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ABSTRACT

The First Amendment reflects the conviction that the widest possible dissemination of information from diverse and antagonistic sources is essential to public welfare. Like the printing press, the Internet has dramatically transformed the marketplace of ideas by providing unprecedented opportunities for individuals to communicate. Though its growth continues to be phenomenal, broadband service providers—acting as Internet gatekeepers—have developed the ability to discriminate against specific content and applications. First, these gatekeepers intercept and inspect data transferred over public networks, then selectively block or slow it. This practice has the potential to stifle the Internet's value as a speech platform by compromising its neutral and open architecture, which has traditionally limited the ability of both public and private entities to engage in censorship.

In 2010, the Federal Communications Commission ("FCC") embraced the concept of network neutrality through its Open Internet Order, which imposes anti-discrimination, anti-blocking, and transparency requirements on broadband providers. Opponents of mandated network neutrality argue, however, that in its attempt to prevent broadband providers from engaging in discrimination on the basis of source or content, the FCC interfered with the right of providers to exercise editorial control. Indeed, in 2014, Verizon argued exactly that in Verizon v. FCC. *Having determined that the FCC's rules, in their then-current form, contravened provisions of the 1996 Telecommunications Act, the D.C. Circuit declined to address Verizon's First Amendment conten-*

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tions. In light of the Verizon *ruling, the FCC has produced new network neutrality rules, and it is a near certainty that the FCC's future efforts will face First Amendment challenge.*

This Article begins by providing background on network neutrality and the architecture of the Internet. It then examines the constitutionality of the FCC's rules, focusing on case law that has developed in the context of communications regulation. The Article argues that the rules are content neutral and that they serve a governmental interest of the highest order: the maintenance of the free and open Internet that is crucial to the promotion of a vibrant marketplace of ideas. Because that interest outweighs incidental restrictions to the speech interests of broadband providers, the Article concludes that the FCC's attempts to mandate Internet openness will survive future First Amendment challenges.

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Introduction

As the Federal Communications Commission ("FCC") has recognized, the key to the Internet's success as "a powerful engine for creativity, innovation, and economic growth" has been the decision of its architects to design it as "a network of networks that would not be biased in favor of any particular application."[1] Rather than creating an architecture in which a single entity could "pick winners and losers," the creators of the Internet developed "an open architecture [that] pushes decision-making and intelligence to the edge

1. Julius Genachowski, Chairman, FCC, Remarks at The Brookings Institution, Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity 2 (Sept. 21, 2009), https://apps.fcc.gov/edocs_public/attachmatch/DOC-293568A1.pdf.

of the network—to end users, to the cloud, to businesses . . . to creators . . . and [to] speakers across the country and around the globe."[2]

The continued viability of that architecture is currently under threat. Technology is shifting away from the dial-up Internet access provided by highly regulated common carrier telephone companies and toward faster and more robust broadband connections. Somewhat counterintuitively, this has the potential to compromise the Internet's traditional end-to-end architecture and, thus, its flexibility as a communications platform and its capacity for fostering innovation.[3] In the United States, high-speed Internet access is only available through a "tightly concentrated industry offering inferior service at high rates."[4] Indeed, the U.S. broadband communications market is characterized by the presence of regional duopolies of Internet Service Providers ("ISPs") that function as gatekeepers to the Internet.[5]

Advocates for network neutrality assert the need for anti-discrimination principles, which would prevent ISPs from leveraging their position as gatekeepers to control the kinds of activities engaged in by Internet users.[6] These advocates are generally motivated by two concerns: first, that unregulated ISPs will engage in anticompetitive behavior;[7] and second, that the power to discriminate against specific kinds of Internet traffic is essentially the power

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2. *Id.* at 3. This aspect of Internet architecture is commonly known as "end-to-end" design. *See* JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 170-71 (2d ed. 2007) (describing the end-to-end design as a key difference between the Internet and the telephone network); J.H. SALTZER ET AL., END-TO-END ARGUMENTS IN SYSTEM DESIGN, http://web.mit.edu/Saltzer/www/publications/endtoend/endtoend.pdf (describing end-to-end design in detail); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 36-37 (2002), http://www.the-future-of-ideas.com/download/lessig_FOI.pdf.

3. *See* NUECHTERLEIN & WEISER, *supra* note 2.

4. Rob Frieden, *Lies, Damn Lies and Statistics: Developing a Clearer Assessment of Market Penetration and Broadband Competition in the United States*, 14 VA. J.L. & TECH. 100, 101 (2009) (disputing the FCC's statistics on deployment of advanced telecommunications capability and arguing that the United States lags behind other developed nations in terms of access to next generation networks and adoption of broadband services); *see also* Genachowski, *supra* note 1, at 3 (citing the substantial decline in the ability of consumers to choose between ISPs as they "make the shift from dial-up to broadband" as one reason for engaging in the rulemaking).

5. *See* FREEPRESS, CHANGING MEDIA: PUBLIC INTEREST POLICIES FOR THE DIGITAL AGE 79-83 (2009), http://freepress.net/files/changing_media.pdf.

6. *See* NUECHTERLEIN & WEISER, *supra* note 2, at 169.

7. *See* Jerome Saltzer, *"Open Access" is Just the Tip of the Iceberg* (Oct. 22, 1999), http://web.mit.edu/Saltzer/www/publications/openaccess.html (noting that cable modem service providers "have a conflict of interest" that incentivizes discrimination against streaming video traffic, insofar as streaming video is a "service that will someday directly compete with cable TV"); LESSIG, *supra* note 2, at 47 (noting that deep packet inspection enables broadband service providers "to slow down a competitor's offerings while speeding up [the provider's] own — like a television set with built-in static for ABC but a clear channel for CBS").

to engage in private censorship.[8] Comcast Corporation and Time Warner Cable's attempted merger, which was opposed by Netflix on the basis of anticompetitive effects, exemplifies the sort of anticompetitive behavior that worries advocates for network neutrality.[9]

The threat posed to Internet openness by broadband providers flexing market power is not theoretical: many providers already engage in acts of discrimination[10] against specific uses of the Internet, including peer-to-peer ("P2P") file-sharing, file transfer using the File Transfer Protocol ("FTP"), and voice over Internet protocol ("VoIP") services.[11] Discrimination is facilitated through "deep packet inspection," which is used by ISPs to intercept and inspect data transferred over public networks.[12] After determining the type of data being transferred, ISPs are able to tag specific "packets"—discrete data units—for faster or slower transfer over the network and can even block transfer altogether.[13]

In its 2010 *Open Internet Order*, the FCC adopted three basic rules aimed at preserving the Internet's open architecture.[14] The first rule, aimed

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8. *See* FCC En Banc Hearing on Broadband and the Digital Future, Comments of the ACLU, The Tech. & Liberty Project of the ACLU, and ACLU of Pa., 1-2 (July 21, 2008), http://www.aclu.org/images/asset_upload_file471_36056.pdf (praising the FCC's enforcement actions against Comcast for ensuring "that the rule of law is followed in keeping the exchange of lawful content and ideas free of censorship by corporate gatekeepers"). *See* Genachowski, *supra* note 1, at 2 (announcing the FCC's intent to engage in a rulemaking to make the open Internet principles enforceable, "the threat of private censorship and the potential collapse of the Internet's open architecture 'puts us at a crossroads': '[w]e could see the Internet's doors shut to entrepreneurs, the spirit of innovation stifled, a full and free flow of information compromised. Or we could take steps to preserve Internet openness, helping ensure a future of opportunity, innovation, and a vibrant marketplace of ideas.'").

9. *See* Petition to Deny of Netflix, Inc. (Aug. 15, 2014), http://apps.fcc.gov/ecfs/document/view?id=7521819696.

10. Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & H. TECH. L. 141, 150-51 (2003) (distinguishing between generally allowable and generally suspect forms of discrimination against uses of the Internet,and describing as suspect those forms of discrimination which are either irrational or involve costs not internalized by broadband operators).

11. *See* Peter Svensson, *Comcast blocks some Internet traffic*, MSNBC (Oct . 19, 2007, 9:36 AM), http://www.msnbc.msn.com/id/21376597; Nate Anderson, *Deep packet inspection meets 'Net neutrality, CALEA*, ARSTECHNICA: GEAR AND GADGETS, (Jul. 25, 2007, 11:10 PM), http://arstechnica.com/hardware/news/2007/07/Deep-packet-inspection-meets-net-neutrality.ars/2. Indeed, the FCC has cataloged instances of discrimination, which include a provider blocking online payment services after entering into a contract with a competing service, a provider restricting the availability of competing streaming video and VoIP services, a provider blocking VoIP applications, and a provider impairing P2P services. *See* Verizon v. FCC, 740 F.3d 623, 648 (D.C. Cir. 2014) (citing Preserving the Open Internet Order, 25 FCC. Rcd. 17,905, 17,925 ¶ 35(2010)).

12. M. Chris Riley & Ben Scott, *Deep Packet Inspection: The End of the Internet As We Know It?*, FREEPRESS 3-4 (Mar. 2009), http://www.freepress.net/files/Deep_Packet_Inspection_The_End_of_the_Internet_As_We_Know_It.pdf.

13. *Id.*

14. Preserving the Open Internet Order, 25 FCC Rcd. 17,905, 17,906 (2010)

at transparency, required broadband providers to disclose certain information regarding their business practices and the commercial terms of their services.[15] The FCC's second rule—"no blocking"—forbade fixed and mobile broadband providers from blocking competitive, but lawful, content or applications.[16] The third rule and final rule—"no unreasonable discrimination"—prevented broadband providers from providing unreasonable disparate treatment among its transmitted Internet traffic, including slowing or degrading specific content.[17]

The rules of the *Open Internet Order* were challenged in *Verizon v. FCC*, which was decided by the United States Court of Appeals for the District of Columbia Circuit on January 14, 2014.[18] Verizon argued that the rules of the *Open Internet Order* are unlawful for several independent reasons, including a violation of the First Amendment.[19] Specifically, Verizon argued that "[b]roadband networks are the modern-day microphone by which their owners engage in first Amendment speech," and that the rules, "which limit broadband providers' own speech and compel carriage of others' speech," cannot survive scrutiny.[20]

In its decision, the D.C. Circuit noted that section 706 of the Telecommunications Act of 1996 empowers the FCC to promulgate rules governing broadband providers' treatment of Internet traffic.[21] Furthermore, the D.C. Circuit noted that the FCC's "justification for the [rules of the *Open Internet Order*]—that . . . [the rules] will preserve and facilitate the 'virtuous circle' of innovation that has driven the explosive growth of the Internet—is reasonable and supported by substantial evidence."[22] Despite these conclusions, the D.C. Circuit vacated the anti-discrimination and anti-blocking portions of the *Open Internet Order*."[23] The court found that if the FCC exempts broadband providers from treatment as common carriers, then the Communications Act expressly prohibits the Commission from regulating them as a common carrier.[24] Because the Commission failed to prove that the anti-

15. *Id.* at 17,906 ("[B]roadband providers must disclose information regarding their network management practices, performance characteristics, and terms and conditions of their broadband services.").

16. *Id.* ("Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services").

17. *Id.* ("Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic").

18. *See Verizon v. Federal Communications Commission*, No. 11-1355, slip op. at 3-4 (D.C. Cir. Jan. 14, 2014).

19. Joint Brief for Verizon and MetroPCS at 11-13, *Verizon*, 740 F.3d 623 (No. 11-135).

20. *Id.* at 12, 42-43.

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

22. *Id.*

23. *Id.* at 659.

24. *Id.* at 628.

discrimination and anti-blocking rules are not *per se* common carrier obligations, the court determined that these portions of the *Open Internet Order* were disallowed under the Communications Act.[25]

Having determined that the anti-blocking and anti-discrimination rules of the *Open Internet Order* contravene provisions of the 1996 Telecommunications Act, the D.C. Circuit declined to address Verizon's First Amendment contentions, leaving open the question as to whether similar rules would be constitutional.[26]

Describing the *Verizon* decision as an invitation by the court "to act to preserve a free and open Internet," FCC Chairman Wheeler announced, on February 19, 2014, the Commission's intention "to accept that invitation by proposing rules that will meet the court's test for preventing improper blocking of and discrimination among Internet traffic . . . ."[27] Accordingly, on March 12, 2015 the FCC released its 2015 *Open Internet Order* which purported to "adopt carefully-tailored rules that would prevent specific practices [known to be] harmful to Internet openness—blocking, throttling, and paid priortization—as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness."[28]

Though the ISPs are constitutionally protected speakers,[29] the interests served by FCC restrictions like those of the *Open Internet Orders* outweigh the likely harms, including: the speech interests involved in maintaining a free and open Internet; the governmental interest in maintaining a vibrant marketplace of ideas; and the interests of the individual users who would otherwise face potentially arbitrary and illegitimate censorship. This Article proceeds in three main parts. Section I provides a general background on the architecture of the Internet, the role played by ISPs as gatekeepers, and network neutrality. Section II surveys First Amendment jurisprudence developed in the context of communications regulation. Section III applies that jurisprudence to the debate over the constitutionality of rules that prevent broadband providers from blocking or otherwise discriminating against lawful Internet traffic. Section III concludes that that those rules are not only constitutional, but are in fact necessary to prevent private interests from

25. *Id.*

26. *See id.* at 634.

27. Tom Wheeler, Chairman, FCC, Statement on the FCC's Open Internet Rules (Feb. 19, 2014), http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules.

28. Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015).

29. *See* Raymond Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87, 125-130 (2000); Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1305 (2010).

blocking the free flow of information and ideas—a goal the Supreme Court has repeatedly recognized as legitimate in the First Amendment context.[30]

I. Background

Before proceeding to a discussion of the First Amendment issues implicated in the FCC's attempts to mandate network neutrality, this Section briefly outlines the Internet's architecture and then provides a history of packet discrimination, network neutrality, and the FCC's role in regulating the provision of broadband Internet access.

A. *Internet Architecture*

The Internet can be conceptualized as consisting of many mutually independent "layers," four of which are crucial to understanding the controversies addressed by this article: (1) a physical layer, over which information is transmitted (including, for example, copper wires, fiber-optic cables, and the airwaves); (2) a logical layer, including basic transmission protocols and the digital signal formats that facilitate communication between Internet-enabled electronic devices; (3) an applications layer, consisting of software (including, for example, e-mail and Web browsers); and (4) a content layer, which consists of the text and media that are available to—and in many cases created by—Internet users.[31]

The physical layer can be conceptualized as a global network of networks linking millions of computers through data carrying and transmission means that include pipes (called "links") and switches (called. "nodes" or "routers").[32] The pipes fall into two general categories: transport facilities, which connect networks;[33] and access facilities, which provide end users with Internet access."[34] ISPs, including broadband providers, have tradition-

30. *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 20 (1945) (holding that an attempt by the Associated Press to deprive its members' competitors of the use of its wire service violated the Sherman Act, and that its policy of exclusion was not shielded by the First Amendment). In support of its holding that the Associated Press's anticompetitive policy was not shielded by the First Amendment, the Court explained that the "First Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public ," that "a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom," and that "[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."

31. *See* Nuechterlein & Weiser, *supra* note 2, at 120.

32. *Id.* at 121, 131.

33. *Id.* at 121 (describing transport facilities as "Internet backbone facilities, [which] connect one network node to another and one network to another").

34. *Id*. at 131 (describing access facilities as "'last mile' pipes that connect an end user's computers to a network node and thence to the Internet").

ally facilitated this "last mile" connection, serving as liaisons between end users and the broader Internet.[35]

The Internet's logical layer "consists of a common computer 'addressing' scheme and a set of protocols for the accurate and efficient transmission of packet-switched data across different computer networks."[36] The protocols include the transmission control protocol ("TCP") and the Internet protocol ("IP"). Together, these two protocols enable transmitted packets to identify their destinations to switches and enable computers on each end of a transmission to confirm that a message has been accurately transmitted and received.[37] In a sense, the Internet can thus be understood as the combination of an interconnected network of physical networks with a set of standard protocols that facilitate targeted data diffusion.[38]

The Internet is "open" in that no one owns the standard logical protocols, and anyone can develop and deploy new applications.[39] Indeed, the engineers who designed the Internet "promoted an end-to-end design principle that gave maximal control to end users"[40] and enabled delivery of packets without regard to their content, origin, or destination.[41]

This open architecture promotes the Internet's value as a platform for debate by preventing discrimination "based on the moral, political, or aesthetic value of content," thereby freeing users to engage in expression that would be too controversial to "be aired on older media platforms such as television and radio."[42] As Bill Herman, an assistant professor of film and media studies at Hunter College CUNY, observed, the result has been a "much more equitable spread of communication power" within American society.[43]

Moreover, due to the speed-differential between broadband and dial-up connections, broadband has opened up new avenues for communication and creativity and produced qualitative as well as quantitative differences in the end user's Internet experience.[44] Broadband not only enhances the user's

35. *Id.* at 131-32.

36. *Id.* at 121.

37. *Id.*

38. *Id.* (describing the Internet as a combination of "the IP-based addressing system and the interconnected network of [physical] networks that rely on TCP/IP as a common logical layer standard").

39. *Id.* at 120 (explaining that the Internet is open "in the sense that no one owns the core protocols at the logical layer and anyone can develop complementary products at the adjacent physical and applications layers").

40. *Id.* at 124.

41. *Id.* ("When applied faithfully, this principle means that packets are delivered on a first come, first served basis without regard to their content, origin, or destination, and are free from any intermediate error checking or filtering").

42. Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103, 112 (2006).

43. *Id.* at 114.

44. NUECHTERLEIN & WEISER, *supra* note 2, at 136.

experience, it enables users to run applications that are too data-intensive for traditional dial-up connections to support, including music and video streaming applications, VoIP applications, and online video games.[45] Unfortunately, as Lawrence Lessig noted, the early end-to-end architecture of the Internet is "being modified by layers of control" that have enhanced the ability of network owners to dictate its development.[46] The "physical layer of the Internet is fundamentally controlled . . . [because] [t]he wires and the computers across which the network runs are the property of either government or individuals."[47] One danger, addressed by the FCC's *Open Internet* rules, is that property owners—here, broadband ISPs—will leverage their control over the Internet's physical layer in order to restrict users' access to applications and content, effectively imposing a regime of private censorship. Up to this point major ISPs have enjoyed, but have not always exercised, "enormous discretion" as to what information is allowed to pass over their networks.[48] The FCC's rules indicate that, based on a growing trend of packet discrimination by broadband providers, ISPs are now attempting to limit the availability of specific content and applications to their users. Such content restriction by ISPs undermines both the Internet's open architecture and its value as a speech platform.

B. *Packet Discrimination, Network Neutrality, and the FCC*

The FCC's *Open Internet* rules are grounded in principles that were originally adopted by the Commission in its 2005 *Broadband Policy Statement*.[49] In this statement, the FCC declared its commitment to four principles—principles that eventually resulted in the *Open Internet* rules:

(1) consumers are entitled to access lawful Internet content of their choosing;

(2) consumers are entitled to run applications and use services of their choosing, subject to the needs of law enforcement;

(3) consumers are entitled to connect through their choice of legal devices that do not harm the network; and

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45. *Id.* ("Broadband not only makes Web browsing much easier and more enjoyable, but also allows users to run particular applications unavailable over dial up connections").

46. LESSIG, *supra* note 2, at xv ("Just as we are beginning to see the power that free resources produce, changes in the architecture of the Internet—both legal and technical—are sapping the Internet of this power. Fueled by a bias in favor of control . . . .").

47. *Id.* at 25.

48. *See* Jerome A. Barron, *Access to the Media - A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937, 953 (2007).

49. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement, 20 FCC Rcd. 14,986, 14,987 (2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

(4) consumers are entitled to competition among network, application, service, and content providers.[50]

In support of these principles, the FCC cited the national Internet policy adopted by Congress in 2005, which stated that "it is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and to promote [its] continued development."[51] The FCC further noted that "in [the Communications Act of 1934], Congress charges the Commission with encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability—broadband—to all Americans."[52]

The FCC also took into account the fact that "[t]he availability of the Internet has had a profound impact on American life" due to its speed and reach, which has dramatically altered traditional methods of and limitations on communication.[53]

> This network of networks has fundamentally changed the way we communicate. It has increased the speed of communication, the range of communicating devices and the variety of platforms over which we can send and receive information. As Congress has noted, [t]he rapidly developing array of Internet . . . services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens. The Internet also represents "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." In addition, the Internet plays an important role in the economy, as an engine for productivity growth and cost savings.[54]

The Communications Act charges the FCC with "regulating interstate and foreign commerce in communication by wire and radio."[55] The Act, as amended by the Telecommunications Act of 1996, defines two categories of regulated entities: telecommunications carriers and information-service providers.[56] Under Title II of the Communications Act, telecommunications carriers are regulated as common carriers; information service providers,

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50. *Id.*

51. *Id.* (citing 47 U.S.C. § 230(b)(1) (2000)).

52. *Id.* (citing 47 U.S.C. § 157 (incorporating section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104 (2000)).

53. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement, 20 FCC Rcd. 14,986, 14,987 (2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

54. *Id.* (internal quotations omitted).

55. 47 U.S.C. § 151 (2012).

56. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005).

however, are not subject to mandatory common carrier regulation.[57] Among other obligations, telecommunications carriers "must charge just and reasonable, nondiscriminatory rates to their customers . . . [and] design their systems so that other carriers can interconnect with their communications networks."[58] Although information-service providers are not subject to mandatory common carrier regulation under Title II, "the FCC has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications."[59]

In a controversial order, the FCC concluded "that cable companies that sell broadband Internet service do not provide 'telecommunications services' as the Communications Act defines that term, and hence are exempt from mandatory common-carrier regulation under Title II."[60] In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court upheld that order, thereby freeing cable broadband providers from common carrier regulation.[61]

The Commission cited Congressional policy and its Title I ancillary jurisdiction in the *Broadband Policy Statement* to impose additional obligations to regulate interstate and foreign communications, and it asserted jurisdiction to make sure that ISPs operated in a "neutral manner" in order to "ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers."[62] Citing its "duty to preserve and promote the vibrant and open character of the Internet," the FCC pledged to incorporate the four principles of the *Broadband Policy Statement* into ongoing policymaking activities with the goal of ensuring that "consumers benefit from the innovation that comes from competition."[63] At the time that these principles were adopted, however, the FCC explicitly declined to develop rules, stating instead that the principles adopted were "subject to reasonable network management."[64]

In 2008, in response to a complaint filed against Comcast alleging that it had selectively targeted and interfered with peer-to-peer applications, the FCC determined Comcast's conduct was unreasonable and ordered the company to stop its selective targeting and interference.[65] Although Comcast as-

57. *Id.*
58. *Id.*
59. *Id.* at 976.
60. *Id.* at 974.
61. *Id.* at 1002.
62. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement, 20 FCC Rcd. 14,986, 14,987 (2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.
63. *Id.*
64. *Id.* at 14,988, n.15.
65. Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, Memorandum Opinion and Order, 23 FCC Rcd. 13,028, 13,060-61 (2008), http://www.wired.com/images_blogs/threatlevel/files/

serted that its conduct was necessary to ease network congestion, the FCC concluded "that the company's discriminatory and arbitrary practice unduly squelche[d] the dynamic benefits of an open and accessible Internet."[66] Comcast challenged the order, and the D.C. Circuit held that the FCC lacked regulatory authority over the network management practices of ISPs under Title I.[67] The court recognized, however, that Congress gave the Commission broad and adaptable jurisdiction to keep pace with rapidly evolving communications technologies, such as the Internet.[68]

Prior to issuing its order in the matter against Comcast, the FCC held an *en banc* hearing on "Broadband and the Digital Future."[69] Network neutrality opponents frequently assert that the dangers of packet discrimination by broadband providers are merely speculative,[70] but the ACLU has released an extensive list of alleged instances of discrimination "in the aftermath of *Brand X*."[71] According to the ACLU, in 2006 alone, "Time Warner/AOL blocked a grassroots e-mail campaign by the DearAOL.com Coalition to inform and mobilize customers against AOL's pay-to-send e-mail tax scheme."[72] The ACLU also claims that "BellSouth blocked its customers in Florida and Tennessee from using MySpace and YouTube,"[73] and "Cingular Wireless . . . blocked the ability of its customers to use PayPal, a popular billing service used to pay for . . . online purchases. . ."[74] In 2007, "Verizon Wireless suspended NARAL Pro-Choice America's access to a text-messaging program for grassroots lobbying . . . citing a company policy of terminating service to any group 'that seeks to promote an agenda or distribute

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comcastdecision.pdf; Secretly Degrading Peer-to-Peer Applications, Memorandum Opinion and Order, FCC 08-183 1, 32 (2008), *available at* http://www.wired.com/images_blogs/threatlevel/files/comcastdecision.pdf.

66. *Id.* at 13,028.

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

68. *Id.*

69. *See* Hearing on Broadband and the Digital Future Before the FCC (July 21, 2008), *available at* https://www.fcc.gov/events/broadband-and-digital-future-public-en-banc-hearing-windows-media-format.

70. *See, e.g.*, Adam T. Thierer, *"Net Neutrality"—Digital Discrimination or Regulatory Gamesmanship in Cyberspace?*, 507 POL'Y ANALYSIS 1 (2004) ("There is no evidence that broadband operators are unfairly blocking access to websites or online services today, and there is no reason to expect them to do so in the future."), http://www.cato.org/pubs/pas/pa507.pdf; *see also* Verizon v. FCC, 740 F.3d 623, 646 (D.C. Cir. 2014).

71. FCC En Banc Hearing on Broadband and the Digital Future, Comments of the ACLU, The Tech. & Liberty Project of the ACLU, and ACLU of Pa., 5 (July 21, 2008), http://www.aclu.org/images/asset_upload_file471_36056.pdf.

72. *Id.* (citing Rob Malda, *Pay-per-e-mail and the "Market Myth*," SLASHDOT (Mar. 29, 2006, 10:10 AM), http://it.slashdot.org/article.pl?sid=06/03/29/1411221).

73. *Id.* at 6 (citing Steve Rosenbush, *The MySpace Ecosystem*, BUS. WEEK (July 24, 2006), http://www.bloomberg.com/bw/stories/2006-07-24/the-myspace-ecosystem).

74. *Id.* (citing Scott Smith, *Cingular Playing Tough on Content Payments*, THE MOBILE WEBLOG (July 7, 2006), http://www.mobile-weblog.com/50226711/cingular_playing_tough_on_content_payment.php).

content that, in its discretion, may be seen as controversial or unsavory to any of [its] users.' "[75] Finally, the ACLU contends that AT&T also "censored a portion of [Pearl Jam lead singer] Eddie Vedder's musical critique of President Bush[76] and threatened to use its terms of service contract to terminate a customer's DSL service for any activity that it considered 'damaging' to its reputation."[77] The evidence of private censorship may be anecdotal, but the danger is far from speculative.[78] In fact, according to the ACLU, "[e]very major service provider has engaged in censorship since 2005."[79]

II. Communications Law and the First Amendment

With the adoption of the First Amendment, the United States embraced the technology of the printing press as an essential component of its political system. The choice evolved not only from the colonists' experience with suppression, but also from the Framers' appreciation for "the highly active and uninhibited communications environment that print made possible."[80] The emergence of the printing press created "a new communications environment in which dissatisfied individuals possessed a capacity for finding allies or reaching others in ways that had not existed previously."[81] Indeed, as law professor and civil rights advocate Zechariah Chafee noted in *Government and Mass Communications*, the freedom of the press was created at

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75. FCC En Banc Hearing on Broadband and the Digital Future, Comments of the ACLU, The Tech. & Liberty Project of the ACLU, and ACLU of Pa., 5, (July 21, 2008), http://www.aclu.org/images/asset_upload_file471_36056.pdf (citing Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. Times (Sept. 27, 2007), http://www.nytimes.com/2007/09/27/us/27verizon.html?_r=1&oref=login).

76. FCC En Banc Hearing on Broadband and the Digital Future, Comments of the ACLU, The Tech. & Liberty Project of the ACLU, and ACLU of Pa., 5-6 (July 21, 2008), http://www.aclu.org/images/asset_upload_file471_36056.pdf (citing Sue Zeidler, *CORRECTED: AT&T Calls Censorship of Pearl Jam Lyrics an Error*, Reuters (Aug. 10, 2007, 1:45 PM), http://www.reuters.com/article/technologyNews/idUSN091821320070809?feedType=RSS&rpc=22&sp=true).

77. FCC En Banc Hearing on Broadband and the Digital Future, Comments of the ACLU, The Tech. & Liberty Project of the ACLU, and ACLU of Pa., 6 (July 21, 2008), http://www.aclu.org/images/asset_upload_file471_36056.pdf (citing Ken Fisher, *AT&T Relents on Controversial Terms of Service, Announces Changes*, ArsTechnica (Oct. 10, 2007, 9:07 PM) http://arstechnica.com/tech-policy/2007/10/att-relents-on-controversial-terms-of-service-announces-changes/).

78. *See* Verizon v. FCC, 740 F.3d 623, 648 (D.C. Cir. 2014).

79. FCC En Banc Hearing on Broadband and the Digital Future, Comments of the ACLU, The Tech. & Liberty Project of the ACLU, and ACLU of Pa., 6 (July 21, 2008), http://www.aclu.org/images/asset_upload_file471_36056.pdf.

80. Harvey L. Zuckman et al., Modern Communications Law 167 (1999) (quoting Ethan Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 Geo. Wash. L. Rev. 1459, 1470 (1989)).

81. M. Ethan Katsh, Electronic Media and the Transformation of Law, 142 (1991).

a time "when the press was a means of *individual* expression, comment, and criticism."[82]

Despite the revolutionary nature of printing technology and the protection of the First Amendment, "the costs or logistics of reaching the masses" has limited the ability of unconventional speakers to promote their ideas in the marketplace, "hence the adage that freedom of the press is limited to those who own one."[83] As Jerome Barron argued, a realistic view of the First Amendment "requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications."[84]

Like the printing press, the Internet has dramatically transformed the communications environment,[85] providing unprecedented opportunities for individuals to communicate. Justice Stevens' words from 1997 continue to ring true today: the Internet's growth "has been and continues to be phenomenal."[86] In many ways the Internet provides an avenue for expression far greater than what was afforded by the invention of the printing press, because "unconventional messages compete equally with the speech of mainstream speakers in the marketplace of ideas that is the Internet . . ." as "anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined."[87] The Supreme Court, in *Reno v. ACLU*, recognized the Internet as "a unique and wholly new medium of worldwide human communication."[88] It enables anyone with Internet access, anywhere in the world, to take advantage of a wide variety of constantly evolving "communication and information retrieval methods."[89]

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82. 1 ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS 15 (1947).

83. ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999).

84. Jerome A. Barron, *Access to the Press - A New First Amendment Right*, 80 HARV. L. REV. 1641, 1648 (1967).

85. *See generally* RICHARD G. LIPSEY, KENNETH I. CARLAW, & CLIFFORD T. BEKAR, ECONOMIC TRANSFORMATIONS: GENERAL PURPOSE TECHNOLOGIES AND LONG-TERM ECONOMIC GROWTH (Oxford Univ. Press 2005). The Internet, like printing, has been recognized by economists Richard Lipsey, Kenneth Carlaw and Clifford Bekar as one of twenty-four "transforming general purpose technologies," a technology "with a broad range and variety of uses, extensive spillovers, susceptibility to improvement through the development of complementary technologies, and the ability to transform economic, political, and social structures." Jonathan Baker, *Educate us on Economics*, FCC (Oct. 27, 2009), http://blog.openinternet.gov.

86. Reno v. ACLU, 521 U.S. 844, 885 (1997).

87. *ACLU*, 31 F. Supp. 2d at 476.

88. *Reno*, 521 U.S. at 850 (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D.Pa. 1996)).

89. *Id.* at 851 (1997). The Court noted that from a reader's perspective, the World Wide Web is comparable "to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services." *Id.* at 853. "From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. *Id.* "Web publishing is simple enough that thousands of individual users and small community organizations are using

As one district court noted, the Internet's low barriers to entry, identical for both speakers and listeners, have resulted in "astoundingly diverse content," available to nearly all "who wish to speak in the medium," making it "the most participatory form of mass speech yet developed."[90] Furthermore, as the Supreme Court recognized, the Internet provides a "relatively unlimited, low-cost capacity for communication of all kinds," including "not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue."[91] The Internet, like the printing press before it, has revolutionized the way individuals speak their minds, engage with their communities, and access information.

Despite the commonalities between the Internet and the printing press, regulations that affect Internet communication may be subject to First Amendment analysis differing from that which is traditionally applied to print media regulations. In striking down a "content-based blanket restriction on speech" in *Reno v. ACLU*,[92] the Supreme Court noted that its cases provided "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."[93] As Marvin Ammori explains, however, print and electronic media frequently receive differing First Amendment treatment.[94]

This is not entirely surprising given the traditional understanding, expressed by Justice Jackson in *Kovacs v. Cooper,* that "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers," leading to the conclusion that "each . . . is a law unto itself."[95] Given the fact that "[m]inds are not changed in the streets and parks as they once were" and that "the more significant interchanges of ideas and shaping of public consciousness occur[s] in mass and electronic media,"[96] the general academic indiffer-

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the Web to publish their own personal 'home pages,' the equivalent of individualized newsletters about the person or organization, which are available to everyone on the Web." *Id.* (citing ACLU v. Reno, 929 F. Supp. 824, 837 (E.D. Pa. 1996)). Indeed, "[a]ny person or organization with a computer connected to the Internet can 'publish' information" and publishers include speakers as diverse as "government agencies, educational institutions, commercial entities, advocacy groups, and individuals." *Id.*

90. ACLU v. Reno, 929 F. Supp. 824, 877, 883 (E.D.Pa. 1996); *see also Reno*, 521 U.S. at 870 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.").

91. *Reno*, 521 U.S. at 870.

92. *Id.* at 868.

93. *Id.* at 870.

94. *See generally* Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005).

95. Kovacs v. Cooper, 336 U.S. 77, 97 (1949).

96. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 802-03 (1996) (Kennedy, J., concurring in part and dissenting in part).

ence to, and in some cases hostility toward,[97] the First Amendment jurisprudence specific to the regulation of electronic media is surprising.[98]

Praising what he refers to as the "communication tradition" of First Amendment jurisprudence and contrasting it with the "print tradition," Professor Ammori argues that, in broad strokes, the differences in treatment can be understood as involving five dimensions:

> (1) whereas the "print tradition" equates structural regulation and content regulation, the "communication tradition" distinguishes structural regulation from content censorship;
>
> (2) whereas print cases emphasize a sharp distinction between public and private, communication cases recognize that the public and private blend in media industries;
>
> (3) whereas the print tradition involves a "nearly fatal presumption" against content-based speech laws, content-based restrictions are not automatically invalid in the communication tradition;
>
> (4) whereas the print tradition evinces a preference for clear rules over balancing or standards, the communication tradition stresses that competing speech interests must often be balanced; and
>
> (5) whereas entities and individuals are interchangeable in the print tradition, some communication tradition scholars argue that "the constitutional speech rights of individuals should differ from those of legally created entities."[99]

Ammori is not alone in recognizing a split in First Amendment jurisprudence. In *The First Amendment in Cyberspace*, Cass Sunstein recognized that "[t]here are two free speech traditions, . . . not simply one."[100]

Before advancing to a discussion of the constitutionality of regulation mandating network neutrality, Section III.A will briefly review the First Amendment jurisprudence providing context for the free speech debate related to network neutrality explored in Section III.B, which concludes that the FCC's rules are constitutional.

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97. *See, e.g.*, HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW 153-174 (1999) (arguing against the use of regulatory power over new media based on utilitarian balancing).

98. *See generally* Ammori, *supra* note 94.

99. *Id.* at 60-86.

100. Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1759 (1995).

A. *The Communications Tradition of First Amendment Jurisprudence*

An important characteristic of the First Amendment is free and open access to divergent expressions and ideas. Fostering a system that allows many different thoughts to proliferate creates a quasi-market that allows individuals to engage with a multitude of ideas. Implicit in this concept is the belief that open competition will sort winning from losing ideas and ultimately lead individuals to their respective truths. The ability to communicate thoughts freely must therefore be protected in order for this market to operate effectively. It is important to note, however, that this market may be distorted not only by government censorship, but also by private censorship, which is treated differently under First Amendment jurisprudence.

In 1967, Jerome Barron noted in his watershed article, *Access to the Press - A New First Amendment Right*, an "anomaly" in American constitutional law: "While we protect expression once it has come to the fore, our law is indifferent to creating opportunities for expression . . . . Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas' is freely accessible."[101] Barron's key insight was his recognition that "[t]here is inequality in the power to communicate ideas just as there is inequality in economic bargaining power" and that "to recognize the latter and deny the former is quixotic."[102] Barron argued that, for those without ownership over the avenues of expression, the "romantic" view could appear as a "rationale for repression," guaranteeing the freedom of media gatekeepers to prevent ideas from being heard.[103] Because unorthodox points of view have no claim "on broadcast time and newspaper space as a matter of right," legal intervention is required "if novel and unpopular ideas are to be assured a forum."[104] This intervention necessarily conflicts with claims of constitutionally protected editorial control.

The "marketplace of ideas" metaphor originated with Justice Holmes,[105] who wrote:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[106]

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101. Barron, *supra* note 84, at 1641.
102. *Id.* at 1647.
103. *Id.* at 1641-42.
104. *Id.* at 1641.
105. *Id.* at 1643
106. Abrams v. United States, 250 U.S. 616, 630 (1919).

As Barron recognized, it is interesting that the same Justice "who reminded his brethren in *Lochner v. New York* that the Constitution was not 'intended to embody a particular economic theory' . . . nevertheless rather uncritically accepted the view that constitutional status should be given to a free market theory in the realm of ideas."[107]

The marketplace of ideas metaphor has perpetuated the assumption that the only threat to "a free market mechanism for ideas" is government intervention, ignoring other possible sources of concern.[108] Justice Douglas's dissent in *Dennis v. United States* illustrates this view:

> When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart. Full and free discussion has indeed been the first article of our faith.[109]

Barron noted that, implicit in this passage, is the faith that "if government can be kept away from 'ideas,' the self-operating and self-correcting force of 'full and free discussion' will go about its eternal task of keeping us from 'embracing what is cheap and false' to the end that victory will go to the doctrine which is 'true to our genius.'"[110] However, while the First Amendment successfully protects free speech and ideas from government censorship, "our constitutional law has been singularly indifferent to the reality and implications of nongovernmental obstructions to the spread of . . . truth."[111] This indifference toward private censorship is particularly problematic where a small group of individuals or organizations have the power to control the content and availability of information, or "when the soap box yields to radio and the political pamphlet to the monopoly newspaper."[112]

Barron argued that difficulties in securing access to media, which was unforeseen by both the framers and the early First Amendment scholars, resulted from increased concentration of media ownership as well as the "changing technology of mass media."[113] Lack of competition within media industries enables media owners with market power to "suppress facts" and

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107. Barron, *supra* note 84, at 1643 (quoting Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

108. *Id.* at 1642.

109. Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting).

110. Barron, *supra* note 84, at 1642-43 (1967) (quoting *Dennis*, 341 U.S. at 584-85 (Douglas, J., dissenting)).

111. *Id.* at 1643.

112. *Id.*

113. *Id. at 1644.*

censor opinions at their discretion,[114] and because evolving technology is most effective when it is broadcast to a large audience, mass media tend to conform to "already widely accepted tastes," making "it very difficult for a novel point of view or a just emerging problem to gain access to network broadcasts or other mass components of the mass communications system."[115]

Establishing a system where ideas have equal access and ability to compete is quite difficult. "The 'marketplace of ideas' view has rested on the assumption that protecting the right of expression is equivalent to providing for it," but, realistically, this is not the case.[116] Thus, Barron criticized contemporary First Amendment jurisprudence for its failure to account for the possibility of market failure in the "marketplace of ideas":

> [The contemporary] constitutional approach . . . looks only to protecting the communications which are presently being made without inquiry as to whether freedom of speech and press, in defense of which so much judicial rhetoric is expended, is a realistically available right. While we have taken measures to ensure the sanctity of that which is said, we have not inquired whether, as a practical matter, the difficulty of access to the media of communication has made the right of expression somewhat mythical.[117]

Quoting Alexander Meiklejohn, Barron argued that for the marketplace of ideas to function as intended, " 'what is essential is not that everyone shall speak, but that everything worth saying shall be said'—that the point of ultimate interest is not the words of the speakers but the minds of the hearers."[118] Under this understanding, it is just as important to create opportunities for expression as it is to prevent government retaliation or censorship of unpopular or antagonistic ideas.[119]

Barron cited *Associated Press v. United States* as an example of "acknowledgment that the public interest . . . can override the first amendment claims of the mass media" and argued that it supports the view that "the public interest in expression of divergent viewpoints should be weighed as heavily when the mass media invoke the first amendment to shield restrictions on access."[120] In that case, the Supreme Court held that an attempt by

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114. *See id.* (quoting J.R. WIGGINS, FREEDOM OR SECRECY 178 (rev. ed. 1964)).

115. Barron, *supra* note 84, at 1645 (quoting D. LACY, FREEDOM AND COMMUNICATIONS 69 (1961)) (internal quotations omitted).

116. Barron, *supra* note 84, at 1647-48.

117. *Id.* at 1652.

118. *Id.* at 1653 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 25-28 (1960)).

119. Barron, *supra* note 84, at 1654 ("[C]reating opportunities for expression is as important as ensuring the right to express ideas without fear of governmental reprisal.").

120. *Id.*

the Associated Press to deprive competitors of the use of its wire service violated the Sherman Act, and that its policy of exclusion was not shielded by the First Amendment.[121] In doing so, the Court explicitly recognized that threats to the freedoms of speech and the press extend beyond censorship by the government, noting that:

> [A] command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom . . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[122]

Two years after Barron argued that "[c]reating opportunities for expression is as important as ensuring the right to express ideas without fear of governmental reprisal,"[123] the Supreme Court unanimously upheld the FCC's fairness doctrine and personal attack rules in *Red Lion Broadcasting Co. v. FCC*.[124] Believing that the access regulations at issue "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment," the Court found both regulations to be valid and constitutional.[125] The Court argued that broadcasting is affected by First Amendment interests, but different standards should be applied to new media due to differences in characteristics.[126] The Court found that the government may limit the use of broadcast equipment to prevent drowning out the free speech of others.[127]

The potential for one broadcaster to snuff out the speech of another relates, in part, to the problem of interference, which itself arises from the physical characteristics of radio signals.[128] "The lack of know-how and equipment may keep many from the air," Justice White wrote, "but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had."[129]

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121. *See* Associated Press v. United States, 326 U.S. 1, 20 (1945).

122. Barron, *supra* note 84, at 1654.

123. *Id.*

124. Barron, *supra* note 48, at 938 (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969)).

125. *Red Lion Broad. Co.*, 395 U.S. at 375.

126. *Id.* at 387 ("[A]lthough broadcasting is clearly a medium affected by a First Amendment interest . . . differences in the characteristics of new media justify differences in the First Amendment standards applied to them.").

127. *Id.* ("Just as the government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.").

128. *Id.* at 387-88.

129. *Id.* at 388.

Because the physical characteristics of signal propagation vary with frequency and because only certain bands of frequency are appropriate for broadcast communications, the FCC allocates broadcast rights to specific frequencies through a licensing scheme, thereby avoiding "harmful interference"—that is, overlap in signals over the same frequency that would result in unintelligibility.[130] A license allows the licensee to broadcast, but does not establish a constitutional right to be the owner of the license or to dominate a radio frequency and thereby exclude others; the people collectively maintain an interest in free speech through broadcast consistent with the First Amendment.[131]

The Court noted that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of the market, whether it be by the Government itself or a private licensee."[132] Also recognizing that "there is no sanctuary in the First Amendment for unlimited private censorship . . . in a medium not open to all,"[133] the Court held that "[i]t does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of public concern."[134]

The *Red Lion* decision was, at least in part, premised on Professor Barron's tools of market analysis, the Court having found that "the access rules ameliorated the effects of a highly concentrated media market."[135] Furthermore, as Barron remarked in a follow-up to his original article, it seemed that "[t]he idea that the First Amendment had an affirmative dimension and that law could not only protect freedom of expression but facilitate it was on the ascent."[136] As Ellen Goodman observes, however, *Red Lion*'s reliance on spectrum scarcity obscured the importance of market structure.[137] The resulting schism in First Amendment doctrine features a relaxed review of broadcast regulation and a higher level of scrutiny for all other media.[138]

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130. *See generally* NUECHTERLEIN & WEISER, *supra* note 2, at 225-60 (describing the physical characteristics of the spectrum and the FCC's licensing scheme).

131. *Red Lion Broad. Co.*, 395 U.S. at 389-90 ("A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens . . . [and] the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment.").

132. *Id.* at 390.

133. *Id.* at 392.

134. *Id.* at 394.

135. Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 HOFSTRA L. REV. 1211, 1225 (2007).

136. Barron, *supra* note 48, at 938.

137. Goodman, *supra* note 135, at 1226 ("Rather than treating spectrum constraints as one of several factors that contribute to concentration, the decision fetishized limited spectrum as the distinguishing feature of broadcasting.").

138. *Id.* at 1226-27.

Echoing Goodman's view, Marvin Ammori notes that the schism between the line of cases and commentary centering electronic media cases like *Red Lion,* and the line of cases focusing on more traditional means of expression has long been recognized by free speech scholars.[139] In *Miami Herald Publishing Co. v. Tornillo*, for example, the Supreme Court "repudiated the idea that a right of access to the print media could be consistent with the First Amendment."[140] The case involved the Miami Herald's refusal to publish replies to editorials attacking Pat Tornillo's candidacy for the state legislature despite the existence of a Florida right of reply statute.[141] *Tornillo*, decided five years after *Red Lion*, involved nearly identical issues, but applied to newspapers rather than electronic media.[142] The Court held that "[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fail[ed] to clear the barriers of the First Amendment because of its intrusion into" editorial control.[143] Noting that "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising," the Court held that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment" and that "governmental regulation of this crucial process" is inconsistent with the First Amendment.[144]

Ammori argues that the holdings of *Red Lion* and of *Tornillo* are irreconcilable and reflect a broader schism between two traditions of First Amendment jurisprudence: a first "paper tradition" focused on increasingly marginal means of expression such as leafleting and picketing, animated by an unwavering distrust of government, and a second "communications tradition" focused on "speech as it occurs in modern society—largely through electronic media—and on individuals' actual power to communicate."[145] Unlike the line of cases and commentary focused on traditional media, the communications tradition, which includes *Red Lion*, "permits government constitutional leeway to adopt structural regulations that foster 'uninhibited, robust, and wide-open' public debate and advance social values like viewpoint diversity and localism."[146] The communications tradition thus "reject[s] the idea that 'the First Amendment is concerned solely with' a narrow

139. Ammori, *supra* note 94, at 63.
140. Barron, *supra* note 48, at 940 (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)).
141. *Id.* at 940-41.
142. Ammori, *supra* note 94, at 64.
143. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).
144. *Id.*
145. Ammori, *supra* note 94, at 64-65.
146. *Id.* at 65 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964)).

conception of 'government power'"[147] and "even suggest[s] at points that government may be 'constitutionally prohibited from diminishing the diversity of voices in our marketplace of ideas' through encouraging or permitting domination of the speech market, even by nongovernmental actors."[148] Given the increasing pervasiveness of electronic media[149] and the fact that "[m]inds are not changed in the streets and parks as they once were,"[150] the theoretical debate between the two jurisprudential traditions "has enormous normative and regulatory implications" for the marketplace of ideas.[151]

The dichotomy between the two traditions of free speech is rooted in the "campaign for communicative pluralism," launched by Jerome Barron, and focused on regulatory interventions "specifically designed to promote communicative opportunities."[152] Pluralists, Ellen Goodman writes, "typically emphasize the instrumental role of the First Amendment in advancing collective interests in the free exchange of ideas."[153] The tension between the two traditions has resulted in a "constitutional terrain of communications policy . . . marked by a conflict between First Amendment rights and values."[154] As Goodman explains:

> Regulations that limit ownership of cable systems and channels, limit ownership of broadcast stations, mandate that satellite systems provide access for noncommercial programming, and mandate that cable systems provide access for local broadcast programming all reallocate speech opportunities from communications proprietors. In all cases, the government is intervening in media markets by redistributing power over the means and content of communication to further First Amendment speech values. In all cases, the regulations clip the rights of proprietors to control private means of communications.[155]

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147. Ammori, *supra* note 94, at 74 (quoting Yochai Benkler, *Property, Commons, and the First Amendment: Towards a Core Common Infrastructure* 27 (Mar. 2001) (Brennan Ctr. for Justice at N.Y.U. Sch. of Law, White Paper for the First Amendment Program), http://www.benkler.org/WhitePaper.pdf (hereinafter Benkler, Core Common Infrastructure).

148. Ammori, *supra* note 94, at 74 (quoting Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 365 (1999) (hereinafter Benkler, *Enclosure*)).

149. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

150. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 802-03 (1996) (Kennedy, J., concurring in part and dissenting in part).

151. Ammori, *supra* note 94, at 61.

152. Goodman, *supra* note 135, at 1211-12.

153. *Id*. at 1212-13.

154. *Id.* at 1216 (citing R. Randall Rainey, S.J., *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 319-20 (1993) ("[T]wo aspects of liberty – individualist and communitarian – are in constant dialectical tension within the First Amendment tradition")).

155. Goodman, *supra* note 135, at 1217 (citations omitted).

Although First Amendment doctrine generally "favors rights over values" and "negative liberties over positive ones,"[156] pluralists have succeeded in establishing exceptions in specific areas such as commercial speech and broadcast regulation, where the Supreme Court has drawn on the communications tradition in order to protect "a robust public informational environment."[157] One dispute in particular, arising out of the FCC's mandate that cable operators must carry broadcast television stations, provides a basis for understanding the jurisprudence at the heart of the debate over the First Amendment implications of the FCC's attempt to mandate network neutrality, explored below in Section III B.

B. *Case Law – Turner I and II*

In 1995, Cass Sunstein recognized *Turner Broadcasting System, Inc. v. FCC* ("*Turner I*")[158] as "by far the most important judicial discussion of new media technologies," with a wide range of future implications.[159] In *Turner I*, the Supreme Court created a new way to understand the relationship between new technologies and the First Amendment and provided a vehicle to "set out principles governing content discrimination, viewer access, speaker access, and regulation of owners of speech sources."[160]

Ironically, Sunstein still underestimated the importance of the case, arguing that *Turner I* differed "from imaginable future cases involving new information technologies, including the Internet," as, at the time, the Internet did not suffer from a "bottleneck problem."[161] In the days when dial-up Internet access was the norm, Sunstein was not the only one who failed to foresee the potential for gatekeepers at the physical layer to leverage their positions to control the availability of applications and content. In 1996, the Supreme Court correctly noted, in *Reno v. ACLU*, that "[n]o single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked."[162] As Bill Herman demonstrates in his 2006 article *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, however, the broadband market that displaced dial-up connections as the primary means of user access is highly concentrated, consisting mainly of regional duopolies.[163]

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156. *Id.* at 1218.
157. *Id.* at 1218 n. 35.
158. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622 (1994).
159. Sunstein, *supra* note 100, at 1765.
160. *Id.* at 1765-66.
161. *Id.* at 1765.
162. Reno v. ACLU, 521 U.S. 844, 853 (1997) (quoting ACLU v. Reno, 929 F. Supp. 824, 838 (E.D. Pa. 1996)).
163. Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103, 126-28 (2006) (explaining that two vehicles, coaxial cables - originally designed to carry television signals - and DSL service - which are carried over telephone lines, serve almost the entire broadband market.).

Turner I presented the question of whether laws requiring "cable television systems to devote a portion of their channels to the transmission of local broadcast television stations" violated the First Amendment by abridging the freedom of speech or of the press.[164] The majority began by noting that "the cable industry . . . stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources."[165] The laws at issue reflected congressional judgment that "due to local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, the overwhelming majority of cable operators exercise a monopoly over cable service."[166] The result was "undue market power for the cable operator as compared to that of consumers and video programmers . . . [and] the power and incentive to harm broadcast competitors."[167] In light of technological and economic conditions, Congress concluded that:

> [U]nless cable operators are required to carry local broadcast stations, [t]here is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried . . . [that] the marked shift in market share from broadcast to cable will continue to erode the advertising revenue base which sustains free local broadcast television . . . and that, as a consequence, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.[168]

The must-carry rules that require cable systems to devote a portion of their channels to local broadcasters regulate speech in two respects: they "reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining."[169] The majority in *Turner I* argued that there could be no disagreement on the initial premise that cable programmers and operators are entitled to the protection of the First Amendment.[170] At issue in the case was the level of scrutiny that should be applied to the must-carry provisions since "not every interference with speech triggers the same degree of scrutiny under the First Amend-

164. *Turner I*, 512 U.S. 622.

165. *Id.* at 627.

166. *Id.* at 633 (citing Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1460 § 2(a)(2)).

167. *Id.*

168. *Id.* at 634 (citing Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1460 § 2(a)(13)-(16)).

169. *Id.* at 636-37.

170. *Id.* at 636 (citing Leathers v. Medlock, 499 U.S. 439, 444 (1991))("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.").

ment." The Court rejected the *Red Lion* framework, asserting that the basis of the Court's broadcast jurisprudence lay in the physical limitations of the electromagnetic spectrum, rather than in the economic characteristics of the broadcast market.[171] The deciding factor in determining whether to apply an intermediate or a strict level of scrutiny, then, was whether the laws at issue were content-neutral or content-based.[172]

Although the *Turner I* Court found that the must-carry rules were content-neutral on their face,[173] it also noted that a facial analysis did not end the inquiry because "even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys."[174] The majority was convinced that "[t]he scope and operation of the challenged provisions" made it clear that "Congress designed the must-carry provisions not to promote speech of a particular content, but to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming . . . ."[175]

The majority rejected the contention that strict scrutiny was required because the must-carry provisions singled out cable operators for disfavored treatment and found no additional arguments sufficient to meet the strict scrutiny standard. Although *Tornillo* "affirmed an essential proposition" that the "First Amendment protects the editorial discretion of the press," the rules at issue in *Turner* were content-neutral and would not force cable operators to "alter their own messages to respond to the broadcast programming they are required to carry."[176] Furthermore, "[g]iven cable's long history of serving as a conduit for broadcast signals," there appeared to be "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey[ed] ideas or messages endorsed by the cable operator."[177] As such, the must-carry provisions did not constitute compelled speech.[178]

Crucially, the majority noted that the plaintiffs' asserted analogy to *Tornillo* ignored an important distinction regarding information access between other forms of media, such as newspapers, and cable television:

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171. *Id.* at 637-40 ("[T]he mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to non-broadcast media.").

172. *Id.* at 641-43.

173. *Id.* at 643. ("[T]he must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech."). *See also id.* at 644 ("Nothing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select."); *id.* at 645 ("[T]his burden is unrelated to content, for it extends to all cable programmers irrespective of the programming they choose to offer viewers.").

174. *Id.* at 645.

175. *Id* at 649.

176. *Id.* at 653, 655

177. *Id.* at 655.

178. *Id.*

> Although a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium. A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications . . . . The same is not true of cable. When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.[179]

Citing *Associated Press*, the majority found that the First Amendment does not prevent the government from ensuring that private actors cannot abuse central pathways of communication to restrict the flow of information.[180] The potential for private censorship by an entity with market power and gatekeeper control over "a pathway of communication" therefore contributed meaningfully to the Court's rejection of the contention that *Tornillo* required strict scrutiny of the must-carry provisions.[181]

Having determined that intermediate scrutiny was appropriate, the majority next considered, under the framework established in *United States v. O'Brien*, whether the must-carry provisions could be sustained.[182] Under *O'Brien*, a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[183] The *Turner I* majority recognized that

179. *Id.* at 656. The court noted with approval Ithiel de Sola Pool's comment that, "[t]he central dilemma of cable is that it has unlimited capacity to accommodate as much diversity and as many publishers as print, yet all of the producers and publishers use the same physical plant. . . . If the cable system is itself a publisher, it may restrict the circumstances under which it allows others also to use its system." *Id.* at 656 n.8 (citing ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 168 (1983)).

180. *Turner I*, 512 U.S. at 657 ("The potential for abuse of this private power over a central avenue of communication cannot be overlooked" as "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.").

181. *See id.*

182. *Id.* at 661-62.

183. United States v. O'Brien, 391 U.S. 367, 377 (1968); *see also Turner I*, 512 U.S. at 662 ("To satisfy this standard, a regulation need not be the least speech-restrictive means of

guaranteeing public access to a wide array of information sources is a "government purpose of the highest order" because it upholds the purpose of the First Amendment.[184] Despite this interest of the "highest order," however, the majority remanded the case for further factual findings on the question of whether the regulations were narrowly tailored to achieve such governmental interest.[185]

Three years later, in *Turner Broadcasting System Inc. v. FCC* ("*Turner II*"), the Court held that the regulations were appropriately tailored.[186] The Court noted that, despite the potential for interference,[187] the "actual effects are modest."[188] Moreover, the burdens of must-carry do not represent "significant First Amendment harm" because the stations were carried voluntarily before the provisions became law and because most of the "channels would continue to be carried in the absence of any legal obligation to do so."[189] The Court held that Congress' policy was "grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination."[190] The Court further noted that "the First Amendment requires nothing more" where content-neutral regulations are at issue and, therefore, held that the must-carry provisions were constitutionally permissible.[191]

As several commentators argue, *Turner II* is as interesting for Justice Breyer's concurrence as it is for the majority opinion.[192] Yochai Benkler, for example, noted that despite Breyer's recognition "that regulation extracts a serious First Amendment price," he also recognized that that price can be

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advancing the Government's interests. 'Rather, the requirement of narrow tailoring is satisfied "so long as the. . .regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."' . . . Narrow tailoring in this context requires, in other words, that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989))).

184. *Turner I*, 512 U.S. at 663 ("[I]t has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" (citing United States v. Midwest Video Corp., 406 U.S. 649, 668 n. 27 (1972) (plurality opinion))).

185. *See id.* at 667-68.

186. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 185 (1997).

187. In determining whether the must-carry provisions were narrowly tailored, the Court noted that they could interfere with protected speech in two ways: first, they restrict the editorial discretion of cable operators by limiting the number of channels they can control; second, they " 'render it more difficult for cable programmers to compete for carriage on the limited channels remaining.' " *Id.* at 214 (quoting *Turner I*, 512 U.S. at 637).

188. *Turner II*, 520 U.S. at 215.

189. *Id.*

190. *Turner II*, 520 U.S. at 224-25.

191. *Id.*

192. *See, e.g.*, Benkler, *supra* note 148, at 376-77; Moran Yemini, *Mandated Network Neutrality and the First Amendment: Lessons from* Turner *and a New Approach*, 12 VA. J.L. & TECH. 1, 24 (2008); Herman, *supra* note 42, at 115; Benkler, *Encolsure*, *supra* note 148, at 227 (Breyer, J., concurring in part).

justified by what he described as a "basic tenet of national communications policy": "[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[193] Quoting Breyer, Benkler explains that such a "policy is not an economic policy," but rather "seeks to facilitate . . . public discussion and informed deliberation, which . . . democratic government presupposes and the First Amendment seeks to achieve."[194] Despite the "serious First Amendment price" of the must-carry provisions—interference with the editorial control exercised by cable companies—Justice Breyer concluded that the government's interest in assuring the public's "access to a multiplicity of information sources" was itself sufficient to reject the First Amendment claim of the cable operators in the case.[195] In doing so, Breyer implicitly adopted the balancing approach found in the communications tradition of First Amendment jurisprudence, recognizing the need for regulation to protect First Amendment values and ensuring the smooth operation of the marketplace of ideas, even at the cost of interfering with First Amendment rights.

III. Network Neutrality and the First Amendment

Network neutrality should survive First Amendment claims on the basis of protected speech by ISPs. First, network neutrality does not interfere with the ISPs' editorial control. Second, intermediate scrutiny is the highest level of scrutiny that can be afforded to the ISPs, and the FCC's network neutrality regulations would survive intermediate scrutiny analysis.

Opponents of network neutrality argue that regulations promoting the continued viability of the end-to-end principle of Internet architecture, which enables the uncensored transfer of information from one point in the network to another, would violate the First Amendment by preventing ISPs from exercising editorial control over the information that passes through their networks.[196] This is unsurprising, as communications proprietors traditionally resist regulation and "if unsuccessful in Congress or at the Federal Communications Commission . . . often go to court asserting their First Amendment rights to be free from . . . governmental controls."[197] In one example, Christopher Yoo, a scholarly opponent of network neutrality, argues that editorial

193. Benkler, *Encolsure*, *supra* note 148, at 377

194. *Turner II*, 520 U.S. at 226 (Breyer, J., concurring in part) (quoting *Turner I*, 512 U.S. at 663).

195. *See, e.g.*, Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 Geo. Wash. L. Rev. 697 (2010); *see also* Joint Brief for Verizon and MetroPCS at 42-48, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. Jul. 2, 2014) (No. 11-1355), 2012 WL 9937411.

196. *See, e.g.*, Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 Geo. Wash. L. Rev. 697 (2010); *see also* Joint Brief for Verizon and MetroPCS at 42-48, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. Jul. 2, 2014) (No. 11-1355), 2012 WL 9937411.

197. Goodman, *supra* note 135, at 1212.

control exercised by Internet service providers fosters rather than impedes free speech values.[198] Given the choice between government regulations ensuring network neutrality and "allowing audiences to choose . . . among intermediaries each exercising their own voice," Yoo postulates that the latter is preferable.[199] Yoo's argument closely tracks that advanced by the plaintiffs in *Turner I*, *Turner II*, and, most recently, in *Verizon*.

A. *Network Neutrality Does Not Interfere with Editorial Control*

First Amendment objections to network neutrality on the basis of editorial control are untenable for two reasons. First, traditional "protected speech" on the basis of editorial discretion is primarily anchored in an affirmative conveyance of a message. In the Internet context, it is the user who selects content. Restricting access is the only method of content control for ISPs. Second, industry practice and general expectations do not support editorial discretion by ISPs. Although "the expressive activities of cable operators do not warrant full First Amendment protection of the sort provided to newspapers, it is . . . now well established that cable-television operators engage in speech and exercise at least a certain degree of editorial discretion," which entitles them to some protection by the First Amendment.[200] As such, the most important question facing the FCC with regard to the constitutionality of mandating network neutrality rules may be whether ISPs will be able to successfully claim that the FCC's rules interfere with their constitutionally protected editorial discretion. This question is examined below, because the *Verizon* plaintiff based its constitutional challenge to the FCC's *Open Internet* rules on exactly such a claim.

In a joint letter sent to the FCC "address[ing] deeper questions of communications policy implicated by the Commission's consideration of a neutrality regime," First Amendment and cyber law experts Tim Wu and Lawrence Lessig argue that "[t]he Supreme Court has never endorsed the position that every aspect of operating a communications network is protected speech, and the consequences of such a view would be untenable."[201] In fact, editorial discretion by ISPs over a broadband network is patently dissimilar to the discretion exercised by cable television operators.[202] This is due primarily to the fact that in the Internet context, end users— rather than broadband operators—select the content they view.[203] The only control the

198. Yoo, *supra* note 196, at 703.
199. *Id.* at 772.
200. Yemini, *supra* note 192, at 17.
201. Ex parte letter from Tim Wu, Assoc. Professor, University of Virginia School of Law, and Lawrence Lessig, Professor of Law, Stanford Law School, to Marlene H. Dortch, Sec'y, FCC 1, 9 (Aug. 22, 2003), http://www.timwu.org/wu_lessig_fcc.pdf (hereinafter Ex parte letter).
202. *Id.*
203. *Id.*

broadband operator has over the content it carries is the ability to restrict usage or block content.[204]

It is therefore unclear whether a broadband operator's content restrictions would qualify as protected speech.[205] Content and usage restrictions of this type "lacks . . . a decided judgment to create a particular package of content or programming for known customers."[206] Although the choice as to what content or types of usage will be banned could be framed as a form of expression, Wu and Lessig further note that "the conduct that the Court has recognized as expressive, like the burning of draft cards in *United States v. O'Brien*, is that which clearly communicates a message."[207] In contrast, it is difficult to ascertain precisely what message is communicated when a broadband Internet service provider restricts usage or blocks content.[208]

Wu and Lessig are not alone in their skepticism toward the editorial control argument. In *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, Bill Herman notes that a belief "that First Amendment values are best upheld by permitting broadband providers to act as editors of the Internet . . . elides the utter lack of either a general expectation or industry-wide practice of editorial discretion on the part of ISPs . . . ."[209] In fact, ISPs "have evidenced inconsistency in how seriously they value and exercise their First Amendment speaker rights."[210] Rob Frieden explains the reasons for "such reticence," by noting that ISPs are able to "avoid tort and copyright liability when they refrain from operating as speakers and editors of content" through their status as conduit-only providers, yet ISPs also become "an aggressive advocate for First Amendment speaker rights when selecting content . . . ."[211]

On the other hand, Moran Yemini argues that, despite these facts, the "potential First Amendment claim[s] [of ISPs] against neutrality rules cannot simply be dismissed by network-neutrality proponents saying that [ISPs] do not exercise editorial discretion and therefore should not be regarded as speakers in the first place."[212] Finding the arguments of Wu, Lessig, and Herman "flawed and inherently contradictory," Yemini argues that pointing

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204. *Id.*
205. *Id.* at 9-10.
206. *Id.*
207. *Id.* at 10.
208. *Id.* Wu and Lessig also rejected the argument that excluding or banning certain content from a network might constitute protected "expressive association." *Id.* "[I]n the absence of any identifiable message or editorial policy informed by usage restrictions," they argued, "it is hard to see how imposing network restrictions would be seen as protected speech under the First Amendment." *Id.*
209. Herman, *supra* note 42, at 113 (2006) (citing Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1905-07 (2006)).
210. Frieden, supra note 29, at 1.
211. *Id.* at 1-2.
212. Yemini, *supra* note 192, at 19

to existing cases of content-based discrimination by ISPs "as proof of the concreteness of [network neutrality advocates'] assertions and the necessity of neutrality rules," while simultaneously insisting that ISPs "are not speakers [under the First Amendment] at all" is like an attempt to "hold the stick at both ends."[213] "[I]f network neutrality is desirable because of, among other reasons, [ISPs'] discrimination against certain content," Yemini asks, "how can it be said, at the same time, that they do not exercise any editorial discretion?"[214]

Assuming, for argument's sake, that Yoo and Yemini are correct, and that ISPs have a cognizable claim that the FCC's attempts to mandate network neutrality violates their First Amendment rights , that claim would lose on its merits, as explored below.

B. *The Highest Level of Scrutiny ISPs Could Receive is Intermediate Scrutiny*

The highest level of scrutiny appropriate in reviewing the constitutionality of the FCC's network neutrality mandates is intermediate scrutiny. *Turner I* provides an apt analogy in examining the constitutionality of network-neutrality regulation. If balanced, the First Amendment interests of broadband providers and the government will show a complex confliction.[215] The broadband providers might show that neutrality regulation limits their control of their privately owned networks, but the courts will likely weigh in favor of the substantial governmental interests found to exist in *Turner I*.[216]

Assuming that the providers' contention of editorial interference would be accepted by a court, the deciding factor in determining the applicable level of scrutiny under a First Amendment challenge, as in the *Turner* cases, would be whether the rules themselves are content-neutral or content-based.[217] The FCC's *Open Internet* rules are facially neutral, insofar as they impose burdens and confer benefits without reference to the content of speech.[218] As Wu and Lessig observe, "a general ban against discriminating among network uses is content-neutral; if anything, more so than the 'must-carry' rule in *Turner* that required carrying specific television channels."[219] Although the rules interfere with the ability of private entities to manage their networks as they see fit, the extent of that interference does not depend upon the content created and provided by ISPs, and nothing in the rules imposes a restriction, penalty, or burden based on that content.[220]

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213. *Id.* at 18.
214. *Id.* at 18-19.
215. *Id.* at 17.
216. *Id.*
217. *See Turner I*, 512 U.S. at 641-43.
218. *See id.* at 643.
219. Ex parte letter, *supra* note 201, at 10.
220. *Cf. Turner I*, 512 U.S. at 643-44.

As the Supreme Court observed in *Turner I*, however, the fact that a given regulation does not burden or benefit "speech of a particular content" does not end the inquiry because "even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys."[221] In *Turner I*, the Court was persuaded that Congress' overriding objective was not to regulate speech based on the message conveyed, but rather to structure the market in such a way as to promote "values central to the First Amendment" by ensuring that the public retains access to information from diverse and antagonistic sources.[222] In keeping with the communications tradition of the First Amendment, the Court recognized the potential legitimacy of content-neutral structural regulation aimed at ensuring the smooth operation of the marketplace of ideas and upheld the must-carry provisions in *Turner II*.

The FCC's stated objective in enacting its network neutrality rules was to ensure that the Internet remains open and enables commerce, "speech, democratic engagement, and a culture that prizes creative new ways of approaching old problems."[223] Recognizing that regional duopoly control of broadband access threatens the open architecture of the Internet that promotes "a vibrant marketplace of ideas,"[224] the FCC acted to prevent broadband service providers from exploiting their market power to restrict access to Internet content and applications, to the detriment of Internet users. This purpose is manifestly unrelated to any message conveyed by the network management practices of ISPs.

Furthermore, as in the *Turner* cases, nothing in the FCC's rules would force ISPs to alter their own messages in responding to the data they would be required to carry and, given the general expectation among users that ISPs serve as non-discriminating conduits for the information that passes through their networks, there is little risk that users would assume the information accessible through their services conveys ideas or messages endorsed by ISPs.[225] As such, the FCC's rules do not constitute compelled speech.[226]

Moreover, in rejecting an asserted analogy to *Tornillo*, the Supreme Court in *Turner I* emphasized the importance of cable operators' heightened control over access to the medium, as compared to the control exercised by newspapers. The Court found that cable operators act as gatekeepers due to their ownership of the "essential pathway for cable speech," allowing the cable operator to "prevent its subscribers from obtaining access to programming it chooses to exclude" and effectively silence competing speakers.[227]

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221. *Id.* at 645-46.
222. *See id.* at 663.
223. Genachowski, *supra* note 1, at 2.
224. *See id.* at 4.
225. *Cf. Turner I*, 512 U.S. at 655.
226. *Cf. id.*
227. *Id.* at 656.

The express purpose of the FCC's network neutrality rules is to disrupt the threat posed by gatekeeper market power, to prevent private interests from restricting—through physical control of a critical pathway of communication—the free flow of information and ideas.[228]

C. *FCC Net Neutrality Regulations Would Survive Analysis Under Intermediate Scrutiny*

The FCC's network neutrality regulations constitute a legitimate government interest, and the rules are narrowly tailored to effectuate the government's goal of fostering an open Internet. Any court called upon to analyze the constitutionality of the FCC's proposed rules should give due deference to the agency, recognizing that the rules are grounded in reasonable factual findings supported by substantial evidence and directly promote First Amendment values by eliminating the threat posed to the marketplace of ideas by private censorship of the Internet. Under the framework established in *United States v. O'Brien*, a content-neutral regulation will be sustained under intermediate scrutiny if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[229] A regulation does not need to be the least speech-restrictive means of advancing the Government's interests to satisfy this standard.[230] Instead, the narrow tailoring requirement is satisfied if the means chosen to further the government's legitimate interests do not burden substantially more speech than is necessary.[231]

In *Reno v. ACLU*, the Supreme Court embraced the Internet as "a unique and wholly new medium of worldwide human communication,"[232] one that enables anyone with Internet access to take advantage of a wide variety of constantly evolving "communication and information retrieval methods."[233] The Court found that the Internet has dramatically transformed the communications environment, providing unprecedented opportunities for individuals to communicate, and that its growth "has been and continues to be

228. *See* Genachowski, *supra* note 1, at 2 ("To date, the Federal Communications Commission has addressed these issues by announcing four Internet principles that guide our case-by-case enforcement of the communications laws. These principles can be summarized as: Network operators cannot prevent users from accessing the lawful Internet content, applications, and services of their choice, nor can they prohibit users from attaching non-harmful devises to the network."); *see also* Protecting and Promoting the Open Internet, *supra* note 28.

229. United States v. O'Brien, 391 U.S. 367, 377 (1968).

230. *Turner I*, 512 U.S. at 662.

231. *Id.*

232. Reno v. ACLU, 521 U.S. 844, 850 (1997) (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

233. *Reno*, 521 U.S. at 851.

phenomenal."[234] As Moran Yemini notes, "[m]any of the findings in *Reno* remain relevant today; the Internet is still a unique medium among mass-media outlets; it is the most decentralized and democratic medium, in practice and especially in potential; and its content is 'as diverse as human thought.' "[235] It is a medium that enriches the marketplace of ideas by providing individual speakers access to a massive and diverse audience, which enables the unconventional and unaccepted to compete with the conventional and common.[236]

Former FCC Chairman Genachowski echoed the Supreme Court's enthusiasm in his speech announcing the FCC's intent to engage in the rulemaking that resulted in the *Open Internet* rules, describing the "open" Internet as "an unprecedented platform for speech, democratic engagement," and creativity.[237] The dangers posed by private censorship, particularly in light of the presently highly concentrated market for broadband services, threaten the Internet's continued viability as a revolutionary platform for individual communication. As Yemini recognizes, "the Court's idealized description of the Internet may be generally true as to the logical and content layers, [but] it is hardly accurate with regard to the physical layer, the broadband infrastructure, particularly in the post–*Brand X* regulatory environment."[238] The statistics uncovered by Bill Herman support this assertion: as of 2006, "Cable and DSL providers . . . controlled almost 98 percent of the residential and small-business broadband market. In fact, "[m]ore than one quarter of consumers have only one choice between cable and DSL, and even in markets with both services available, customers usually face a duopoly, with one choice for each type of service."[239] In light of this high degree of concentration, the notion that broadband subscribers are able to exercise any meaningful degree of consumer sovereignty over Internet access is dubious at best. When broadband ISPs engage in either individual or systematic discrimination, subscribers typically have little choice but to acquiesce to the offending policy.[240]

As the Supreme Court recognized in *Turner I*, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order," because it "promotes values central to the First Amendment," and because "it has long been a basic tenet of national com-

234. *See id.* at 885.
235. Yemini, *supra* note 192, at 14.
236. *See* ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999).
237. Genachowski, *supra* note 1, at 2 (quoting *Reno*, 521 U.S. at 870).
238. Yemini, *supra* note 192, at 14.
239. Herman, *supra* note 42, at 130.
240. *See, e.g.*, Reed Hastings, *Internet Tolls And The Case For Strong Net Neutrality*, NETFLIX US & CANADA BLOG (Mar. 20, 2014, 2:00 PM), http://blog.netflix.com/2014/03/internet-tolls-and-case-for-strong-net.html (Netflix explaining that it will have to pay "tolls" to ISPs to ensure high speed access to its customers despite its objections on the basis of net neutrality).

munications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[241] The express purpose of the FCC's network neutrality rules is to ensure that the Internet retains the open architecture that has made it uniquely successful in promoting "a vibrant marketplace of ideas."[242] The governmental interest is precisely in preventing the suppression of free expression and in facilitating the public discussion and informed deliberation that "democratic government presupposes and the First Amendment seeks to achieve."[243]

The only remaining question is whether the rules are narrowly tailored to achieve this interest, within the meaning of *O'Brien*. In *Turner II*, the Court noted that "courts must accord substantial deference to the predictive judgments of Congress," and the judiciary's sole obligation being "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[244] On remand, the Court had "no difficulty in finding a substantial basis to support Congress' conclusion that a real threat justified enactment of the must-carry provisions," emphasizing that cable operators' gatekeeper control enables them to "silence the voice of competing speakers with a mere flick of the switch," and finding that cable operators taking actions adverse to local broadcasters was "more than a theoretical possibility."[245]

A similar degree of deference is appropriate when the judgment at issue is that of a federal agency rather than that of Congress: "Complete factual support for the [FCC's] judgment or prediction is not possible or required; a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency."[246]

When evaluating a content-neutral regulation that incidentally burdens speech, courts "will not invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests."[247] Where content-neutral regulations are at issue, "the First Amendment requires nothing more" than finding that the policy at issue is "grounded on reasonable factual findings supported by [substantial] evidence."[248]

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241. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663 (1994) (quoting United States v. Midwest Video Corp., 406 U.S. 649, 668 n. 27 (1972) (plurality opinion)) (internal quotations omitted).

242. Genachowski, *supra* note 1, at 4.

243. *Turner II*, 520 U.S. at 226 (Breyer, J., concurring in part).

244. *Id.* at 195 (majority opinion) (internal quotation marks omitted).

245. *Id.* at 196-97, 202 (internal quotation marks omitted).

246. *Id.* at 196 (quoting FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 814 (1978)).

247. *Turner II*, 520 U.S. at 217-18.

248. *Id.* at 224-25.

That the regional duopoly structure of the broadband market affords broadband ISPs the opportunity to leverage market power to restrict access to content and applications is well-documented. The "last mile" connection between the end user and the rest of the Internet, the connection provided by ISPs, has historically been the least competitive part of the communications network,[249] and "nearly every regional broadband market is very highly concentrated."[250] As such, "[w]eb sites are increasingly dependent on broadband service from regional cable and telecommunications duopolies," the cable-DSL duopoly share of the broadband market having "grown from 94.5 percent in 1999 to 97.5 percent in 2004."[251] As Bill Herman observes, "[t]his leaves customers with little recourse even in light of egregious customer service, let alone broadband discrimination."[252]

Furthermore, broadband discrimination is a real threat. Like cable operators, broadband ISPs possess gatekeeper control enabling them to "silence the voice of competing speakers with a mere flick of the switch."[253] Although "much of the discussion surrounding the issue" is "forward looking,"[254] a "growing list" of examples of broadband discrimination has emerged in the aftermath of *Brand X*.[255] The FCC, relying on this growing body of evidence, has exercised its expert judgment in determining that systematic discrimination is more than a theoretical possibility, and that the public mandates network neutrality. Although some argue that any network neutrality mandate would necessarily impact the speech rights of ISPs,[256] any such interference is at most incidental, and is entirely necessary to ensure that ISPs refrain from suppressing the speech of others.

Conclusion

Opponents of network neutrality argue that regulations promoting the continued viability of the end-to-end principle of Internet architecture, which enables the transfer of information from one point in the network to another free from censorship, would violate the First Amendment by preventing ISPs from exercising editorial control over the information passing through their networks.

Of course, the fact that the Internet facilitates individual expression, free from editorial control, is precisely what sets it apart from the majority of

249. Raymond Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22,* 75 Tul. L. Rev. 87, 100 (2000).

250. Herman, *supra* note 42, at 126.

251. *Id.* at 128-29.

252. *Id.* at 129.

253. *Cf. Turner II*, 520 U.S. at 197 (quoting *Turner I*, 512 U.S. at 656).

254. Yemini, *supra* note 192, at 26.

255. *See, e.g.*, FCC En Banc Hearing on Broadband and the Digital Future, Comments of the ACLU, The Tech. & Liberty Project of the ACLU, and ACLU of Pa., 5 (July 21, 2008), http://www.aclu.org/images/asset_upload_file471_36056.pdf.

256. Yoo, *supra* note 196, at 703.

currently existing communications platforms. Just as the printing press did in its time, the Internet has dramatically transformed the marketplace of ideas, providing unprecedented opportunities for individuals to communicate, and making the freedoms of speech and of the press realities in the lives of Internet users.[257] The uncensored Internet has facilitated the wide dissemination of information from diverse and antagonistic sources and has led to a "much more equitable spread of communications power" in our society.[258] As such, it would be a shame if online expression were stifled by regional duopolists asserting a constitutional right to censorship of user content. Even if the opponents of network neutrality are correct in asserting that packet discrimination by ISPs constitutes a form of protected editorial control, it is a form that hinders, rather than advances, First Amendment values.[259]

If the FCC's attempts to mandate network neutrality are struck down as unconstitutional, the eventual result might be a return to a *status quo* in which the owners and managers of communications technology have the power to limit the expression of individuals by determining the conditions in which debate can occur. The FCC, however, has thus far been careful in crafting its open Internet rules so as to ensure their content neutrality. Because these rules promote a governmental interest of the highest order—the maintenance of the free and open Internet that is crucial to the promotion of a vibrant marketplace of ideas[260]—it is highly likely that the FCC's network neutrality rules, like the must-carry rules at issue in the *Turner* cases, would survive a First Amendment challenge.

257. *See* Reno v. ACLU, 521 U.S. 844, 870, 885 (1997).

258. Herman, *supra* note 42, at 114.

259. As the Supreme Court recognized in *Associated Press v. United States*, "[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." The First Amendment jurisprudence surrounding communications regulation has traditionally recognized this diversity value. Assoc. Press v. United States, 326 U.S. 1, 20 (1945).

260. *Turner I*, 512 U.S. at 663.