval for interconnection agreements between incumbent and competitive carriers)).

155. This is a favored cause of fiber-based broadband deployments. See, e.g., FIELD HEARING ON INNOVATION AND REGULATION BEFORE H. COMM. ON OVERSIGHT AND GOV’T REFORM, 112th Cong. 126 (2011) [hereinafter Medin 2011 House Testimony] (testimony of Milo Medin, Vice President of Access Serv’s, Google Inc.).

156. Id.
trivial, the lack of "reliable, timely, and affordable access" to utility poles "is a significant barrier to deploying broadband services." Given the costs of the alternatives—erecting a separate pole, or digging and filling underground trenches—"there is often no practical alternative for network deployment except to utilize available space on existing poles." But a "local monopoly in ownership or control of poles," places pole owners "in a position to extract monopoly rents . . . in the form of unreasonably high pole attachment rates." As a result, the gross cost of negotiating pole attachments and rights-of-way can account for up to one-fifth of the total cost of a new broadband deployment.  

To address these significant costs, Congress has granted the FCC the authority to "regulate the rates, terms, and conditions for pole attachments." In 2011, the FCC regulated the rates paid by telecommunications and wireless service providers seeking attachment rights, bringing those rates in line with the lower prices available to cable television operators under a separate subsection of the statute. Although the new rates were challenged by the utilities that owned the poles, they were welcomed by telecommunications service providers. But information service providers were outside the scope of this proceeding. This had the practical effect (at the time) of excluding broadband subscription services from these favorable rates. Companies such as Google, 

157. Id.


159. Nat’l Cable & Telecomm’s Ass’n v. Gulf Power Co., 534 U.S. 327, 330 (2002) (“Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents.”); S. REP. No. 95-580 (1977).


164. Cable operators that provide both broadband service as well cable television service have access to regulated pole rates. Gulf Power, 534 U.S. at 342. The same is true for, for example, DSL providers that offer traditional telecommunications services. Id. But broadband providers that offer a voice product that is not strictly a “telecommunications service,” or that provide an IPTV service rather than a cable-based TV product do not qualify for the favorable rate—or any rate at all.
which sells broadband service via Google Fiber, complained that despite the improvements in the FCC’s pole attachment order, they still “do not have automatic attachment rights” even though “broadband providers are exactly the group [the FCC] wouldn’t want to leave out,” given the economic and social benefits from new broadband deployment and competition from new entrants.\(^\text{165}\)

To be sure, reclassification has automatically swept broadband providers into the reach of section 224. But the Commission did not have to reach that far. Section 706 provides the authority necessary to extend pole attachment rights to broadband providers. Section 706 explicitly authorizes the Commission encourage broadband deployment through “regulating methods that remove barriers to infrastructure investment.”\(^\text{166}\) Just as a Commission rule that is based on an existing regulatory program falls within the scope of a “regulating method,”\(^\text{167}\) such as the CTCPCA, so too would an order extending pole attachment rights to broadband providers. And the absence of automatic attachment rights, and delays associated with negotiating terms and engineering the poles to be “ready” for outside attachments, obstruct new infrastructure deployment.\(^\text{168}\) Thus, the Commission could have exercised authority under section 706 to extend pole attachment rights to broadband providers.\(^\text{169}\)

What is surprising, however, is that even if the Commission had declined to take such action, the states would have been able to do so themselves, even in the absence of reclassification. Subsection (c) of section 224 gives states the option to opt out of the federal pole attachment scheme. Provided that the state itself regulates pole attachment rates (and certifies to the Commission that it does so), the federal scheme is reversely “preempt[ed]” by the state

\(^\text{165}\). Medin 2011 House Testimony, supra note 155.


\(^\text{167}\). See supra Part II.C (proposing rule based on Commission’s existing CTCPCA authority).


\(^\text{169}\). One might argue that Section 224 itself limits the Commission’s authority to extend attachment rights to others. That is, by limiting its applicability to only certain classes of services, the statute has necessarily precluded any possibility of extending pole attachment rights to information services—even under another statute. Such a view would take an overly restrictive view of both the Commission’s and D.C. Circuit’s interpretations of section 706: Both have noted that section 706 gives the Commission authority “to take actions . . . not inconsistent with other provisions of law.” Verizon Commc’ns Inc. v. FCC, 740 F.3d 623, 634 (D.C. Cir. 2014); 2010 Open Internet Order, supra note 7, at ¶ 119. The 2010 Open Internet Order exceeded this authority because it violated the Communications Act’s command that a telecommunications carrier be treated as a common carrier “only to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. § 153(51) (2014) (emphasis added). Section 224 contains no similarly explicit language that necessarily confines its reach to only telecommunications carriers and cable system providers.
regulation. Twenty-one states have invoked this option by exercising state-level regulatory authority over pole attachments. But just as the Commission’s federal authority under section 224 excepts information service providers, some instances of state-granted authority do not extend to broadband carriers. Indeed, while section 706 refers explicitly to state commissions “with regulatory jurisdiction over telecommunications services,” the authority granted in the statute extends to the regulation of information services. Altogether, section 706 gives states the authority to use “regulating methods,” such as grants of pole attachment rights, to “encourage” the deployment of broadband, even where the Commission might have declined to do so.

This is not entirely unusual: As Philip Weiser has written extensively, the Telecommunications Act incorporates a robust form of “cooperative federalism.” What is exceptional about this circumstance, however, is the state’s hypothesized ability to exercise federally-granted authority where the Commission has declined to exercise that regulatory power. This situation presents the inverse of existing models of cooperative federalism in Telecommunications Act: Generally, the FCC is granted the authority to supplement absent state action, not the other way around.

The opportunity for state-originated regulation pursuant to federally-granted power—where the federal government has declined action, thus presents two questions. The first is for states “to decide how, if at all, to justify state agency action . . . outside those actions specifically authorized by state

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171. See id.
172. E.g., MASS. GEN. LAWS, ch. 166, § 25A (2014) (authority limited to “telegraph,” “telephone,” “television,” or wireless provider of “telecommunications service.”).
173. Verizon, 740 F.3d at 649 (“[S]ection 706 grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers . . . .”).
174. This is potentially remarkably easy to achieve: In theory, a state commission could exercise its authority under section 706 to adopt a pole attachment regulation that is practically identical to the Commission’s prevailing rule (or identical in only parts, such as the rate formula), except that it extends to information service providers. The authority FCC’s Pole Attachment Order rests almost entirely on section 224. Assuming that a state’s power to use “other regulating methods” under 706 encompasses the Commission’s authority under section 224, the state can issue such a rule. Once it has done so, the state can exercise its opt-out authority under section 224, affirming that it has now regulated pole attachments (under its section 706 authority).
176. See, e.g., Weiser, Chevron, supra note 175, at 19; Weiser, Constitutional Architecture, supra note 11, at 665 n.3 (FCC provides “oversight” and “backup” to “state agencies.”).
On this point, Philip Weiser has argued in favor of reading “state limitation[s] on agency action” as “not . . . prevent[ing] state agency implementation of federal law.” In particular, this is achieved not through the preemption of state law limitations on state agency authority, but rather, through the application of “a reverse-Erie model,” wherein a state commission adheres to its own procedures, but can exercise substantive federal power.

The second matter, however, is unique to the scenario described here. Where states “superintend the implementation of federal law,” “they are expected to do in compliance with federal law.” Such state actions are usually either explicitly authorized by the statute or by the Commission. But how should we construe the effect of the Commission’s silence on a regulatory question, such as—to stay with the present example—whether pole attachment rights extend to information service providers? The state exercise of federal power beyond the bounds of state law authorization seems permitted where it is consistent with federal law. And it clearly contravenes the Supremacy Clause where it is inconsistent with federal law. But where Congress has concurrently granted authority to a federal agency and to the states, the states are free to pick up the baton even if the federal agency declines to act.

The scope of state authority to exercise federal power under the Telecommunications Act has traditionally been limited to a “few specified areas.” The Commission’s interpretation of section 706 as a concurrent grant

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177. Weiser, Constitutional Architecture, supra note 11, at 674.
178. Id.
179. Id. at 680-81.
180. Id. at 672, 676.
181. Weiser, Federal Common Law, supra note 175 at 1740 (FCC authorizing state experimentation for slamming).
182. AT&T Corp. v. Iowa Util’s Bd., 525 U.S. 366, 385 (1999); Weiser, Constitutional Architecture, supra note 11 at 676.
183. U.S. Const. art. VI, cl. 2; see also 47 U.S.C. § 253 (2014) (FCC authority to preempt state laws and regulations).
184. See AT&T, 525 U.S. at 410-12 (1999) (Thomas, J., concurring in part and dissenting in part) (noting that Congress can grant states (and state agencies) authority to exercise federal power in spite of existing federal authority); see also AT&T, 525 U.S. at 385 n.10 (majority opinion) (commenting on Justice Thomas’s concurrence and agreeing that “it is well settled that state officers may interpret and apply federal law” but noting the novelty of the Telecommunications Act); cf. Jessica Bulman-Pozen, Federalism as a Safeguard of the Separation of Powers, 112 Colum. L. Rev. 459, 489-90, 494 (2012) (describing how California took action to “vindicat[e] congressional intent” where the federal government had “abdicated its statutory duty to do so” under the Clean Air Act). But see Vonage Holdings Corp., 19 FCC Rcd. 22,404, 22,426-27 (2004) (preempting state regulation because “multiple disparate attempts to impose economic regulations” by the fifty states would “thwart . . . the goals and objectives of section 706”).
185. AT&T, 525 U.S. at 385 n.10 (mentioning “ratemaking, interconnection
of federal and state jurisdiction transforms this limitation on the model of “cooperative federalism” that was adopted by the Telecommunications Act of 1996. The statute’s grant of authority to use any “regulating method” to “remove barriers to infrastructure investment,” combined with the willingness of courts to entertain broad theories on how to achieve this objective,\(^\text{186}\) gives state commissions wide latitude to exercise federal power beyond the limits imposed by state legislatures. Until now, state commissions have invoked section 706 only rarely,\(^\text{187}\) but the Commission’s revised interpretation of the statute creates more opportunities for states to intervene on various policy matters,\(^\text{188}\) including mergers of telecommunications companies.\(^\text{189}\)

**B. Federal Power: Preempting State Regulation of Municipalities**

The FCC has interpreted section 706 to grant state commissions an unprecedented breadth of authority—beyond the limits imposed by state legislatures—to use varied regulation to “remove barriers to infrastructure investment.”\(^\text{190}\) Nevertheless, some have suggested that states have taken actions that have an opposite effect: Scholars and commentators argue that state laws prohibiting municipalities from developing and operating their own broadband networks are needless barriers to infrastructure investment, and they have thus urged the FCC to preempt those laws.

Some estimates suggest that over 150 municipalities own and operate broadband networks within their community.\(^\text{191}\) Proponents of these networks

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\(^{186}\) Verizon Commc’ns Inc. v. FCC, 740 F.3d 623, 643 (D.C. Cir. 2014) (Commission’s “triple-cushion shot” theory of economic demand for broadband deployment valid to exercise authority under section 706); see also Weiser, Chevron, supra note 175, at 4 (arguing that courts should defer, under Chevron, to state agency exercises of federal power).


\(^{188}\) Ill. Bell Tel. Co., 2009 WL 5503211, at *38 (Ill. C.C. Dec. 22, 2009) (order on rehearing) (stating that section 706 “supports” a state law requirement for telecom companies to deploy broadband capabilities to 80% of its customers); see also Weiser, Constitutional Architecture, supra note 11, at 671 (“[b]y the federal government’s own admission, it is almost always unwilling and/or unable to take back the power to implement cooperative federalism programs.”).

\(^{189}\) Comcast Corp., App. No. 14-04-013, at 11 (Cal. Pub. Util’s Comm’n Feb. 13, 2015) (decision granting application with conditions), http://docs.cpuc.ca.gov/PublishedDocs/Edocs/C00/000/M146/K376/146376008.PDF (asserting authority to review the proposed merger between Comcast and Time Warner Cable under section 706).


\(^{191}\) Institute for Local Self-Reliance, Community Broadband Map, COMMUNITY
argue that they have significant “economic and social benefits” beyond those that regularly accompany broadband access, including many that result from a more successful and cohesive local community. In Florida, for example, a locally-owned broadband deployment is estimated to save Martin County approximately $30 million over 20 years. Similarly, the introduction of a competing community fiber network in Wilson, North Carolina spurred price and quality competition with Time Warner Cable, yielding an estimated $1 million per year in consumer savings.

But advocates of municipal broadband service may have also occasionally miscalculated. There have been several optimistic reports regarding the fiber deployment in Lafayette, Louisiana, but other analyses have suggested that the project is deeply indebted, losing approximately $45,000 per day. Similarly, before selling its network to Google for one dollar, estimates suggest that the municipal network in Provo, Utah had incurred over $8 million in debt.

Viewed together, the results for municipal broadband are mixed. Some municipal broadband services have resulted in large losses to the communities they attempted to serve. But it also seems likely that at least some state

195. SUSAN CRAWFORD, CAPTIVE AUDIENCE 255 (2013); Rick Jervis, Louisiana City Blazes High-Speed Web Trail, USA TODAY (Feb. 5, 2012, 12:28 PM), http://usatoday30.usatoday.com/news/nation/story/2012-02-01/broadband-telecom-lafayette/52920278/1 (“LUS Fiber has captured nearly one-third of the city’s 45,000 residential and business subscribers, . . . . To compete, Cox has slashed its rates for some residents and business customers, lowering TV and Internet bills across the city.”).
197. GOOGLE FIBER, INC. & PROVO CITY CORP., ASSET PURCHASE AGREEMENT 13 (2013) (“In consideration of the sale, assignment and transfer of the Acquired Assets . . . Purchaser (i) will pay to Seller in cash $1.00 (One Dollar) (the ‘Purchase Price’),” http://www.provo.org/home/showdocument?id=2296.
legislatures have erred by restricting municipalities from developing their own networks. Despite the success of the network in Wilson, North Carolina, that state enacted legislation that prevents other towns from engaging similar projects. Similar statutes, enacted in nearly half of the states, may have strangled other welfare-enhancing ventures, and some have suggested that these laws result from the political capture of state legislatures.

In response, advocates of municipally-owned and operated networks called on the Commission to preempt such state legislation. Even the dissent to Verizon suggests that section 706 gives the Commission the authority to preempt such "paradigmatic barrier[s] to infrastructure investment." Scholars have advanced similar arguments, noting that "Congress can delegate preemptive power to agencies," and courts rely on "the organic statute to discern whether Congress has done so." The Commission has heeded that call, striking down specific statutes in North Carolina and Tennessee that it found to contravene the express purpose of section 706. To be sure, whether a statute so capacious and broadly worded as section 706 authorizes the Commission to preempt state laws is subject to debate. But these reservations notwithstanding, the Commission has determined that the "regulating methods" within the scope of section 706 include preemptive regulation. And, given that the contours of an agency’s regulatory authority are subject to the agency’s reasoned interpretation, the

199. Community Broadband Map, supra note 191.
201. Verizon Commc’ns Inc. v. FCC, 740 F.3d 623, 660 n.2 (D.C. Cir. 2014) (Silberman, J., dissenting) ("An example of a paradigmatic barrier to infrastructure investment [under section 706] would be state laws that prohibit municipalities from creating their own broadband infrastructure to compete against private companies.").
204. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (requiring statute express a "clear and manifest purpose" to preempt state laws); see also Watters v. Wachovia Bank, N.A., 550 U.S. 1, 36-42 (2007) (Stevens, J., dissenting) ("No case from this Court has ever applied [Chevron’s] deferential standard to an agency decision that could so easily disrupt the federal-state balance."); cf. Gillian Metzger, Federalism and Federal Agency Reform, 111 COLUM. L. REV. 1, 32-33 (2011).
206. City of Arlington v. FCC, 133 S. Ct. 1863 (2013). The decision in City of
Commission’s interpretation of the statute may stand. Indeed, in other contexts, the Commission has invoked its authority under section 706, in conjunction with other powers, to preempt state regulation of internet-based voice services. Altogether, preemptive regulation aimed at state laws restricting municipal broadband plausibly seems within the scope of the section 706, suggesting yet again the impressive scope of the statute’s grant of authority.

But the question of whether such regulation lies within the broad scope of the Commission’s authority under section 706 is distinct from the question of whether the Commission ought to exercise that authority. The debate between proponents of state legislation to restrict municipal broadband and advocates for preemptive regulation is a gloss atop an essentially empirical question: Do municipally-provided broadband services increase social welfare? The most important feature of this question is that it cannot be answered universally. Whether a municipal network will be successful depends on a variety of local factors. On costs, those questions include the presence of existing usable infrastructure (e.g., so-called “dark fiber”). On revenue, those questions include the presence and number of existing broadband providers, and local demand for broadband. The answers to these questions vary not only state-by-state, but census block by census block.

The Commission’s approach to the exercise its preemptive power thus far seems to follow a middle course. To be sure, responsibility for determining whether a municipally owned-and-operated broadband network is in the interests of the community should lie, in the first instance, with the community itself. Indeed, communities frequently exercise such “real local legal authority,

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Arlington notwithstanding, the Supreme Court has been inclined to take a stricter view of an agency’s authority to preempt state legislation, citing federalism interests. See supra note 204 and accompanying text. One way to reconcile these competing lines of cases may be to allow the agency deference in its interpretation of whether a statute delegates preemptive power, but require any preemptive agency action to be explicitly clear. See Wyeth v. Levine, 555 U.S. 555, 576-77 (2009) (“While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”) (internal quotation marks omitted). But see Wyeth, 555 U.S. at 576-77. (“Even in such cases, however, we have not deferred to an agency’s conclusion that state law is pre-empted. Rather, we have attended to an agency’s explanation of how state law affects the regulatory scheme.”).

208. See supra note 206 (reconciling strict standards for preemption with regulatory deference).
209. Compare supra note 195 (deployment in Lafayette successful), with supra note 196 (opposite).
notwithstanding the nominal rules of state supremacy. As a matter of institutional competence, this is because the municipality is best able to assess the relative benefits of such a network, and is in the best position to determine costs of network deployment given local resources. Furthermore, because the costs and benefits of the deployment will be internalized by the municipality, locating the decision whether to build with the community itself is likely to lead to the most efficient allocation of its resources.

But given a mandatory choice between state legislation or Commission regulation, a rule that preempts any and all state restrictions on municipal projects seems unwarranted. Turning again to institutional competence concerns, the state is more able than the Commission—though less able than the town—to value the costs and benefits of any individual municipal network. Furthermore, any losses incurred by the municipal entity beyond its ability to pay are likely to be borne by the state—and not the federal—government. That is, the state bears a de facto responsibility for insuring the municipality. Thus, properly viewing the choice between state restrictions and federal preemption as a choice between Type I and Type II error, the state would seem entitled to take a risk-averse stance to shield its treasury, and a Commission rule that would preempt all such legislation endangers that choice.

The Commission, however, has thus far deployed its authority only in response to petitions from municipalities themselves, suggesting that the Commission is reacting to choices made by the municipality—the entity most competent to decide whether to undertake a broadband enterprise. And the Commission has focused the exercise of its preemptive power at state statutes aimed at increasing the costs of locally-provided broadband service, while preserving provisions that impose accounting requirements and require separation between the city’s general fund and its commercial venture.

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214. Compare Interlocal Entity Service Prohibition, H.B. 60, 2014 Gen. Sess. (Utah 2014), http://le.utah.gov/~2014/bills/static/HB0060.html (blanket proscription on new construction of broadband infrastructure by an “interlocal entity”) with ALA. CODE § 11-50B-1 et seq. (2015) (imposing constraints on funding sources before profitability). I treat these financial conditions in the Alabama code as distinct from the other restrictions contained within the Alabama code. I also do not view imputed cost requirements, as a general matter, among those financial conditions that seem possibly appropriate for a state to
narrowly scoped preemptive regulation under section 706 may preserve a municipality’s local authority to build and operate a broadband network without intruding on the financial relationship between a state and its localities.

**CONCLUSION: REGULATORY FEDERALISM AND EXPERIMENTALISM**

Verizon’s challenge to the Federal Communications Commission’s *Open Internet Order* voided the core substance of those rules. But in losing the authority to enforce those rules, the Commission gained substantial new authority. By accepting the FCC’s interpretation of section 706 as affirmatively delegating the regulatory authority to promote the deployment of broadband, the D.C. Circuit affirmed a significant breadth of FCC regulatory authority.

This was no “minor victory.” Rather, the Commission has already relied on its revised interpretation of the statute to support a complete overhaul of the Connect America Fund, a nearly $5 billion per year subsidy for broadband and telecommunications deployment, to preempt state statutes that restrict municipally-provided broadband service, and to support, in conjunction with its authority under Title II of the Communications Act, new network neutrality rules.

Furthermore, the reach of section 706 extends beyond the Commission and into the states. The statute explicitly vests authority with “each State commission” to encourage the deployment of broadband to all Americans. The statute’s concurrent grant of jurisdiction to the FCC and to state commissions has important implications for the model of cooperative federalism that has dominated telecommunications regulation for nearly two decades. The grant of federal power might be seen as giving authority to preempt decisions traditionally vested with the states. The grant of authority to state commissions allows local regulators to act where the FCC has declined to do so.

In a twist, the grant of power to state commissions might be used to promulgate network neutrality-like regulations at the state level. Under the economic theory advanced by the Commission and accepted by the D.C. Circuit, network neutrality rules are designed to spur investment in broadband infrastructure through increased demand for broadband-based services. States, then, might exercise their own section 706 authority to promote “infrastructure
investment” through regulations that prevent broadband providers from blocking and throttling access to legal content and from discriminating among network applications on the basis of affiliation.\textsuperscript{220} Some complaints about the practices of broadband providers have already been brought to the attention of state authorities. Until now, states have referred those matters to the Federal Communications Commission.\textsuperscript{221} Section 706 gives those states the opportunity to directly address their citizen’s concerns, and allows for parallel enforcement of network neutrality violations.

To be sure, broadband carriers may encounter difficulties when faced with multiple regulators. Indeed, the Commission has used its own authority under section 706 to preempt state regulation and prevent the proliferation of “50 or more additional sets of different economic regulations.”\textsuperscript{222} Recently, however, the Commission has been more tolerant of state regulation, and it has even taken tentative steps to encourage telecommunications experimentalism. In early 2014, the Commission began accepting proposals for a series of policy experiments to guide its ongoing regulatory approach. By “central[izing] coordination of the evaluation of the results” of these varied policy approaches, some features of the Commission’s new process are classically experimentalist.\textsuperscript{223} But other aspects of the Commission’s approach adhere to a more rigid command-and-control model of regulation: The Commission “encourage[s] geographic diversity” in proposals for policy experiments,\textsuperscript{224} but involves state regulators only to the extent that it must “notify and consult” them.\textsuperscript{225}

That need not be so. Section 706’s concurrent grant of jurisdiction to federal and state regulators embraces an experimentalist approach to telecommunications regulation. In some ways, the exercise of these overlapping grants of authority may be in competition. But more importantly, section 706 allows a state to “serve as a laboratory; and try novel social and economic experiments” with broadband policy.\textsuperscript{226} The Commission’s interpretation of section 706 gives states the freedom to experiment with varied approaches to telecommunications regulation, while empowering the Commission to generalize their successes.

\textsuperscript{220} Id.
\textsuperscript{221} Letter from Derek Schmidt, Att’y Gen., Kan., to FCC (Nov. 2, 2012) (forwarding complaint filed by Douglas McClendon with the Kansas Attorney General alleging that Google Fiber’s Terms of Service violate network neutrality principles).
\textsuperscript{222} Vonage Holdings Corp., 19 FCC Red. 22,404 at 22,427 (2004).
\textsuperscript{224} Technology Transitions; Connect America Fund, 79 Fed. Reg. 11,327 (Feb. 28, 2014) (to be codified at 42 C.F.R. pt. 54).
\textsuperscript{225} Id. at 13.
\textsuperscript{226} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).