A CONFLICT OF VISIONS: HOW THE "21ST CENTURY FIRST AMENDMENT" VIOLATES THE CONSTITUTION'S FIRST AMENDMENT

GEOFFREY A. MANNE*
BEN SPERRY**
TOM STRUBLE***
BERIN SZOKA****

INTRODUCTION

Is net neutrality necessary to protect First Amendment values in the 21st Century?[1] Or does the First Amendment actually *prevent* net neutrality regulation?[2] How can both of these questions be considered simultaneously?[3]

At issue is a conflict of visions about the nature of the liberty protected by the First Amendment. Philosopher Isaiah Berlin famously described two clashing concepts of liberty — negative and positive.[4]

* Executive Director, International Center for Law and Economics
** Associate Director, International Center for Law and Economics
*** Legal Fellow, TechFreedom
**** President, TechFreedom

1. *See, e.g.*, Marvin Ammori, *Net Neutrality and the 21st Century First Amendment*, BALKINIZATION BLOGSPOT (Dec. 10, 2009, 10:54 AM), http://balkin.blogspot.com/2009/12/net-neutrality-and-21st-century-first.html; Julian Hattem, *Franken: Net neutrality is 'First Amendment issue of our time'*, THE HILL, Jul. 8, 2014, *available at* http://thehill.com/policy/technology/211607-franken-net-neutrality-is-first-amendment-issue-of-our-time; Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343 (2014). *See also* Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,447, 37,452, 37,465 (proposed July 1, 2014) (to be codified at 47 C.F.R. 8).

2. *See* Brief for TechFreedom as Amici Curiae Supporting Appellant, Verizon Tel. Cos. v. FCC, 570 F. 3d 295 (D.C. Cir. 2009) (No. 11-1355) [hereinafter "Net Neutrality Amicus"].

3. Much of this introduction is adapted from Ben Sperry, *Net Neutrality: Two Concepts of Liberty*, COMPETITIVE ENTERPRISE INSTITUTE (Jun. 19, 2012, 2:28 PM), https://cei.org/blog/net-neutrality-two-concepts-liberty.

4. *See generally* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY (Oxford 1969), *available at*

Simply, negative liberty is freedom *from* external interference. Positive liberty, on the other hand, is freedom *to* do something, including having the power and resources necessary to do it.

For example, negative liberty means that no one may rightfully take my property away from me without my consent. Positive liberty means that I have a right to health care that must be provided for me if I cannot afford it on my own.

Positive rights necessarily involve at least some subjugation of the rights of others. A right to health care, for instance, would violate the rights of those who must provide or subsidize health care services without their consent. Further, it would infringe upon others' positive rights insofar as there are scarce resources available to pay for all such rights.

Conversely, negative rights are compossible with one another, which means all people could hold them simultaneously. These rights apply only against aggressors—*e.g.*, rapists, murderers, and thieves—and not against those who are respecting the rights of others.

Proponents of net neutrality regulations (*i.e.*, rules barring broadband providers from engaging in blocking, unreasonable discrimination, and the like) invoke a positive conception of liberty, while opponents of such regulations invoke a negative conception. As a result, the two sides routinely talk past each other. Regulatory advocates argue that end-users should have the "right" to access anything on the Internet by using the networks provided by Internet Service Providers ("ISPs"). This is a freedom to surf the Internet. Opponents argue that the ISPs have a "right" to manage their networks, just as one would have the right to manage any property on whatever terms and conditions one chooses. This is a freedom *from* external interference when managing one's network.

With few exceptions, our Constitutional rights embody the negative conception of liberty. This includes the right of free speech protected by the First Amendment. Unless state action is involved, one could not bring a successful First Amendment challenge against another person to stop them from speaking. Under the Constitution's negative conception of liberty, I have the right to kick you out of my home for something as menial as saying the word "broccoli," and this would not violate your

---

https://www.wiso.uni-hamburg.de/fileadmin/wiso_vwl/johannes/Ankuendigungen/Berlin_twoconceptsofliberty.pdf.

right to free speech. My right to property trumps your right to speech, which is really your right to use your property (your voice, tongue, etc.) to say what you want insofar as it does not invade my property right.[5]

Of course, even under a negative conception of liberty, there *are* important restraints upon ISPs. Social mores, generally applicable laws, and contracts govern how ISPs use their property, just as with all other private entities. If consumers truly desired net neutrality and punished companies for diverting from such a policy, social pressure and contracts could likely do most of the work to ensure "neutral" outcomes.[6] Meanwhile, if ISPs have so much market power that they can safely ignore consumer preferences, antitrust law will restrain (and, importantly, deter) their abuse of that power.[7]

Below, we examine the debate over the First Amendment merits of the Federal Communications Commission's ("FCC") "Open Internet" Order issued in March 2015. This article is not intended to be a complete constitutional assessment of the Order, which raises other constitutional concerns, most notably Fifth Amendment takings[8] and due process con-

---

5. Properly construed (in economic terms), a property right "means some protection against other people's choosing against my will one of the uses of resources, said to be 'mine' . . . [it] is 'an assignment of exclusive authority to some individual to choose any use of the goods deemed to be his private property.'" ARMEN A. ALCHIAN, *Some Economics of Property Rights*, in ECONOMIC FORCES AT WORK 130 (1977). Thus property rights need not apply only to physical or tangible property, but to anything over which the authority to determine use may be made – including speech. *See also* MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 113 (1982) ("Freedom of speech is supposed to mean the right of everyone to say whatever he likes. But the neglected question is: Where? where does a man have this right? He certainly does not have it on property on which he is trespassing. In short, he has this right only either on his *own* property or on the property of someone who has agreed, as a gift or in a rental contract, to allow him on the premises. In fact, then, there is no such thing as a separate 'right to free speech'; there is only a man's *property* right: the right to do as he wills with his own or to make voluntary agreements with other property owners.").

6. *See, e.g.*, Timothy B. Lee, *The Durable Internet: Preserving Network Neutrality Without Regulation*, CATO INSTITUTE POLICY ANALYSIS NO. 626 (2008), *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/pa-626.pdf.

7. For a discussion of why antitrust enforcement doesn't create the same free speech problems as net neutrality regulation, *see infra* Section III.B.4.0.

8. *See* Daniel A. Lyons, *Virtual Takings: The Coming Fifth Amendment Challenge to Net Neutrality Regulation*, 86 NOTRE DAME L. REV. 66 (2011).

cerns.[9] In Part I, we explore the positive conception of free speech in legal theory, and analyze it under current First Amendment jurisprudence. We argue that net neutrality regulation is *not* required by the First Amendment. In Part II, we present our primary argument, that prescriptive regulations governing network management (as distinct from a transparency mandate) may actually *violate* the First Amendment under the compelled speech doctrine — a question that the D.C. Circuit did not have to reach in its most recent net neutrality opinion, *Verizon v. FCC*,[10] because, while the court upheld the FCC's transparency rule, it struck down the FCC's non-discrimination and no-blocking rules on statutory grounds.[11] In Part III, we suggest alternative ways to protect consumers from the harms at which net neutrality regulation is aimed (if they can be substantiated) while minimizing First Amendment problems, including: more clearly establishing a record, tailoring regulation to clear problems, beginning with enforcement of a transparency rule and other existing laws, user education and empowerment, and promoting both broadband competition and deployment.

I. THE FIRST AMENDMENT DOES NOT REQUIRE NET NEUTRALITY REGULATION

While proponents have pointed to the free speech values net neutrality regulation aims to protect,[12] the First Amendment itself does not

9. The vagueness of the FCC's order raises both First and Fifth Amendment concerns, especially regarding the general conduct standard. *See infra* Part II.E; FCC v. Fox Tel. Stations, 132 S. Ct. 2307, 2318 (2012) ("The Commission's lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation of §1464 as interpreted and enforced by the agency 'fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.' This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon 'sensitive areas of basic First Amendment freedoms.'") (citations omitted). *See also* Reno v. ACLU, 521 U. S. 844, 871 (1997) ("The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect.").

10. 740 F.3d 623 (D.C. Cir. 2014).

11. *See id*. at 656–59. Generally, courts avoid constitutional questions if the dispute can be settled on other grounds.

12. *See* Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,447, 37,452, 37,465 (proposed July 1, 2014) (to be codified at 47 C.F.R. 8).

require that the government provide opportunities for speech, or defend against private action. As we show below, the First Amendment protects primarily the negative concept of free speech.

A. The Internet is Not a Public Forum under First Amendment Doctrine

Some have argued that the Internet is a public forum, and that, when making choices about "blocking" and "fast lanes," ISPs should be held to the same strict scrutiny standard that government normally is held to for First Amendment violations.[13]

---

13. *See, e.g.*, Adam Lamparello, *The Internet is the New Marketplace of Ideas: Why* Riley v. California *Supports Net Neutrality* 1–2 (Oct. 24, 2014) (unpublished manuscript), *available at* http://works.bepress.com/adam_lamparello/31 ("The internet is the digital age equivalent of traditional public and limited purpose public forums, such as public sidewalks and town halls, just [as] cellular telephones are equivalent to a private home. It enables the free flow of information between networks, including speech on matters of political, social, and commercial importance. When internet service providers (ISPs) manipulate the flow of this information based on a user's identity or message, such as by charging excessive fees or 'traffic shaping,' a technique that limits available bandwidth and results in 'slowing down some forms of traffic, like file-sharing, while giving others priority,' they engage in content-based discrimination. Thus, just as the First Amendment prohibits the government from regulating speech in public and limited public forums on the basis of its content, it should also prohibit ISP and website operators from doing the same on the internet. Such conduct is akin to allowing the Boy Scouts to march in the public square, while relegating flag burners to desolated areas, remote deserts or dark alleys."); Dawn Nunziato, *Net Neutrality, Free Speech, and Democracy in the Internet Age*, *in* NET NEUTRALITY, FREE SPEECH AND DEMOCRACY IN THE INTERNET AGE (2008), *available at* http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1919&context=faculty_publications ("Courts and policymakers — and members of the public — should embrace an affirmative conception of the First Amendment for the Internet age. The prevailing negative conception of the First Amendment fails to recognize and protect the important role that the state should serve in regulating these dominant private conduits of expression in order to facilitate the conditions necessary for democratic self-government . . . . Those of us who are concerned with the role that free speech plays in facilitating liberal democracy must rethink the appropriate conception of the First Amendment in the context of the media landscape of today — and tomorrow. Decisions regarding what speech is allowed — and what speech is censored — should not be committed solely to the dictates of the dominant private entities that control expression on the Internet. A fundamental rethinking of the meaning of the First Amendment's protections, and of free speech values generally, is therefore in order.").

This is the most obvious form of the positive conception of liberty. Its proponents argue that ISPs themselves should be treated as if they were government actors, and that users and edge providers should have direct First Amendment claims against them for net neutrality violations, even in the absence of an enforceable net neutrality rule. Compelling as this vision might sound to some, it is utterly inconsistent with the negative conception of liberty enshrined in the First Amendment.

While the Internet may be a "public forum" in the colloquial sense, this term also has a specific legal meaning under First Amendment jurisprudence. For First Amendment purposes, a public forum is government-owned property that is open to the public for expression and assembly.[14] Private networks run by ISPs are *not* government-owned property. Thus, any arguments based on the idea that the Internet is a public forum or limited public forum under the First Amendment must fail.

B. ISPs are Not State Actors

While some have actually made the argument above, that the Internet itself is a public forum, a more sophisticated argument might be that, while the Internet is not a public forum, ISPs may still be state actors and thus must answer for First Amendment violations.[15] Generally speaking, the protections of the First Amendment apply only to state action.[16] Obviously, ISPs are not state actors in the sense that they are not government officials. There are, however, a few narrow carve-outs from this general rule that allow for private entities to be treated as state actors.[17] But, much like telephone companies before them,[18] ISPs are not state actors under any of these exceptions, either.

---

14. *See generally* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (referring to streets, parks, and other public property traditionally used for debate, assembly, and expression, the Court stated, that "[t]he right to use a public place for expressive activity may be restricted only for weighty reasons.").

15. *See, e.g.*, Steven R. Morrison, *What the Cops Can't Do, Internet Service Providers Can: Preserving Privacy in Email Contents*, 16 VA. J.L. & TECH. 255, 280–89 (2011).

16. *See* Shelly v. Kraemer, 334 U.S. 1, 13 (1948) (holding that the 14th Amendment requires state action).

17. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (holding private action can be state action when "there is a sufficiently close nexus between the State

1. Performance of a Public Function

While merely opening up a business to the public is not considered state action, a private actor *can* become a state actor by performing a "public function." For example, in *Marsh v. Alabama*,[19] the Supreme Court held that a company town could not require Jehovah's Witnesses to acquire a permit to distribute leaflets on the town's private sidewalks.[20] The Court reasoned that "[s]ince these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation."[21]

Though plaintiffs have attempted to expand this exception to the general principle that operating private property open to the public constitutes a "public function," courts have repeatedly declined to do so. In *Lloyd Corporation v. Tanner*,[22] for example, the Supreme Court ruled that shopping center patrons did not have a First Amendment right to distribute handbills within the mall because the mall had not been sufficiently dedicated to the public function of free speech.[23] In fact, the Court noted that while "courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."[24]

---

and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself.").

18. *See, e.g.*, Info. Providers' Coal. for Def. of the First Amendment v. FCC, 928 F.2d 866, 877 (9th Cir. 1991) ("Carriers are private companies, not state actors[,] and accordingly are not obliged to continue, restrict or terminate the services of particular subscribers. Thus, a carrier is free under the Constitution to terminate service to dial-a-porn operators altogether." (citation omitted)); Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1297 (9th Cir. 1987) ("The question is whether state action also inhered in Mountain Bell's decision to adopt a policy excluding all 'adult entertainment' from the 976 network. We hold that it did not.").

19. 326 U.S. 501 (1946).

20. *See id.* at 517.

21. *Id.* at 506.

22. 407 U.S. 551 (1972).

23. *See id.* at 565.

24. *Id.* at 568.

Courts have even considered the question within the context of digital communications. In *Cyber Promotions v. America Online*,[25] a federal district court found that a company did not have the First Amendment right to send out mass email advertisements to all America Online ("AOL") users without restriction by AOL's spam filters.[26] Plaintiffs argued that AOL had opened its servers to the public, thereby performing a "public function."[27] The court rejected these arguments, ruling that, as a "'global Web of linked networks and computers' which exists and functions as the result of the desire of hundreds of thousands of computer operators and networks to use common data transfer data protocol to exchange communications and information" whose constituent parts are "owned and managed by private entities and persons, corporations, educational institutions and government entities,"[28] Internet management is not something traditionally and exclusively performed by government. In other words, the court stated that AOL, the dominant ISP of the time, "exercises absolutely no powers which are in any way the prerogative, let alone the exclusive prerogative, of the State."[29] The court also rejected the notion that providing e-mail and Internet service opened AOL's property to the public because it was performing any municipal power or essential public service.[30]

ISPs would presumably stand in the same position today as in 1996, when *Cyber Promotions* was decided. AOL was in a dominant position at the time, exercising what the FCC today would call a "terminating access monopoly" over delivering traffic to its users.[31] Yet the court ruled that third parties had no First Amendment right to access AOL's users.[32] Instead, the court found that AOL had the right to engage in network management to provide its users with a better online experience.[33]

---

25. 948 F. Supp. 436, 442 (E.D. Pa. 1996).

26. *See id*. at 445–47.

27. *Id*. at 442.

28. *Id*. at 441 (quoting ACLU v. Reno, 929 F. Supp. 824, 832 (E.D. Pa. 1996)).

29. *Id*. at 441.

30. *Id*. at 442–43.

31. *See* Hank Hultquist, *WCIT, IP-IP Interconnection and the Terminating Monopoly*, AT&T PUBLIC POLICY BLOG (Jun. 19, 2012), http://www.attpublicpolicy.com/international/wcit-ip-ip-interconnection-and-the-terminating-monopoly/.

32. Cyber Promotions v. AOL, 948, F. Supp. 436, 456 (E.D. Pa. 1996) ("Because AOL is a private company and its e-mail servers are AOL's private property

2. Judicial Enforcement of a Contractual Right

A second exception, which has also been cabined by subsequent decisions, is the judicial enforcement rule from *Shelley v. Kraemer*.[34] The case concerned the odious practice of racial covenants in real estate. The Supreme Court held that, while "the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment[,]"[35] private parties may not use the government's courts to enforce them. While private entities are free to discriminate, the Court found that *enforcement* of such contracts would violate the Fourteenth Amendment's Equal Protection Clause.[36]

While the full extent of this exception is not clear, courts *have not* applied it to private agreements limiting speech.[37] Rather, courts have consistently found that settlement agreements and other contractual limitations on speech are only private action, not state action, even if courts enforce them.[38] Thus, it is unlikely an ISP user or third party site could

---

and because neither the Internet nor AOL's accessway to the Internet are public systems within the meaning of the First Amendment, a private company such as Cyber simply does not have the unfettered right under the First Amendment to invade AOL's private property with mass e-mail advertisements.").

33. *Id*. at 456 ("[T]he First Amendment does not prevent AOL from using its PreferredMail System to protect its private property rights by blocking Cyber's mass e-mail advertisements from clogging AOL's system and damaging AOL's reputation while at the same time not receiving any compensation whatsoever from Cyber.").

34. 334 U.S. 1 (1948).

35. *Id*. at 13.

36. *Id*. at 20–21.

37. *See, e.g*., Mark D. Rosen, *Was* Shelley v. Kraemer *Correctly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 458–60 (2007) (collecting cases).

38. *See, e.g*., United Egg Producers v. Standard Brands, Inc., 44 F.3d 940, 943 (11th Cir. 1995) (holding that a settlement stipulation to restrict advertisements that effectively limited First Amendment-protected commercial speech rights was not a violation because there was no state action); Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 799 (Cal. 2001) (upholding lease term that prohibited tenants from distributing unsolicited newsletters and judicial enforcement did not make it state action); State v. Noah, 9 P.3d 858, 863 (Wash. Ct. App. 2000) (holding that a settlement agreement's term not to publicly criticize a certain type of therapy was enforceable even though it limited protected speech since there was no state action); Midlake on Big Boulder Lake, Condo. Ass'n v. Cappuccio, 673 A.2d 340, 342 (Pa. Super. Ct. 1996) (holding that judicial enforcement of a condominium association's prohibition on the posting of "for sale" signs was not state action and

successfully rely on the *Shelley* rule if it wished to sue an ISP for restricting free speech pursuant to a contractual term that restricted access to content in some way (for example, a discounted broadband plan that offers access only to a pre-selected range of sites and services). In fact, if an ISP promises certain quality standards, access to "unlimited" content, certain levels of speed, no-blocking, or non-discrimination, but fails to deliver, it might be liable under a contract theory, under consumer protection law, or even under common law fraud (if it had no intention of fulfilling the promise at the time of the formation of the contract). For First Amendment purposes, however, no contractual restrictions on Internet access violate free speech rights.

3. Government Coercion, Influence, or Encouragement of Private Act

Government's mere acquiescence to the performance of a private act is *not* state action. But if the government coerces, influences, or encourages private action, that *is* state action.[39] The line between the two is admittedly murky. But consider, for example, the Supreme Court's decision in *Rendell-Baker v. Kohn*[40] involving a private school "whose income is derived primarily from public sources and which is regulated by public authorities."[41] The Court decided that neither the funding nor the regulation caused the private school to be subject to First Amendment scrutiny in its employment decisions because there was an insufficient nexus between those government acts and the school's employment decisions.[42]

It is true that some ISPs have received substantial funding in the form of Universal Service Funds, including Connect America Funds,

---

consequently did not trigger the First Amendment); Linn Valley Lakes Prop. Owners Ass'n v. Brockway, 824 P.2d 948, 951 (Kan. 1992) (holding that the enforcement of a restrictive covenant barring the posting of signs was not state action).

39. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 841–42 (1982).

40. 457 U.S. 830 (1982).

41. *Id.* at 831. *See also Blum*, 457 U.S. at 993–95 (dealing with a similar case involving privately run hospitals which received a great deal of federal funding and regulation under Medicaid).

42. *Rendell-Baker*, 457 U.S. at 840–41.

and/or state and local subsidies to build out their networks.[43] ISPs have also faced (and often benefitted from) regulation at both the national and local levels to varying degrees, such as cable franchises, public rights of way, and so on, some of which undoubtedly amount to implicit subsidies.[44] Some have argued that the Internet itself is a government program at heart, having been conceived of as a project of the Defense Advanced Research Projects Agency.[45] But none of this would transform ISPs into government actors under the First Amendment because none of this creates a direct nexus between subsidies or regulations and the ISPs' business decisions about blocking, prioritization, Quality of Service ("QoS") guarantees or any other form of non-"neutrality." Nothing about the government's relationship with ISPs compels or encourages the type of activity that would violate the First Amendment if it were government action.

4. Joint Enterprise or Symbiotic Relationship

Government contracts with private individuals or organizations do not normally transform the actions of those private actors into state action.[46] There are occasions, though, where the government and a private party enter into a "joint enterprise" or a "symbiotic relationship" such that the resulting activity would be analyzed as state action.[47]

---

43. *See Universal Service*, FCC ENCYCLOPEDIA, http://www.fcc.gov/encyclopedia/universal-service (last updated Jan. 8, 2015); *Connect America Fund*, FCC ENCYCLOPEDIA, http://www.fcc.gov/encyclopedia/connecting-america (last updated Jan. 6, 2015).

44. *See* 47 U.S.C. § 251 (2012).

45. Farhad Manjoo, *Obama Was Right: The Government Invented the Internet*, SLATE (July 24, 2012), http://www.slate.com/articles/technology/technology/2012/07/who_invented_the_internet_the_outrageous_conservative_claim_that_every_tech_innovation_came_from_private_enterprise.html.

46. *See, e.g.*, *Blum*, 457 U.S. at 991; Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978); Jackson v. Metro. Edison Co., 419 U.S. 345, 357 (1974).

47. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (recognizing the State as a "joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."); *See also Jackson*, 419 U.S. at 357 (finding that there was no symbiotic relationship); *Rendell-Baker*, 457 U.S. at 830 (finding no symbiotic relationship).

For example, in *Blum v. Yaretsky*,[48] a private hospital had received substantial Medicaid subsidies for 90 percent of its patients.[49] The plaintiffs argued that the discharge decisions of the hospital were part of a joint enterprise with the government, and thus should be analyzed as state action.[50] The Supreme Court rejected this argument, ruling that:

> [P]rivately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of [the state action doctrine]. That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.[51]

Again, whatever the government's role in funding the technologies underlying the Internet, this does not make the Internet a joint enterprise between the government and business for First Amendment purposes. ISPs have invested hundreds of billions of dollars upgrading and expanding the networks,[52] and market interactions between ISPs, content providers, and users from around the world have made the Internet into the marvel it is today. In light of *Blum*, where up to 90 percent of patients received Medicaid funding and yet the hospitals' decisions still were not considered state action, it seems exceedingly unlikely that the much smaller percentage of funding received by ISPs in the form of Universal Service funds or other subsidies would make their decisions about blocking or fast lanes into a joint venture with government.[53]

---

48. 457 U.S. at 1011.

49. *Id*. at 1010.

50. *Id*. at 1010–11.

51. *Id*. at 1011.

52. *See* Ben Sperry, *Will the Real Broadband Heroes Please Stand Up?*, TRUTH ON THE MARKET (Sept. 19, 2013), http://truthonthemarket.com/2013/09/19/will-the-real-broadband-heroes-please-stand-up/.

53. *See Blum*, 457 U.S. at 1011–12.

In short, what matters is not the relative importance of subsidies, but establishing a clear quid pro quo—the exchange of subsidies for changes in editorial policy. For example, in 2008, FCC Chairman Kevin Martin proposed requiring that the winner of the auction of the "D Block" of 700 MHz spectrum be required to provide a free (but slow) mobile broadband service available to any American with a compatible device—on the condition that the Internet service be censored. Anna Eshoo (ironically, a leading Congressional Democrat representing much of Silicon Valley, often considered a haven of free speech idealism), proposed requiring that the winning licensee "offer such free data service with a technology protection measure or measures that protect underage users from accessing obscene or indecent material through such service"—in other words, precisely the kind of mandatory age verification that the Supreme Court had ruled violated the First Amendment rights of adults to access potentially indecent material anonymously.[54] With such a clear nexus between government provision of spectrum and censorship, the plan would almost certainly have violated the First Amendment.

5. Pervasive Entwinement with Private Organization

The final exception to the state action doctrine involves government agencies participating as members of private organizations.[55] Mere membership by a government agency in a private body does not transform the actions of the entire body into state action, but if the government is "pervasively entwined" with the leadership of the organization, its activity is analyzed as state action.[56]

In *NCAA v. Tarkanian*,[57] the Supreme Court considered whether a state school's participation in NCAA sanctions converted the NCAA

54. *See* Adam Thierer and Berin Szoka, *What's Worse Than Rigged Auctions & Internet Censorship? How About Both in One Package!*, TECHNOLOGY LIBERATION FRONT (Jun. 6, 2008), http://techliberation.com/2008/06/06/whats-worse-than-rigged-auctions-internet-censorship-how-about-both-in-one-package/.

55. *See, e.g.*, Brentwood Acad. v. Tenn. Secondary School Athletic Assoc., 531 U.S. 288 (2001); Nat'l Collegiate Athletic Assoc. v. Tarkanian, 488 U.S. 179 (1988).

56. *Brentwood Acad.*, 531 U.S. at 298 ("The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings . . . .")

57. *Tarkanian*, 488 U.S. at 179.

into a state actor for the purposes of reviewing sanctions against basketball coach Jerry Tarkanian.[58] The Court held that the NCAA was not a state actor, ruling that the University of Nevada, Las Vegas' ("UNLV") influence over the resulting rules was miniscule and that the university chose to adopt them as its own, much like a state bar association adopting the ABA Code of Professional Responsibility.[59] While there are cases where greater involvement by government agents may tip the balance in favor of state action,[60] in general, private organizations are not transformed into state actors merely by having some government involvement in their membership or even decision-making.

Government participation in an organization like ICANN may well affect its status as a state actor,[61] but the same cannot be said for broadband providers, at least for typical private broadband providers in the United States. Their investment decisions and ongoing business decisions cannot be said to be made by government agents in the corporate boardroom, or in concert with any ISP rule-making or governing bodies. Thus, there cannot be the type of "pervasive entwinement" necessary to convert ISPs into state actors for First Amendment analysis.

C. Summary: The First Amendment Does Not Mandate Net Neutrality

ISPs are neither government-owned public property nor do they fall into any of the exceptions to the state action doctrine. Thus, their decisions about "blocking" or "fast lanes" cannot be said to violate the First Amendment. The Constitution generally does not protect a positive concept of liberty, and here it does not mandate net neutrality.

---

58. *Id.* at 192.

59. *Id.* 193–95.

60. *See, e.g.*, *Brentwood Acad.*, 531 U.S. at 288, 290–92 (holding a state high school athletic association may engage in state action where it "includes most public schools located within the State, acts through their representatives, draws its officers from them, is largely funded by their dues and income received in their stead, and has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority.").

61. *See* A. Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 U. ILL. L. REV. 1, 4–5 (2003).

II. NET NEUTRALITY REGULATION COULD VIOLATE THE FIRST AMENDMENT BY COMPELLING SPEECH

Imposing net neutrality regulations upon ISPs could violate the First Amendment by compelling broadband providers to speak.[62] Far from *imposing* net neutrality, the First Amendment's negative concept of liberty would actually *prevent* much government action on behalf of net neutrality. Under the First Amendment, the government may not compel speech from private entities, or force them to host such speech. While a newspaper is not required by the First Amendment to print anything in particular, it would actually be a First Amendment violation for the government to force a newspaper to print, for example, a letter to the editor from a politician who insisted on his "right of reply."[63] Constitutionally, it makes no difference whether the government forces broadband providers to speak in certain ways or to not speak at all. Although "[t]here is certainly some difference between compelled speech and compelled silence. . . in the context of protected speech, the difference is without constitutional significance . . . ."[64]

First Amendment review subjects government mandates of speech to strict scrutiny, meaning the government must show the mandates are narrowly tailored to a compelling governmental interest. After the Supreme Court's decision in *Sorrell v. IMS Health Inc.*,[65] it is clear that data can be speech. Moreover, ISPs will be required, under the

62. *See* Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 I/S: J. L. & POL'Y FOR THE INFO. SOC'Y 197 (2007).

63. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

64. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 574 (1995) (extending the protections against compelled speech to "business corporations generally . . . [and to] professional publishers"); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding unconstitutional a Florida statute requiring newspaper to publish political candidate's reply to critical editorial). Most fundamentally, "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Riley*, 487 U.S. at 796–97 (emphasis omitted); *see also* Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 9 (1986) (holding electric utility could not be compelled to include in its billing envelope an advocacy group's flyer with which it disagreed).

65. 562 U.S.___, 131 S. Ct. 2653, 2667 (2011) (holding that "the creation and dissemination of information are speech within the meaning of the First Amendment").

FCC's no-blocking rule, to carry data (information) through their networks.[66] As a result, if a court views the mandate to carry all data as akin to compelling speech, the FCC will have a difficult burden to satisfy.

A court may (and, in our view, should) hold that this compelled carriage counts as a speech interest under the First Amendment. In *Comcast Cablevision of Broward County v. Broward County*,[67] for instance, the Federal District Court for the Southern District of Florida found that transmitting content over wires counts as a speech interest.[68] The court stated: "Liberty of circulating is not confined to newspapers and periodicals, pamphlets and leaflets, but also to delivery of information by means of fiber optics, microprocessors and cable."[69]

On top of the no-blocking rule, the "general conduct" standard[70] contained in the 2015 Order may fail under an overbreadth challenge.[71] This standard lacks any meaningful constraints on FCC discretion, and offers essentially no clarity on what is and is not legal. At a press conference, FCC Chairman Tom Wheeler was asked what the standard means. He replied, candidly, "We don't really know. We don't know where things will go next. We have created a playing field where there are known rules, and the FCC will sit there as a referee and will throw the flag."[72] This vagueness will likely have a chilling effect on speech because ISPs will be unsure of whether their content choices are within the bounds of the law—thus making the law unconstitutionally over-broad.

66. *See* Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738, 19,740, para. 15 (Apr. 13, 2015) (to be codified at 47 C.F.R. pt. 1, 8, 20), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-13/pdf/2015-07841.pdf [hereinafter "2015 Order"].

67. Comcast Cablevision of Broward Cnty. v. Broward Cnty, 124 F. Supp. 2d 685, 686 (S.D. Fla. 2000).

68. *See id*.

69. *Id*. at 692.

70. 2015 Order at 19,740, 19,755-58, paras. 20-22, 133-49.

71. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973).

72. L. Gordon Crovitz, *Obamanet's Regulatory Farrago*, WALL ST. J. (Mar. 15, 2015), http://www.wsj.com/articles/gordon-crovits-obamanets-regulatory-farrago-1426457509.

A. Some Disclosure Rules Would Likely Survive First Amendment Review

Among the rules issued by the FCC in 2010 and again in 2015, the one that creates the least First Amendment concern is the transparency requirement.[73] In general, compelling companies to accurately disclose their business practices is less of a First Amendment problem than is regulating their business practices. This is particularly the case where the business practices involve editorial discretion, because compelling truthful, objective speech would satisfy the test for commercial speech relatively easily, much like labeling and disclosure requirements.[74]

Courts would likely analyze ISP transparency requirements much as they do food labeling requirements: as long as what is compelled is speech about objective facts and not opinions, they would likely receive minimal scrutiny.[75] Thus, the more granular and less conclusory the required disclosures, the more likely they would be to survive First Amendment analysis.

B. The FCC's No-Blocking and Non-Discrimination Rules Would Fail under Strict Scrutiny

The no-blocking rule of the 2015 Order compels speech by forcing Internet service providers to post, send, and allow access to nearly all types of content, even if an ISP prefers not to transmit such content.[76]

73. 2015 Order at 19740-41, para. 23-24 (to be codified at 47 C.F.R. §8.3).

74. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650–51 (1985) ("[While] in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech . . . the interests at stake in this case are not of the same order.").

75. *See, e.g.*, Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (applying *Zauderer* to hold that requiring meat producers to include purely factual information about the country of origin of their meat on their packaging serves sufficient governmental interests and does not violate the First Amendment); N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (applying *Zauderer*, *Sorrell,* and a rational basis test to uphold New York City's requirement that certain restaurants post calorie content information on their menus because the information is "factual and uncontroversial").

76. *See* 2015 Order at 19,740, para. 15 (to be codified at 47 C.F.R. § 8.5) ("A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.").

Compelled speech requirements force speakers to alter content, and are thus content-based regulations.[77] Content-based regulations are usually held to strict scrutiny, even when there is no discrimination by viewpoint.[78] Courts have recognized that the First Amendment protects the editorial discretion of broadband providers in determining what content they transmit.[79] Although, as the FCC admits even in the latest NPRM, alleged network-neutrality violations have been rare,[80] that does not diminish broadband providers' constitutional rights to decide for themselves what to transmit and on what terms. A speaker's freely made choice to transmit the messages of others is itself an exercise of First Amendment rights to control the content transmitted; failing to exercise a right to do otherwise does not waive a speaker's right to determine the content it chooses to transmit in the future.[81]

As mentioned above, the First Amendment has been found to protect the editorial discretion of newspapers from a government mandate to allow candidates access to the newspaper to respond to criticism. How analogous is this to net neutrality? Two federal District Courts have

77. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.").

78. *See, e.g.*, Sable Commc'ns v. FCC, 492 U.S. 115, 126 (1989); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 655 (1990); Boos v. Barry, 485 U.S. 312, 334 (1988) (plurality).

79. *See* Comcast Cablevision of Broward Cnty. v. Broward Cnty., 124 F. Supp. 2d 685 (S.D. Fla. 2000) (holding a county ordinance requiring favorable-term access for all Internet service providers violates broadband cable owners' free speech rights); *id*. at 692 ("Liberty of circulating is not confined to newspapers and periodicals, pamphlets and leaflets, but also to delivery of information by means of fiber optics, microprocessors and cable."); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) ("Turner I") ("[Through] original programming or by exercising editorial discretion over which stations or programs to include in its repertoire[, cable programmers and operators] see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.") (internal citations omitted); Ill. Bell Tele. Co. v. Vill. of Itasca, 503 F. Supp. 2d 928, 948 (N.D. Ill. 2007) (collecting cases recognizing that cable and satellite companies' activities are protected by the First Amendment).

80. *See* Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,447, 37,452 (proposed July 1, 2014) (to be codified at 47 C.F.R. § 8). ("[T]he number of existing cases has been relatively few[.]").

81. *See* Malik v. Brown, 16 F.3d 330, 332 (9th Cir. 1994) ("A 'use it or lose it' approach [to constitutional rights] does not square with the Constitution.").

already recognized that the First Amendment protects the editorial discretion of broadband providers in determining what content they transmit.[82] If a court found that the FCC's net neutrality rules violate the ISPs' editorial discretion over their pipes, the Commission would have to show the rules are narrowly tailored to serve a compelling government interest. The FCC's "record" in support of regulation is woefully inadequate to that task, both because the record of actual examples of blocking or discriminatory conduct by ISPs is so sparse and because the circumstantial case is even weaker: whatever incentives there are for ISPs to do such things, there must be similar and perhaps even greater incentives not to do them in the marketplace. Further, there are more narrowly tailored ways to deal with net neutrality harms that would not impinge on First Amendment rights, as detailed below in Part III.

1. No Principled Way to Distinguish ISPs from Speakers

If challenged on First Amendment grounds, the FCC will likely argue that ISPs are "conduits," not speakers, and point for support to the Communications Decency Act (CDA) and Digital Millennium Copyright Act (DMCA).[83]

Because ISPs are not held liable as editors (as a newspaper would be under the law of defamation), the FCC argued in the 2015 Or-

82. *See Ill. Bell Tele. Co.*, 503 F. Supp. 2d at 948 (collecting cases recognizing that cable and satellite companies' activities are protected by the First Amendment*); Comcast Cablevision of Broward Cnty.*, 124 F. Supp. 2d at 686 (holding a county ordinance requiring favorable-term access for all Internet service providers violates broadband cable owners' free-speech rights).

83. *See* 2015 Order at 19,833, para. 544 ("The rules we adopt today do not curtail broadband providers' free speech rights. When engaged in broadband Internet access services, broadband providers are not speakers, but rather serve as conduits for the speech of others. The manner in which broadband providers operate their networks does not rise to the level of speech protected by the First Amendment. As telecommunications services, broadband Internet access services, by definition, involve transmission of network users' speech without change in form or content, so open Internet rules do not implicate providers' free speech rights."). Scholars previously made the same argument. *See, e.g.*, Nicholas Bramble, *Ill Telecommunications: How Internet Infrastructure Providers Lose First Amendment Protection*, 17 MICH. TELECOMM. & TECH. L. REV. 67, 99–102 (2010).

der that ISPs are not speakers.[84] But the CDA limits ISPs' liability precisely in order to *encourage* their exercise of editorial discretion.[85] Under the CDA, ISPs have every right to prevent content from passing through their pipes. The CDA simply states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker *of any information provided by another information content provider*."[86] The content of the speech carried by ISPs is distinct from the speech exercised by ISPs when they choose whether and how to carry certain content on their networks. This editorial discretion is itself an exercise of protected speech. Similarly, newspapers open up much of their content to outsiders, as they rely primarily upon advertising revenue, but yet retain editorial discretion over the content of those ads, as well as letters to the editor, op-eds, etc.

Moreover, the CDA explicitly recognizes that ISPs may "restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[87] The fact that the provider is acknowledged to have, and to exercise, independent judgment about which content is offensive suggests that it retains editorial discretion for First Amendment purposes, regardless of whether it actually exercises that right.

---

84. *See* 2015 Order at 19,834, para. 552 ("We also take note that, in other contexts, broadband providers have claimed immunity from copyright violations and other liability for material distributed on their networks because they lack control over what end users transmit and receive. Broadband providers are not subject to subpoena in a copyright infringement case because as a provider it 'act[s] as a mere conduit for the transmission of information sent by others.' Acknowledging the unexpressive nature of their transmission function, Congress has also exempted broadband providers from defamation liability arising from content provided by other information content providers on the Internet. Given the technical characteristics of broadband as a medium and the representations of broadband providers with respect to their services, we find it implausible that broadband providers could be understood to being conveying a particularized message in the provision of broadband Internet access service.").

85. *See* Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) ("Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.").

86. 47 U.S.C. § 230(c)(1) (2012) (emphasis added).

87. *Id*. at § 230(c)(2)(A).

Finally, the argument that ISPs are mere conveyors of bits conflicts with their liability and responsibility under copyright law. Although that liability is limited under DMCA Safe Harbor provisions,[88] there remains some residual liability when the ISP knows what the bits contain,[89] requiring ISPs to have certain policies in place to facilitate copyright enforcement.[90] The ISPs' editorial responsibilities make them, in at least some key respects, analogous to newspapers; as such, they cannot be mandated to carry speech against their editorial discretion absent a compelling governmental justification.

While some scholars have criticized the view that data or algorithms can be speech,[91] there is no easy limiting principle that prevents the First Amendment's application in such cases—or that could ensure that denying First Amendment protection to data or algorithms would not undermine First Amendment protection of more traditional forms of speech.[92] For instance, Tim Wu (who coined the term "net neutrality"[93]) proposes a functionality requirement. He argues that the dividing line between protected and unprotected speech should be whether the communicator is a person attempting to communicate a specific message in a non-mechanical way to another, and whether the communication at issue is more speech than conduct.[94]

When the rubber actually hits the road, though, his legal theory is very difficult to apply, and may, ironically, *reduce* the vulnerability of ISPs to First Amendment challenge:

---

88. *See* 17 U.S.C. § 512(c)(1) (2012).

89. *Id*. at § 512(b)(1) ("A service provider shall not be liable for monetary relief . . . if the conditions set forth in paragraph (2) are met.").

90. *Id*. at § 512(i) ("The limitations on liability established by this section shall apply to a service provider only if the service provider — has adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers . . . .").

91. *See, e.g*., Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013).

92. *See, e.g*., Mark Joseph Stern, *Google Says Search Results Are Free Speech. That's Not Entirely Crazy*, SLATE (Nov. 20, 2014), http://www.slate.com/articles/technology/future_tense/2014/11/are_google_results_free_speech_protected_by_the_first_amendment.html.

93. *See* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. LAW 141 (2003).

94. *See* Wu, *supra* note 89, at 1496–98.

> The rule of thumb is this: the more the concierge merely tells the user about himself, the more like a tool and less like protected speech the program is. The more the programmer puts in place his opinion, and tries to influence the user, the more likely there will be First Amendment coverage. These are the kinds of considerations that ultimately should drive every algorithmic output case that courts could encounter.[95]

Under Wu's rule, insofar as net neutrality advocates are right that ISPs are restricting consumer access to content (*i.e.*, ISPs are "tr[ying] to influence the user"), the more the analogy to the newspaper in *Tornillo* starts to make sense: ISPs have a right to exercise editorial discretion and mandating speech would be unconstitutional.[96] Ironically,

95. *Id.* at 1533.

96. *See* Ben Sperry, *Constitutional Dynamism: Responding to Tim Wu on "Machine Speech," "Opportunism," and First Amendment*, TRUTH ON THE MARKET (Sept. 2, 2013), http://truthonthemarket.com/2013/09/02/constitutional-dynamism-responding-to-tim-wu-on-machine-speech-opportunism-and-first-amendment/; *see also* Barbara A. Cherry & Julien Mailland, *Toward Sustainable Network-Openness Obligations on Broadband in the U.S.: Surviving Providers' First Amendment Challenges* 14–15 (2014 TPRC Conference Paper, Mar. 29, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417758 ("In the current business model, broadband providers are simple conduits that transmit the message of others. However, this could change in two ways. First, broadband providers could move to a model when their main service is not to provide access to an open internet but to curate content and provide it through a gated community. This was the business model of most information-distribution network access providers in the 1980's and until the point where NSFNET was privatized . . . In this case, the broadband provider would more likely be considered a speaker under the *Spence* test. Second, short of becoming a gated community as were AOL, CompuServe, and services of the like, broadband providers of today could move towards providing a dual service: access to the open internet on the one hand, and access to a private community of content on the other. Such is, in the wireless world, Apple's iOS model. There is evidence suggesting that broadband providers are moving towards such a model as well . . . . In such case, broadband providers would likely be classified as both conduits for the speech of others and speakers themselves."); Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1702 (2011) ("Creating one's own material, or substantively editing others' material, will suffice under the *Turner I* standard. A webpage that a company creates is speech for purposes of the First Amendment.

the application of Wu's test to ISPs effectively puts them in the kind of "use it or lose it" dilemma over their First Amendment rights that courts have roundly rejected.[97] For instance, a newspaper does not lose the right to edit or reject guest op-eds merely because it had a practice of accepting for publication any letters it received that fit length requirements.

It is also unclear whether the case law pointed to by proponents of net neutrality regulation is dispositive. For instance, in *PruneYard Shopping Center v. Robins*,[98] the Supreme Court distinguished the shopping center at issue from the newspapers in *Tornillo* on the grounds that the latter perform editorial functions, whereas the former generally do not.[99] While some have argued that ISPs are in a similar position to the shopping center,[100] there are several key differences. First, ISPs exist primarily to transmit speech and, in some cases, to perform editorial functions. This makes them more akin to the newspapers of *Tornillo* than to a mall. More importantly for First Amendment analysis, ISPs are not open to the general public; rather, they grant access only to subscribers with whom they have contracted to provide broadband service. The shopping center is, by choice of its owner, not limited to the personal use of consumers. It is, instead, a business establishment that is open to the public "to come and go as they please."[101]

Scholars have also analogized the position of ISPs to the position of law schools in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*[102] by arguing that speech is no more compelled by net neutrality regulations than law schools were compelled to speak by being re-

---

Note that this does not make the company a speaker for all purposes: an oil-exploration company is engaged in speech when it creates its webpage, but not when it drills for oil. But creating a webpage is a core expressive activity and will thus trigger the First Amendment. The same applies to substantively editing others' materials. For instance, an Internet access provider that explicitly provided a substantively edited Internet experience (*e.g.*, a service that blocked access to indecent material and presented itself as a 'family friendly' offering) would be a speaker.").

97. *See, e.g.*, Malik v. Brown, 16 F.3d 330, 332 (9th Cir. 1994) ("A 'use it or lose it' approach [for constitutional rights] does not square with the Constitution.").

98. 447 U.S. 74 (1980).

99. *Id.* at 88.

100. Bramble, *supra* note 83, at 89–90.

101. *PruneYard*, 447 U.S. at 87.

102. 547 U.S. 47 (2006).

quired to allow military recruiters on campus.[103] But *Rumsfeld* is easily distinguishable: the Solomon Amendment conditioned certain federal funds on law schools allowing military recruiters access on equal terms with other recruiters.[104] Here, private ISPs are being compelled by government to allow content to pass through their networks, rather than being incentivized to do so by subsidies.[105] Again, there is no nexus between government subsidy—implicit or explicit, current or past—and ISPs' editorial discretion.[106]

2. Discrimination Based Upon Speaker Demands Strict Scrutiny

Net neutrality regulation will demand exacting scrutiny if it picks and chooses among speakers.[107] The NPRM initially proposed to apply the non-discrimination rule only to fixed, not mobile, broadband providers and to apply a less restrictive version of the no-blocking rule to mobile providers than to fixed providers,[108] just as the 2010 Open Internet Order did.[109] The FCC has now decided to apply the same, equally "tough" rules to both categories of broadband providers.[110] This does not, however, mean that the rules no longer discriminate among speakers.

The FCC has re-interpreted Section 706 to regulate *any* form of "communications" that in any way promotes broadband deployment, no matter how convoluted. In *Verizon*, the D.C. Circuit accepted this re-interpretation as a reasonable reading of an ambiguous statute under

103. Bramble, *supra* note 83, at 81–82.

104. *Rumsfeld,* 547 U.S. at 54.

105. *See* 2015 Order at 19,740, para. 15 (to be codified at 47 C.F.R. § 8.5).

106. *See supra* notes 34–56 and accompanying text.

107. *Cf.* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 94–95 (1972) (finding general ban on picketing near schools impermissibly content-based because it contained an exclusion for labor picketing).

108. *See* Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,447, 37,479 (proposed July 1, 2014) (to be codified at 47 C.F.R. 8).

109. *See Open Internet Order*, 25 F.C.C.R. at 17956–57, 17959–60, paras. 94-95, 99.

110. *See* 2015 Order at 19,764, para. 186 ("The open Internet rules we adopt today apply to fixed and mobile broadband Internet access service.").

Chevron.[111] We reject this interpretation and have explained in detail why we believe Congress did not intend Section 706 to be an independent grant of authority.[112] But if Section 706 *is* an independent grant of authority, there is nothing in the text to limit its scope to broadband providers—only the ultimate purpose that must be served by the regulation (broadband deployment). The FCC has not explained why its "virtuous cycle" theory would not be equally applicable to other so-called "gatekeepers" in the Internet ecosystem. For example, why could not Apple and Microsoft be said to have a "terminating access monopoly" over their mobile operating systems, or Google over its search algorithm? It is certainly conceivable that the FCC could offer some principled distinction between ISPs and the developers of app stores, operating systems, mobile platforms, search engines, social networks, etc., such that excluding them from the scope of "neutrality" rules would not constitute speaker discrimination. But as yet it has not done so—certainly not in any way that would satisfy the kind of rigor demanded by courts in assessing whether to deviate from strict scrutiny. Under the net neutrality rules adopted by the FCC, it appears[113] that Apple can continue to exercise editorial discretion in deciding which applications it will allow iPhone and iPad users to access.[114] Similarly, an edge provider can continue to exercise editorial discretion with regard to which IP addresses it will serve content to.[115] By permitting these decisions, but precluding similar decisions made by ISPs, the FCC discriminates among speakers.

Besides the economic disruption caused when the government regulates only certain speakers, the government's differential treatment of speakers violates basic First Amendment principles of, yes, neutrali-

111. *See* Verizon v. FCC, 740 F. 3d 623, 635-42 (D.C. Cir. 2014).

112. TECHFREEDOM & ICLE LEGAL COMMENTS, IN THE MATTER OF PROTECTING AND PROMOTING THE OPEN INTERNET, GN DOCKET NO. 14-18, 62 (July 17, 2014), *available at* http://www.laweconcenter.org/images/articles/tf-icle_nn_legal_comments.pdf.

113. *See infra* Part II.E (discussing the uncertainty created about the scope of the rules by the general conduct standard).

114. *See* Larry Downes, *Unscrambling the FCC's Net Neutrality Order: Preserving the Open Internet — But Which One?*, 20 COMMLAW CONSPECTUS 83, 93 (2011–2012).

115. *Id*.

ty.[116] As enacted, the rules should be subject to strict scrutiny,[117] and thus will have to overcome the "strong presumption of invalidity" that applies to all such laws,[118] which must be "justified by a compelling government interest and is narrowly drawn to serve that interest."[119]

3. FCC Has Not Defined a Compelling Government Interest Requiring Regulation

Neither the NPRM or the 2015 Open Internet Order identifies a compelling government interest requiring regulation.[120] The evidence simply does not show discriminatory practices requiring sweeping new regulatory remedies.[121] As stated by Commissioner Ajit Pai,

> The evidence of these continuing threats? There is none; it's all anecdote, hypothesis, and hysteria. A small ISP in North Carolina allegedly blocked VoIP calls a decade ago. Comcast capped BitTorrent traffic to ease upload congestion eight years ago. Apple introduced FaceTime over Wi-Fi

116. *Cf.* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 659 (1994) ("*Turner I*") ("Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns."); Larry Downes, *The Net Neutrality Walk of Shame* (Sept. 28, 2009), http://larrydownes.com/the-net-neutrality-walk-of-shame/.

117. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714–17 (holding that New Hampshire could not require individuals to display the state motto on the vehicle license plate because the State's claimed interest was not "ideologically neutral").

118. Vieth v. Jubelirer, 541 U.S. 267, 294 (2004).

119. Brown v. Entm't Merchs. Ass'n, 564 U.S. ___, 131 S. Ct. 2729, 2738 (2011).

120. The Order thinks, at most, that it should have to fulfill intermediate scrutiny. *See* 2015 Order at 19,833, para. 544 ("[A]nd even if broadband providers were considered speakers with respect to these services, the rules we adopt today are tailored to an important government interest—protecting and promoting the open Internet and the virtuous cycle of broadband deployment—so as to ensure they would survive intermediate scrutiny.").

121. *See* Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,448, 37,452–53 (proposed July 1, 2014) (to be codified at 47 C.F.R. § 8) (describing merely two U.S. disputes, one of which settled and the other of which was resolved without FCC action, and various disputes that occurred in Europe); 2015 Order at 19,747, para.79 (giving 3 examples of possible blocking).

> first, cellular networks later. Examples this picayune and stale aren't enough to tell a coherent story about net neutrality. The bogeyman never had it so easy.[122]

Evidence of discriminatory practices has long been lacking. In 2009, one scholar noted that although "there are some 121.2 million broadband Internet service lines in the United States," there are "few instances where network operators supposedly violated the FCC's network neutrality principles."[123] This is unsurprising given how well market forces already discipline broadband providers: consumers demand unfettered access and "[p]erceived violations [of network neutrality] are met with nearly immediate and widespread public backlash through the very medium that is allegedly at risk: the free and open Internet."[124]

4. FCC Has Not Narrowly Tailored the Proposed Rule to the Alleged Harm

The Order's framework is not narrowly tailored to support the government's claimed interest. It forces broadband providers to allow nearly all speech, all the time.[125] By contrast, even under the long-abandoned "Fairness Doctrine,"[126] the Supreme Court permitted the government to compel speech only when that requirement was limited in time and scope. In *CBS, Inc. v. Federal Communications Commission*,[127] for instance, the Court upheld "a limited right to 'reasonable' access that pertains only to legally qualified federal candidates and may be invoked

---

122. Dissenting Statement of Ajit Pai, at 333. http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf

123. Barbara Esbin, *FCC Could Mess Up Internet with 'Net Neutrality' Rules No One Needs*, U.S. NEWS & WORLD REPORT (Nov. 24, 2009), http://www.usnews.com/opinion/articles/2009/11/24/fcc-could-mess-up-internet-with-net-neutrality-rules-no-one-needs.

124. *Id.*

125. 2015 Order at 19,740, para. 15 (to be codified at 47 C.F.R. § 8.5).

126. *See generally* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) (upholding an FCC determination that the fairness doctrine no longer served the public interest).

127. 453 U.S. 367 (1981).

by them only for the purpose of advancing their candidacies once a campaign has commenced."[128] The Court contrasted that limited right to a general right requiring the granting of access to all comers, noting, "[p]etitioners are correct that the Court has never approved a general right of access to the media," and adding, "[n]or do we do so today."[129] Yet the Order creates just such a general right, with a carve-out only for whatever category of speaker the FCC chooses to exclude from its largesse. The beneficiaries are all those wishing to make content available through providers' networks, and they will be able to do so whenever they want. If a blanket order mandating nearly unfettered access is "narrow," it is difficult to imagine what a "broad" compulsion of speech would look like.

It is hornbook law that the "government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[130] With few allegations of network discrimination (let alone whatever would fall into the presumably narrower category of "unreasonable" network discrimination), the FCC's net neutrality rules would fail even if they only minimally burdened speech. As it is, the adopted rules force broadband providers to substitute the editorial discretion of content providers for their own. The FCC's proposed net neutrality regulations go too far; in essence, they "burn the house to roast the pig."[131]

If the FCC fears that there is insufficient broadband competition, it (and Congress and state and local governments) could address that problem more directly by encouraging broadband deployment.[132] In general, that means avoiding the regulatory uncertainty inherent in Title II, the very tool Chairman Wheeler has now invoked.[133] In wireline service,

128. *Id*. at 396 (internal citations omitted).

129. *Id*.

130. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

131. Reno v. ACLU, 521 U.S. 844, 882 (1997).

132. *See infra* Section III.

133. *See* 2015 Order at 19,738, para. 5 ("Carefully-tailored rules need a strong legal foundation to survive and thrive. Today, we provide that foundation by grounding our open Internet rules in multiple sources of legal authority—including both section 706 of the Telecommunications Act and Title II of the Communications Act.").

that could mean subsidizing last-mile infrastructure construction;[134] in mobile services, that could mean facilitating tower siting and ensuring adequate spectrum for competing wireless-broadband services.[135] Finally, if broadband providers abuse their market power to block access to competitors or their affiliates, such abuses can be addressed through the existing laws of consumer protection and antitrust, rather than by infringing on providers' editorial discretion.[136]

C. No-Blocking and Non-Discrimination Rules Would Fail, Even Under Turner-Level Scrutiny

The FCC officially reclassified broadband services as common carriers under Title II of the Communications Act on February 26, 2015.[137] It will likely take at least a year for an initial appellate decision as to whether the FCC has justified this reversal of its previous classification of these services as Title I information services—and whether the FCC can appropriately couple reclassification with broad grants of forbearance to achieve what Chairman Wheeler calls "modernizing" or "tailoring" the 1934 Communications Act.[138]

But even if a court were to accept reclassification,[139] the FCC could not satisfy its burden of proof under intermediate-scrutiny review.

---

134. *See* Derek Slater, *Homes with Tails: What if You Could Own Your Internet Connection?* (New Am. Found. Wireless Future Program Working Paper No. 23, 2008), *available at* http://www.newamerica.net/files/HomesWithTails_wu_slater.pdf.

135. *See infra* Section III.B.8. *See also* Department of Justice, *Ex Parte* Submission, In the Matter of Economic Issues in Broadband Competition: A National Broadband Plan for Our Future, GN Docket No. 09-51 (Jan 4, 2010) *available at* http://www.justice.gov/atr/public/comments/253393.pdf#page=8 (discussing importance of wireless competition).

136. *See infra* Section III.0.

137. *See, e.g.*, 2015 Order at 19,782, para. 308 ("Based on the updated record, we conclude that retail broadband Internet access service is best understood today as an offering of a 'telecommunications service.'").

138. *See* Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, WIRED (Feb. 4, 2015), http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/. *See also* 2015 Order at 19,742, paras. 37-40 (titled "Promoting Investment with a Modern Title II").

139. The decision itself being subject to First Amendment analysis. *See infra* II.D.

In *Turner Broadcasting Systems v. FCC*,[140] the Supreme Court held that the must-carry provisions of the 1992 Cable Act were consistent with the First Amendment.[141] The provisions required cable providers to carry certain local and public broadcast stations as channels.[142] The Court ruled that, since the must-carry regulations were content-neutral restrictions that incidentally burdened speech, they were subject to intermediate, rather than strict, scrutiny.[143] Intermediate scrutiny requires the government to show a content-neutral regulation (1) furthers an important or substantial government interest; (2) is unrelated to the suppression of speech; and (3) is no more burdensome than necessary to further that interest.[144] While there is ambiguity in the precise distinction between the "narrow tailoring" prong of intermediate scrutiny and the "least restrictive means" prong of strict scrutiny,[145] it *is* clear that, even under intermediate scrutiny, the FCC cannot choose a policy that would place greater burdens upon ISPs than necessary.

1. FCC Has Not Articulated a Substantial Government Interest

The FCC's analysis in support of its proposed regulations has fallen far short of establishing a substantial government interest. Under intermediate scrutiny, "the guiding principle... is that the government must 'demonstrate that the recited harms' to the substantial government interest 'are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way.'"[146] But as discussed above, the harms here remain almost entirely conjectural. The FCC relied on anecdotes of three instances of denial of access in the Order and based the rules primarily on hypothetical threats to the "Open In-

140. 520 U.S. 180 (1997) (*Turner II*).

141. *See id*.

142. *Id*. at 185.

143. *Id*.

144. *Id*.

145. *See* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007).

146. Minority Television Project, Inc. v. FCC, 676 F.3d 869, 879 (9th Cir. 2012) (quoting *Turner I*, 512 U.S. at 664–65).

ternet."[147] This is precisely the kind of "conjectural" analysis dismissed by the Court in *Turner II*.

The cable must-carry provisions upheld in *Turner II* were predicated on Congress's express finding (entitled to "considerable deference") that most cable systems had functional monopolies that gave them "undue market power,"[148] and that cable systems had "increasing ability and incentive to drop local broadcast stations."[149] However, no congressional findings support the FCC's rationale in the Order; indeed, Congress has repeatedly declined to enact network-neutrality legislation.[150] In fact, the legislation Congress has enacted suggests it believes that minimizing Internet regulation is a more important governmental interest than FCC micromanagement of network access.[151]

Instead of relying on anything as compelling as Congressional findings that cable possessed an actual monopoly at the time of the 1992 Cable Act (let alone studies by actual economists[152]), the FCC, in this case, relies on two far less convincing arguments. First is the idea that, while broadband providers do not actually have a monopoly, they are a "gatekeepers" who control access to their customers and "*may* harm the open Internet, such as preferring their own or affiliated content, demanding fees from edge providers, or placing technical barriers to reaching end users,"[153] thus undermining the virtuous cycle that supposedly drives investment in broadband (access to edge providers fuels consumer demand, which in turn incentivizes broadband investment, thus restrictions

147. *See* 2015 Order at 19,747-48, paras. 78-85 (discussing the "incentive and ability" of ISPs to limit openness); *id*. at 19,747, para. 79 n. 123 (citing only 3 specific instances of blocking).

148. *Turner I*, 512 U.S. at 622, 636.

149. *Turner II*, 520 U.S. at 197.

150. *See, e.g*., Internet Freedom Preservation Act of 2009, H.R. 3458, 111th Cong. (2009); H.R. 5353, 110th Cong. (2008); S. 215, 110th Cong. (2007); S. 2917, 109th Cong. (2006); Network Neutrality Act of 2006, H.R. 5273, 109th Cong. (2006); Internet Non-Discrimination Act of 2006, S. 2360, 109th Cong. (2006).

151. *See, e.g*., Blake D. Morant, *Symposium: First Amendment Issues in Emerging Technology – The Search for a Viable Theory of Regulation in the Digital Age*, 47 UNIV. LOUISVILLE L. REV. 661, 672 (2009) ("The Telecommunications Act of 1996 . . . clearly requires deference to the 'vibrant and competitive free market,' which should be 'unfettered by Federal or State regulation.'") (quoting 47 U.S.C. § 230(b)(2) (2006)).

152. *See infra* note 186.

153. 2015 Order at 19,747, para. 80 (emphasis added).

on edge providers limit consumer demand and thus limit broadband deployment).[154] While the D.C. Circuit Court of Appeals did accept the FCC's "virtuous cycle" theory for purposes of *Chevron*/APA analysis,[155] the court declined to delve into any First Amendment analysis.[156] Some scholars have argued that the 2010 Open Internet Rules would have survived this prong of intermediate scrutiny.[157]

There are two fatal defects in this assertion. First, the court's acceptance of a proffered claim to support agency discretion under *Chevron* review or under the Administrative Procedure Act is not the same thing as acceptance of that claim as a legitimate government interest under intermediate scrutiny. Review of agency discretion under the "reasonableness" standard of *Chevron* Step Two is exceedingly deferential, accepting any reasonable grounds to support agency action that is "in the exercise of [its] authority."[158] Similarly, when a court reviews an agency's use of its authority under the APA to determine whether the action is arbitrary and capricious, it considers merely whether the agency offered a reasoned explanation for the policy choice from the relevant data.[159] But this need not satisfy any (let alone all) of the prongs of intermediate scrutiny review. It may be a "reasonable policy choice"[160] to posit hypothetical interference with a supposed "virtuous cycle" to justify the existence of agency authority to regulate broadband,[161] but that

154. *Id*. at para. 82 ("Such practices could result in so-called 'tolls' for edge providers seeking to reach a broadband provider's subscribers, leading to reduced innovation at the edge, as well as increased rates for end users, reducing consumer demand, and further disrupting the virtuous cycle.").

155. Verizon v. FCC, 740 F.3d 623, 644 (D.C. Cir. 2014).

156. *See id*. at 659.

157. *See* BARBARA A. CHERRY & JULIEN MAILLAND, TOWARD SUSTAINABLE NETWORK-OPENNESS OBLIGATIONS ON BROADBAND IN THE U.S.: SURVIVING PROVIDERS' FIRST AMENDMENT CHALLENGES 22–23 (2014 TPRC Conference Paper, Mar. 29, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417758.

158. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 969 (2005).

159. *See* Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

160. *Brand X*, 545 U.S. at 971.

161. We believe it is not, and neither did the dissent in *Verizon v. FCC*. *See Verizon*, 740 F.3d 623, 662–67 (Silberman, J., concurring in part and dissenting in part).

does not mean that banning what broadband providers "might" do or "may have incentive" to do, without evidence or even an analysis of the likelihood that they *would* do so, is a substantial state interest.

Relatedly, while promoting broadband *investment* may well be a substantial state interest, it is by no means clear that doing so by promoting the FCC's "virtuous cycle" is. The former is an end in itself; the latter is a means of promoting an end. Deferential *Chevron* review may permit the agency to choose any reasonable means of promoting a congressionally mandated end, but intermediate scrutiny is more exacting. To the extent that *Verizon* turned on an assessment of the reasonableness of the agency's chosen means to promote broadband investment, it may offer little, if any, support for the agency in a First Amendment challenge.

Second, the FCC pointed to its recent redefinition of broadband as service capable of providing 25 Mbps down and 3 Mbps up to claim that cable providers today have an actual monopoly over broadband service just as Congress and the FCC said they did over video service back in 1992.[162] But even if this were true, it would still only be true in *some* markets. The FCC's own 2015 Broadband Progress Report shows that, in December 2013, cable providers faced stiff competition from "telcos" providing at least 25 Mbps service in at least 39% of markets, and shows no providers at all offering such speeds in 16% of markets.[163] So, at most, the FCC might be able to establish true monopoly power as a substantial government interest only in the remaining 45% of U.S. markets.

In fact, the FCC's reliance on December 2013 data is highly outcome-determinative because our own research indicates that, by December 2014, the situation had changed dramatically: AT&T alone had completed a year early its three-year plan to upgrade 75% of its footprint (potentially serving over half the households in America) from tradition-

162. 2015 Order at 19,748, para. 81 ("Additionally, 45 percent of households have only a single provider option for 25 Mbps/3 Mbps broadband service, indicating that 45 percent of households do not have any choices to switch to at this critical level of service.").

163. 2015 Broadband Progress Report And Notice Of Inquiry On Immediate Action To Accelerate Deployment, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126 (Feb. 4, 2015), para. 83, Chart 2.

al 6 Mbps service to service delivering speeds of at least 25 Mbps (and potentially far more). This suggests that the next Broadband Progress Report will tell a very different story.[164]

Regardless of which snapshot in time the FCC relies upon to characterize the market, its conclusion that the market is not highly competitive is dependent on its decision to raise the minimum speed benchmark from 4 Mbps to 25 Mbps. That decision would be difficult for the FCC to defend under "arbitrary and capricious review;" it would be impossible to defend under the far more exacting standard of First Amendment scrutiny.[165]

2. FCC's Proposed Rules Are Not Aimed at Suppressing Broadband ISPs' Speech

The second prong appears to be fulfilled because the FCC is not aiming to suppress the ability of broadband providers themselves to speak. However, it is notable that the FCC's focus on promoting free expression does concede that a speech interest is present. In other words, the more the FCC plays up the free expression component of net neutrality rules, the more clear it becomes that this is a mandated speech case.

3. FCC Chose Means Substantially Broader than Necessary

Even if the FCC could establish a "substantial" government interest, it must still show that the means chosen to achieve that interest are not substantially broader than necessary.[166] Doctrinally, it is not precisely

---

164. Comments of TechFreedom in Response to Oppositions to Petition, *In the Matter of Applications of Comcast Corp. and Time Warner Cable, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57 (Dec. 23, 2014) *available at* http://docs.techfreedom.org/TF_Reply_to_ComcastTWC_Petitions.pdf.

165. TechFreedom, Ex Parte, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126 (Jan. 22, 2014) at 21, *available at* http://apps.fcc.gov/ecfs/document/view?id=60001015787.

166. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989).

clear how this standard differs from the "less restrictive" means test of strict scrutiny. It is likely that the government would not be required to resort first to some of the less restrictive means described below that aim to restructure the market, but *would* be required to at least explain why the FCC had not structured its rules more narrowly, such as by relying on a transparency rule first, setting a presumption of legality for the non-discrimination rule, exempting user-directed prioritization, etc.[167]

Further, the Supreme Court's rationale in *Turner II* was tied to the fact that must-carry regulations were found to have minimal impact on cable providers.[168] Here, on the other hand, the FCC's opinion that there would not be a substantial burden on broadband ISPs has not yet been tested in court. In an environment where Netflix and other streaming video services account for a large percentage of Internet traffic, and the FCC's rules apply to interconnection, it is quite plausible that proposed rules *would* impose a considerable burden on ISPs. If this is the case, then a court would have another reason to rule that the no-blocking and non-discrimination rules are broader than necessary.

D. Does Reclassification Matter?

Reclassification may do less to insulate the FCC's new rules from First Amendment scrutiny than many Title II enthusiasts have claimed.[169] According to them, Title II reclassification would allow the FCC to separate the conduit function of ISPs from their speech function. But this move *itself* must still be justified, first as a matter of administrative law, and then under the First Amendment. Courts will likely consider the speech interests involved under at least the intermediate scrutiny

---

167. *See infra* Part III.

168. *Turner II,* 520 U.S. 180, 182 (1997) ("[T]he vast majority of cable operators have not been affected in a significant manner. . . . [S]uch operators have satisfied their must-carry obligations 87 percent of the time using previously unused channel capacity; 94.5 percent of the cable systems nationwide have not had to drop any programming; the remaining 5.5 percent have had to drop an average of only 1.22 services from their programming; operators nationwide carry 99.8 percent of the programming they carried before must-carry.").

169. *See, e.g.*, Barbara A. Cherry & Julien Mailland, *Toward Sustainable Network-Openness Obligations on Broadband in the U.S.: Surviving Providers' First Amendment Challenges* (2014 TPRC Conference Paper, Mar. 29, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417758.

standard of the *Turner* cases, regardless of the classification status of ISPs.[170]

First, the FCC's argument, relying on scholarly work by Stuart Benjamin, that common carriers have not historically had speech rights[171] may not apply where, as here, the FCC reclassifies ISPs as common carriers against their wishes. Historically, a company became a common carrier by voluntarily taking that status upon itself.[172] Common carrier status involved both benefits and burdens, such as nondiscrimination and a commitment to serve all comers. By opting-in, providers may indeed have *voluntarily* relinquished certain free speech rights. But where existing ISPs are "reclassified" as common carriers through no affirmative action of their own, but because of a regulatory rule change, the situation is substantially different: they are being compelled in their capacity as speakers. In such a case, whatever First Amendment deference has historically been granted to common carrier regulation would be unwarranted.

Second, it is clear that FCC declaratory rulings, such as the decision to reclassify broadband ISPs, are subject to First Amendment analysis.[173] Even accepting, for the sake of argument, that the FCC is correct

---

170. The FCC's argument in the Order, while it does not outright concede this fact, makes motions towards it. *See* 2015 Order at 19,833, para. 544 ("And even if broadband providers were considered speakers with respect to these services, the rules we adopt today are tailored to an important government interest—protecting and promoting the open Internet and the virtuous cycle of broadband deployment—so as to ensure they would survive intermediate scrutiny.").

171. The FCC relied heavily on Benjamin, *supra* note 96, at 1686–87 ("The longstanding historical practice and understanding was that common carriers of speech were mere transmitters who were not speakers for purposes of the First Amendment. . . . No court has ever suggested that regulation of such carriage triggers First Amendment scrutiny. On the contrary, courts have long treated common carriage regimes as not raising First Amendment issues. . . . [Courts] have held that conduits do not have free speech rights of their own."). S*ee* Order at 19,833, para. 549.

172. Barbara Esbin, *Reclassification of Broadband Internet Access: No Slam Dunk*, PROGRESS & FREEDOM FOUND. (Apr. 14, 2010), http://blog.pff.org/archives/2010/04/reclassification_of_broadband_internet_access_no_s.html.

173. *See, e.g.*, New York State Broadcasters Ass'n v. United States, 414 F. 2d 990 (2d Cir. 1969).

about common carriers' free speech rights,[174] this does not mean that the decision to reclassify is immune from First Amendment scrutiny. Simply allowing the government to force ISPs to abandon rights by regulatory classification runs counter to the Supreme Court's unwillingness to continue treating modes of communication differently in the digital age.[175]

Further, insofar as Section 706 is sufficient statutory basis for the FCC's net neutrality rules, as the FCC apparently argues,[176] the Commission will have a difficult time arguing that reclassification is no more burdensome than necessary. In fact, it is worth noting that the FCC defends its application of Title II (in addition to Section 706) to ISPs in order to protect the Open Internet only because it says that "the application of sections 201 and 202 is appropriate to remove any ambiguity regarding our authority to enforce strong, clear open Internet rules."[177] Although "protecting the Open Internet" may (or may not) amount to a suf-

174. *See* 2015 Order at 19,833, para. 544 ("The rules we adopt today do not curtail broadband providers' free speech rights. When engaged in broadband Internet access services, broadband providers are not speakers, but rather serve as conduits for the speech of others. The manner in which broadband providers operate their networks does not rise to the level of speech protected by the First Amendment. As telecommunications services, broadband Internet access services, by definition, involve transmission of network users' speech without change in form or content, so open Internet rules do not implicate providers' free speech rights.").

175. *See* Robert Corn-Revere, *Defining Away the First Amendment*, PERSPECTIVES NO. 8 (The Media Institute, May 2010), *available at* http://www.mediainstitute.org/PDFs/Perspectives8.pdf ("The majority's core First Amendment findings point to a continuing recognition of full First Amendment rights for new communications technologies. This trend necessarily would limit any attempt to expand FCC jurisdiction over new media simply by manipulating regulatory classifications.").

176. *See* 2015 Order at 19,777, para. 275 ("Section 706 affords the Commission affirmative legal authority to adopt all of today's open Internet rules."). *See also id*. at 19,812, para. 448 ("Although some have argued that section 706 of the 1996 Act provides sufficient authority to adopt open Internet protections, and we do, in fact, conclude that section 706 provides additional support here, we nonetheless conclude that the application of sections 201 and 202 is appropriate to remove any ambiguity regarding our authority to enforce strong, clear open Internet rules.") (internal citations omitted).

177. *Id*. at 19,812, para. 448. *See also id*. ("For example, although we find that we have authority under section 706 of the 1996 Act to implement appropriate enforcement mechanisms, our reliance on sections 201 and 202 as additional sources of authority (coupled with the enforcement provisions from which we do not forbear, as discussed below), eliminates possible arguments to the contrary.").

ficient government interest to survive First Amendment review, surely "removing ambiguity" does not. If it did, government would have a powerful new argument for justifying censorship across a wide array of cases.

Defenders of regulation often argue that the market has converged on *de facto* net neutrality, so there can be little harm in any FCC action that merely preserves the status quo.[178] But reclassification goes beyond this, compelling ISPs to forever give up editorial discretion except that which is allowed them by the FCC, such as for reasonable network management. Actually using that editorial discretion (e.g., by selectively blocking or giving priority to certain applications or edge providers as a way of differentiating their services and trying to better serve their subscribers) is not a violation of common carrier status; it is proof that ISPs never opted into common carrier status, and that they retain their First Amendment rights. Again, failing to exercise a First Amendment right does not waive a speaker's right to determine the content it chooses to transmit in the future.[179] Indeed, the fact that the broadband market has evolved a *de facto* norm of "neutrality" in the absence of a regulatory mandate because of reputational and competitive forces undermines the FCC's First Arguments in two ways: it reduces the government's interest in mandating *de jure* neutrality while also demonstrating the efficacy of alternatives to regulation.

E. The FCC's General Conduct Standard Would Fail an Overbreadth Challenge

The Order's "general conduct" standard is vulnerable to an overbreadth challenge because it is not narrowly tailored, and is impermissi-

178. *See* 2015 Order at 19,751, paras. 102-03 (section titled "The Commission Must Act to Preserve Internet Openness").

179. *See supra* note 81. The situation might be different if broadband providers had not merely operated in a *de facto* neutral matter, but also claimed essential benefits that were available only to common carriers; this might well constitute voluntarily opting into the traditional *quid pro quo* of common carrier status and thus estop a broadband provider from attempting to reclaim its private carrier status when convenient. The most commonly cited example of a such a benefit, non-discriminatory pole attachment rights, is not, in fact, available uniquely to common carriers, but to cable providers as well (indeed, Title II common carriers pay *higher* rates than cable providers). 47 U.S.C. § 222(d) & (e).

bly vague. Since it provides insufficient guidance to regulated parties as to the contours and likely application of the standard, it will likely chill ISPs' speech by discouraging them from engaging in pro-competitive and pro-consumer business arrangements with edge providers, and from otherwise using new and innovative software protocols to more effectively manage their networks, for fear of punishment by the FCC.

In the Order, the FCC "adopt[s its] tentative conclusion to follow a case-by-case approach, considering the totality of the circumstances, when analyzing whether conduct satisfies the no-unreasonable interference/disadvantage standard to protect the open Internet."[180] The FCC then discusses a "non-exhaustive list of factors" that will be used to analyze whether or not behavior violates the general conduct standard.[181] It will be up to a court to decide whether the Order's discussion of these factors provides enough guidance to covered entities as to the contours and outlines of the rule, and what is and is not proscribed by it, in determining whether it is overly broad.

Such claims could be brought against the rule on its face, and not merely as-applied, because "the Court has altered its traditional rules of standing to permit — in the First Amendment area — 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'"[182] In this context, litigants are "permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[183]

So long as a court is willing to recognize the editorial speech rights of ISPs in managing their networks and transmitting content across them, an overbreadth challenge is likely to succeed here, because there is

180. 2015 Order at 19,756, para. 138.

181. *Id*. at 19,756-57, paras. 139–145 (listing End-User Control, Competitive Effects, Consumer Protection, Free Expression, Application Agnostic, Standard Practices, and Effect on Innovation, Investments, or Broadband Deployment among the factors to be considered).

182. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)).

183. *Id*. at 612.

a strong case to be made that the adopted rules will lead ISPs to refrain from engaging in constitutionally protected speech.

III. CRAFTING CONSUMER PROTECTIONS CONSISTENT WITH THE FIRST AMENDMENT

The First Amendment is not, of course, an absolute bar to all government intervention; rather, First Amendment doctrine defines what government must do to justify regulation that burdens protected speech. Whether each of the proposed Open Internet rules, or any alternative approach taken by the FCC or Congress, ultimately faces strict or intermediate scrutiny, the path towards constitutionally sustainable consumer protections begins with clearly defining the government's interest, narrowly tailoring intervention to that interest, and at least exploring, if not actually first trying, less restrictive alternatives to the proposed regulations. While intermediate scrutiny would clearly be less demanding in this last regard, as noted above, we have grouped these alternatives together for conceptual clarity.

This approach is consistent with the First Amendment's concept of negative liberty—protecting free speech from government interference—while allowing a broad range of contractual arrangements in the marketplace only to be checked by generally applicable laws.

A. Clearly Identifying Government Interest

The FCC has asserted the following justification for the rules proposed in the NPRM: (1) ISPs have the incentive and ability to block and discriminate against certain applications and edge providers; (2) the FCC needs to protect edge providers to ensure that the virtuous cycle of broadband deployment continues; and, thus, (3) the FCC needs to enact net neutrality rules to prevent ISPs from blocking or discriminating against edge providers and applications.[184]

Following *Verizon*, advocates of regulation have routinely asserted that the decision in some way validated the FCC's "triple bank shot" theory. In fact, the D.C. Circuit merely assessed whether the FCC

184. *See* Protecting and Promoting the Open Internet, 79 Fed. Reg. 37447, 37453–54 (proposed July 1, 2014) (to be codified at 47 C.F.R. § 8).

had crossed the very low bar of the "substantial evidence" test of administrative law.[185] But the FCC will face a much higher standard under First Amendment review. Nevertheless, the 2014 rulemaking did essentially nothing to expand the FCC's factual or analytical record.[186]

The D.C. Circuit accepted the theory behind the FCC's stated government interest for purposes of determining whether the rule was arbitrary and capricious, but it never actually had to weigh the strength of the FCC's evidence against the weight of the burden the FCC's rules placed upon ISPs for First Amendment purposes because the court in *Verizon* never reached the First Amendment claims. If the court had not held that the FCC's no-blocking and non-discrimination rules violated the Communications Act's prohibition on imposing common carrier obligations on non-common carriers, it might have even struck them down as arbitrary and capricious. If it *had* reached the question, the court might have struck down those rules under a First Amendment challenge as well. Depending on the level of scrutiny applied, a court would likely have concluded that the asserted government interest was either not compelling or not substantial, i.e., the chosen regulatory framework was not appropriately tailored to the asserted government interest and the FCC had not shown that less restrictive alternatives could not have achieved that interest.

At the very least, the FCC should work on developing a record of instances of blocking and throttling that is more than anecdotal and conjectural. Indeed, in their statements accompanying the NPRM, Commissioners Rosenworcel and Pai both chided the FCC for proceeding so quickly and called for more research and input from stakeholders to strengthen the record before any more rules were proposed.[187] The inde-

185. Verizon v. FCC, 740 F.3d 623, 644 (D.C. Cir. 2014) ("The Commission's finding that Internet openness fosters the edge-provider innovation that drives this 'virtuous circle' was likewise reasonable and grounded in substantial evidence.").

186. *See* Protecting and Promoting the Open Internet, 79 Fed. Reg. 37447, 37453–54 (proposed July 1, 2014) (to be codified at 47 C.F.R. § 8).

187. *See* Concurring Statement of Commissioner Jessica Rosenworcel, *Protecting and Promoting the Open Internet*, GN Docket No. 14–28, 92 (May 15, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1.pdf ("I support an open Internet. But I would have done this differently. Before proceeding, I would have taken time to understand the future. . . . I would have taken time for more input. . . . I would have preferred a delay. I think we moved too fast to be fair. So I concur."). *See also id*. at 96–97 (dissenting statement of Commissioner Ajit

pendent expert reports called for are precisely the kind of thing that might establish a government interest.[188] Indeed, European Union regulators have produced multiple expert reports as they have explored the need for regulation, and how best to tailor it.[189] The FCC needs to do more to explain the various effects of the touted virtuous cycle, and how investment at one point on the circle (e.g., edge providers) really drives investment at another (e.g., ISPs). Finally, to withstand even moderate constitutional scrutiny, the FCC needs to consider the various alternative tools available to it—and other branches of government—to protect an "Open Internet."

B. "Less Restrictive" & More Narrowly Tailored Alternatives

In general, the First Amendment does not require government to do nothing; it merely requires that government begin addressing real problems through the least restrictive means (strict scrutiny) or, at least, through a narrowly tailored alternative (intermediate scrutiny). A well-crafted transparency rule, user education, user empowerment technologies, existing law, a legislative compromise, or increased broadband competition could all address the concerns underlying calls for net neutrality regulation *without* offending the First Amendment.

These alternatives provide narrowly tailored remedies and can be based upon factual records sufficient to establish a government interest, unlike the net neutrality rulemakings. Importantly, these legal remedies

---

Pai) ("I agree with my colleague, Commissioner Rosenworcel, that we have rushed headlong into this rulemaking by holding this vote today. . . . [H]ere's one suggestion. Just as we commissioned a series of economic studies in past media-ownership proceedings, we should ask ten distinguished economists from across the country to study the impact of our proposed regulations and alternative approaches on the Internet ecosystem. . . . We should also engage computer scientists, technologists, and other technical experts to tell us how they see the Internet's infrastructure and consumers' online experience evolving. Their studies too should be subject to peer review and public hearings. . . . In short, getting the future of the Internet right is more important than getting this done right now.") (internal citations omitted).

188. Dissenting Statement of Commissioner Ajit Pai, *Protecting and Promoting the Open Internet*, GN Docket 14–28, 96–97 (May 15, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1.pdf.

189. *See* Roslyn Layton, *Writing Net Neutrality Rules in the Dark: Why Is the FCC Shying Away from Official Reports?*, TECH POL'Y DAILY (Jan. 6, 2015), http://www.techpolicydaily.com/communications/writing-net-neutrality-rules-dark/.

would all be consistent with the negative concept of liberty enshrined in the First Amendment.

1. Require Transparency and Enforce Violations

The FCC itself has actually recognized that enforcing transparency could do much of the work of regulating the reasonableness of network management. Before the FCC attempted to issue comprehensive rules in 2010, it attempted to enforce the FCC's 2005 policy statement on a case-by-case basis against Comcast, for allegedly throttling BitTorrent traffic on its network.[190] While the FCC's 2008 order was ultimately struck down by the D.C. Circuit in late 2010 for failing to establish clear legal authority,[191] that order merits re-examination for its discussion of the close link between regulating conduct (today, the non-discrimination rule) and simply requiring transparency.

Presaging its "virtuous cycle" theory, the Commission found that Comcast's "discriminatory and arbitrary practice unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management."[192] The Commission added that "Comcast's failure to disclose the company's practice to its customers has compounded the harm."[193] The Commission closely connected the two ideas:

> Comcast's claim that it has always disclosed its network management practices to its customers is simply untrue. Although Comcast's Terms of Use statement may have specified that its broadband Internet access service was subject to "speed and upstream and downstream rate limitations," such

190. Memorandum Opinion and Order, *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications and Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* WC Docket No. 07-52 (Aug. 1, 2008), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf.

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

192. Memorandum Opinion and Order, *supra* note 189.

193. *Id.*

> vague terms are of no practical utility to the average customer. Of course there are "limitations" on the speed and bitrate of a customer's Internet connection, but even the best-informed customer would not have inferred from these or Comcast's other terms of service that peer-to-peer protocols were disfavored on Comcast's networks. And although Comcast eventually disclosed some elements of its network management practices to customers, Comcast's first reaction to allegations of discriminatory treatment was not honesty, but at best misdirection and obfuscation. If Comcast actually believed its practices were reasonable, it should not have behaved in this manner. A hallmark of whether something is reasonable is whether a provider is willing to disclose to its customers what it is doing. To the extent that Comcast wishes to employ capacity limits in the future, it should disclose those to customers in clear terms.[194]

This raises a number of questions. Most fundamentally, before prescribing the reasonableness of network management practices, why not begin by first requiring transparency? Why not at least see whether reputation markets can adequately discipline corporate behavior? For instance, Cass Sunstein has argued that regulators should attempt to achieve their goals through "smart disclosure," backed by government enforcement, before resorting to prescriptive regulation.[195] Even if such an approach proved inadequate, attempting it initially would at least allow the FCC to more clearly define the government interest that requires prescriptive regulation—that is, conduct that harms consumers and will persist even when clearly disclosed. Simply put: what is the problem that

194. *Id*. at 13059, para.53 (internal citations omitted).

195. Cass R. Sunstein, OIRA Administrator, "Informing Consumers Through Smart Disclosure," Memorandum to the Heads of Executive Departments and Agencies (Sept. 8, 2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/informing-consumers-through-smart-disclosure.pdf.

requires not merely a transparency rule, and enforcement thereof, but additional regulation?

The FCC has multiple potential bases for issuing, and enforcing, such a transparency rule. First, the D.C. Circuit upheld the FCC's 2010 transparency rule as a reasonable exercise of the authority it has claimed through its re-interpretation of Section 706(a) as an independent grant of authority.[196] Judge Silberman, in his dissent, added that the FCC could have used its ancillary authority and Section 257 to justify the transparency rules.[197] In either case, the FCC has general authority to punish inaccurate statements to the Commission under Section 502 or Section 503(b).[198] Of course, Congress could authorize the FCC to issue a transparency rule precisely as the Communications Act of 2006, which passed the House by an overwhelming (veto-proof) bipartisan majority, would have done.[199] The FCC may assume that Congress is incapable of legislating, but courts, in assessing the availability of less restrictive means, will not make that assumption.

The Federal Trade Commission also has long enforced public disclosures by companies through its Section 5 authority over deceptive practices[200]—even when such disclosures are required by law, rather than being purely voluntary. For example, enforcement of privacy policies is required by California law.

First Amendment doctrine does not ask whether the specific agency at issue could find less restrictive alternatives to regulation (within its existing authority), but whether *government* (in general) could find less restrictive means for addressing the government interest at issue.[201] But, as a practical matter, the fact that the FCC has bundled transparency mandates with prescriptive regulation, even after suggesting that transparency alone might suffice, will probably cause a court to be more skeptical of the FCC's claim that it had adequately considered less restrictive approaches than burdening speech.

---

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

197. *Id*. at 668 n.9 (Silberman, J., concurring in part and dissenting in part).

198. *See* 47 U.S.C. §§ 502, 503(b) (2012).

199. *See* Communications Act of 2006, H.R. 5252, 109th Cong. (2006), *available at* https://www.congress.gov/bill/109th-congress/house-bill/5252.

200. Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2011).

201. Brown v. Entm't Merchs. Ass'n, 564 U.S. ___, 131 S. Ct. 2729, 2738 (2011).

2. User Education

Disclosing corporate practices is a critical first step towards enabling the market to adequately discipline the acts and practices of ISPs, but such disclosures are useful only if users and market watchdogs are able to comprehend them. Thus, concurrent with transparency obligations, government could support user education and digital literacy aimed at helping consumers understand ISPs' disclosures, engage with them meaningfully, and make informed choices that correspond with their personal preferences — such as switching to another broadband provider or taking advantage of user empowerment technologies. Indeed, if American consumers are adequately informed and able to meaningfully express and adapt their user preferences, there would seem to be little if any reason to prohibit the sort of user-directed prioritization agreements discussed by AT&T in its Open Internet comments. In fact, several net neutrality proponents have admitted that they would not find such agreements to be objectionable.[202] Yet the FCC refused to recognize any kind of legal safe harbor for such user-directed prioritization.[203]

How government should go about promoting user education and digital literacy is open to debate. The FCC has repeatedly emphasized the idea that consumers need to be better informed about their online practices, but it is sometimes difficult to say how best to engage with uninformed users, who often simply do not see the appeal of IP-based services. It is comparatively simple to develop computer classes and implement them as part of mandatory primary school curricula, but members of the older generations are much harder to reach. It may even be that cultivated, closed-environment Internet spaces and services — akin to AOL's platform during the 1990s — are the most effective way to get seniors and other older users onto the Internet for the first time. As long as those users are adequately informed about the details of the process, there seems to be little reason such non-neutral Internet offers should be prohibited.

---

202. *See* Comments of AT&T Services, Inc., In the Matter of Protecting & Promoting the Open Internet, GN Docket No. 14–28, 27–30 (July 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521679206 (discussing the difference between non-user-directed and user-directed prioritization, and noting that CDT and Free Press had both admitted that the latter would be permissible).

203. *See* 2015 Order at 19,756-57, para. 139.

3. User Empowerment Technologies

The Supreme Court has consistently considered user-empowerment technologies to be less restrictive alternatives to regulation of speech when doing First Amendment analysis.[204] Filters and other technological-based solutions—such as age verifications—were found to be less restrictive alternatives to content-based restrictions on Internet pornography.[205] In this context, that could mean encouraging the development and adoption of technological tools to bypass unreasonable network management or better scrutinize it, which could be less restrictive methods to promote the government's goals on net neutrality than the proposed rules. The government has a duty, under both strict and intermediate scrutiny, to at least explore these other less restrictive methods.

Such tools could include:

- Tools that allow users to circumvent unreasonable network management, such as encryption, proxies or VPNs;
- Tools that allow users to measure network performance and, through crowdsourcing data from multiple users, identify patterns in undisclosed non-neutral network management; and
- Tools similar to those proposed by AT&T[206] that would allow users to set their preferences on prioritization, so that non-neutral treatment is truly directed by users, not broadband companies. Such tools could serve as the front-end user interface for a behind-the-scenes market for prioritization, where services marked important by the user are prioritized, at a price, while those that are ranked lower in importance travel more cheaply.

4. Enforcement of Existing Laws

Net neutrality is usually depicted as an alternative to antitrust law. In fact, a panoply of other existing laws could address the kinds of

204. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 667 (2004); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000).

205. *See id.*

206. *See supra* note 201 and accompanying text.

concerns raised by net neutrality advocates — if such harmful conduct actually materialized.

i. Antitrust

One way the government can protect consumers is through rigorous enforcement of the antitrust laws. For example, in the computer and telecommunications context, the United States brought a successful claim against Microsoft for an attempt to monopolize the consumer web browser application market (by unseating the then-prominent Netscape Navigator and shifting consumers towards its own Internet Explorer).[207] If a company with similar market power as Microsoft—say, a mobile OS developer, or an ISP —tried to use its strategic vantage point in one market to monopolize an adjacent market—say, a type of application, or a video-streaming service—the government (as well as private plaintiffs) should be equally able to utilize these laws to investigate (and, if necessary, litigate) these types of actions and ensure that they do not harm consumer welfare.

But even violations of antitrust laws cannot be "predicated solely on protected speech."[208] One of the major advantages of antitrust is that any enforcement action must be built upon a factual record that is able to stand up to court scrutiny. While even antitrust law must withstand strict scrutiny, it is much more likely to do so because the record can establish a compelling, non-conjectural government interest, and the chosen remedies can be narrowly tailored to the interests and parties at hand.

ii. FTC Section 5

Additionally, even if a claim could not fairly be made for an attempt to monopolize, the government could also use the Federal Trade

207. United States v. Microsoft Corp., 253 F.3d 34, 50-51 (D.C. Cir. 2001) (upholding monopolization claim under the Sherman Act).

208. Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., 175 F.3d 848, 860 (10th Cir. 1999); Eugene Volokh & Donald Falk, *First Amendment Protection for Search Engine Search Results* 20 (Working Paper, Apr. 20, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2055364 ("[A]ntitrust law itself, like other laws, is limited by the First Amendment, and may not be used to control what speakers say or how they say it.").

Commission Act[209] to address four kinds of conduct not covered by the antitrust laws:

1. Unfair practices—those that cause substantial injury to consumers without countervailing benefit, and that consumers themselves cannot reasonably avoid;
2. Deceptive practices, including material omissions;
3. Enforcement of network management disclosures required by the FTC;
4. Enforcement of codes of conduct developed by self-regulatory or multi-stakeholder processes.[210] At least in the similarly complicated area of how to regulate how Internet companies use consumer data, the Obama Administration has lauded such processes as uniquely capable of addressing "Internet policy challenges."[211] Such processes are no less viable in this arena, and have long been proposed as superior alternatives to regulation.[212]

FTC unfairness enforcement actions could also help protect edge providers and consumers if there are times when an ISP privileges its own content with faster lanes than those provided to a competitor. Unlike a broad net neutrality rule against all prioritization, a limited decision

209. *See* Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012).

210. *See* 15 U.S.C. § 45.

211. *See* WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL ECONOMY 23 (Feb. 2012), *available at* http://www.whitehouse.gov/sites/default/files/privacy-final.pdf ("The Administration supports open, transparent multistakeholder processes because, when appropriately structured, they can provide the flexibility, speed, and decentralization necessary to address Internet policy challenges. A process that is open to a broad range of participants and facilitates their full participation will allow technical experts, companies, advocates, civil and criminal law enforcement representatives responsible for enforcing consumer privacy laws, and academics to work together to find creative solutions to problems. Flexibility in the deliberative process is critical to allowing stakeholders to explore the technical and policy dimensions—which are often intertwined—of Internet policy issues.").

212. *See, e.g.*, Philip J. Weiser, *The Next Frontier for Network Neutrality* (working paper 2007), *available at* http://siliconflatirons.com/documents/publications/neutralityLaw/WeiserNextFrontier.pdf.

against an anti-competitive prioritization agreement would be narrowly tailored and would not have an excessive burden on speech.

The FTC's targeted enforcement of deceptive promises would augment contractual enforcement, and false statements of fact in business dealings do not have First Amendment protection.[213] Contrary to popular presumption that the FTC may only punish affirmative deceptions, the FTC's 1983 Deception Policy Statement treats affirmative deceptive statements and deceptive omissions equally: they are equally actionable *if they are material*.[214] Thus, the FTC may be able to require disclosures even if the FCC does not, for example, regarding speed, non-neutral network management, blocking, etc. The FTC would *not* need to establish any harm to consumers, because materiality functions as an analytical proxy for consumer injury.[215]

5. More Carefully Targeted Legislation

A legislative compromise on net neutrality that had Congressional findings of market power and anticompetitive practices along with a narrowly tailored set of remedies could withstand First Amendment scrutiny where the current Order does not:

213. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.") (internal citation omitted).

214. FEDERAL TRADE COMMISSION, FTC POLICY STATEMENT ON DECEPTION (1983), *available at* http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception.

215. *Id*. ("[T]he representation, omission, or practice must be a 'material' one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary.").

- Begin with a transparency mandate, and enforce violations on the logic of the 2008 order: if a practice isn't reasonable, an ISP will not want to be caught doing it.[216]
- Focus rules governing conduct on demonstrated problems: regulating *ex post* rather than *ex ante* helps both to ensure that the government has established an interest *in that particular case* and also that the remedy is narrowly tailored. A presumption of lawfulness would significantly help assure that the rules do not burden more speech than necessary to achieve government's interest.[217]
- Exempt user-directed prioritization from the scope of any rules, such that regulation would more clearly focus on conduct motivated by potential rent-seeking by broadband providers and where user empowerment technologies fall short.[218]
- Emphasize reliance on multi-stakeholder processes for developing consensus-driven codes, as Denmark, Norway, and Sweden have done.[219] If it is voluntary, there is no state action problem.

---

216. *See* Free Press and Public Knowledge, File No. EB-08-IH-1518, WC Docket No. 07-52 (Aug. 1, 2008), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf.

217. *See* Hal Singer, *Has the FCC Chairman Solved the Net Neutrality Quagmire?*, FORBES (Jan. 31, 2014), http://www.forbes.com/sites/halsinger/2014/01/31/by-proposing-adjudication-chairman-wheeler-may-have-solved-the-net-neutrality-quagmire/.

218. *See* Int'l Ctr. For Law & Econ. & TechFreedom, *Protecting and Promoting the Open Internet*, ICLE & TechFreedom Policy Comments, (July 17, 2014), *available at* http://apps.fcc.gov/ecfs/document/view;jsessionid=GLnZTycdL5458dGZnGhShpG2zPX8c1K74X8lG7pNW5sQSXFFzXkZ!-448120223!-58662085?id=7521706145 (describing various pro-consumer business models that would be deterred or foreclosed by net neutrality regulations).

219. *See* Roslyn Layton, *When It Comes to Net Neutrality, the Nordic Model Is the Best Approach*, TECH POLICY DAILY (July 1, 2014; 6:00 AM), *available at* http://www.techpolicydaily.com/communications/comes-net-neutrality-nordic-model-best-approach/.

6. Lowering Switching Costs among Broadband Providers

The FCC dismisses the potential for competition among broadband providers to discipline network management, and thus claims that each broadband provider has a "terminating access monopoly,"[220] but this simply is not the case. The vast majority of Americans live in areas with two or more broadband providers able to offer speeds of at least 10 Mbps downstream and 1.5 Mbps upstream.[221] As noted above, the evidence suggests that cable providers face growing competition from "telcos," who have been investing massively in upgrading their old DSL systems to next-generation VDSL2 fully capable of providing at least the 25 Mbps the FCC has (arbitrarily) declared the minimum viable speed.[222] And these statistics don't even take into account mobile broadband providers, which lead the world in LTE deployment and capital expenditures per capita.[223] Mobile carriers have been pouring billions of dollars into deploying new towers and upgrading their wireless networks. If the FCC

---

220. *See* Protecting and Promoting the Open Internet, 79 Fed. Reg. 37447, 37453 (proposed May 15, 2014) (to be codified at 47 C.F.R. § 8), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1.pdf.

221. INDUS. ANALYSIS & TECH. DIV., WIRELINE COMPETITION BUREAU, FCC, *Internet Access Services: Status as of December 31, 2013*, 9 (Oct. 2014) *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-329973A1.pdf (showing 95% of U.S. census tracts to have two or more fixed broadband providers capable of offering 10 Mbps upstream and 1.5 Mbps downstream speeds, but noting that each particular household may not have access to the same number of providers, and thus that it is not a true measure of competition).

222. *See* TechFreedom, Response to Oppositions to Petition, *In the Matter of Applications of Comcast Corp. and Time Warner Cable, Inc. For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57 (Dec. 23, 2014), *available at* http://docs.techfreedom.org/TF_Reply_to_ComcastTWC_Petitions.pdf.

223. *See, e.g.*, Seventeenth Annual Report on the State of Competition in Mobile Wireless, *Written Ex Parte Communication*, WT Docket No. 13–135, 1–2 (Oct. 2, 2014) (internal citation omitted), *available at http://apps.fcc.gov/ecfs/document/view?id=60000870404* ("In 2013, U.S. carriers spent about four times more on network infrastructure per subscriber than the rest of the world spent . . . . The U.S. tops the charts in LTE subscribers and service."). *See also* FCC, *supra* note 193, at 10 (showing 98% of U.S. census tracts to have two or more providers capable of offering 10 Mbps upstream and 1.5 Mbps downstream speeds if you include mobile).

is able to free up enough spectrum, these carriers could soon be offering residential broadband via wireless local loops, and that is a viable competitor to wireline broadband for many users who don't do much data-intensive online activity (like streaming video). Fixed wireless broadband is also a viable competitor for users who are very price conscious, prefer the convenience of paying a single carrier for both fixed and mobile broadband needs, and/or just dislike the local cable and telephone companies and want to stick it to them by buying service from one of their competitors.

As more competitors enter each market, consumers may increasingly switch broadband providers—perhaps to take advantage of certain incentives[224]—and such churn in the market will drive all providers to try to up their game, by reducing prices, increasing quality, and otherwise trying to differentiate their services from those of their competitors, all to the benefit of consumers. However, particularly in the wireline context, the FCC should explore whether there are ways to lower switching costs. The power the Commission has claimed under Section 706 to do anything that promotes broadband is so sweeping that surely it would include, for example, regulating early termination fees on broadband contracts to ensure that they are not anti-competitive. Or, a broadband provider could be required, upon announcing any significant changes in its network management policy, to let its customers cancel their contracts without penalty within, say, a two-month window.

Whatever the merits, on net, of such regulations (and they would surely have costs as well as benefits), they would clearly be less restrictive (in First Amendment terms) than regulations on network management because they would focus on the underlying economics of the market, rather than regulating the editorial discretion of broadband providers. Other interventions could be less restrictive and perhaps more effective.

---

224. For example, T-Mobile and other U.S. carriers have recently begun offering to pay the early termination fees for customers who are willing to switch over to their service. *See, e.g.*, *Get the Phone You Want Today. We'll Pay Your Early Termination Fees*, T-MOBILE, http://www.t-mobile.com/offer/switch-carriers-no-early-termination-fee.html (last visited Jan. 7, 2014). Sprint has gone one step further in trying to lure customers away from the competition, not just promising to buy out existing contracts, but also offering to cut customers' Verizon or AT&T bills in half. *See*, *Sprint Presents the Cut Your Bill in Half Event!*, SPRINT, https://halfprice.sprint.com (last visited Jan. 14, 2015).

Imagine a government-run website—say, BroadbandChoice.gov—that allows users to compare broadband services available at their address along with the speeds and other dimensions of service they offer. This website could greatly increase the effectiveness of the transparency rule and reduce the need for no-blocking and non-discrimination rules. This is simply one way of implementing the kind of "smart disclosure" proposed by Cass Sunstein.[225]

7. Promoting Broadband Deployment

The federal government could work to promote broadband deployment, which may help reduce consumer harms by promoting more competition. Market competition is the best discipline.

For example, Congress could:[226]

- Promote the IP transition as fast as possible to accelerate telco deployment of faster service. Telcos still spend billions of dollars annually maintaining their legacy networks, when that money could be going towards fiber optics and other technologies with greater longevity.[227]
- Promote new entry into the wireline broadband market,[228] such as by extending equal pole attachment rights to broadband-only providers.[229]

225. Sunstein, *supra* note 195.

226. *See* Protecting and Promoting the Open Internet, *TechFreedom & ICLE Legal Comments, GN Docket* No. 14–28, 96–103 (July 17, 2014), *available at* http://www.laweconcenter.org/images/articles/tf-icle_nn_legal_comments.pdf (discussing various legal options the FCC has on the net neutrality issue).

227. *See, e.g.*, Matt Hamblen, *Group Challenges Regs Requiring Phone Companies to Maintain Copper Networks: AT&T Has Asked the FCC to Permit Trials for a Move to Wireless and IP-Only*, COMPUTERWORLD (Oct. 8, 2013), http://www.computerworld.com/article/2485718/wireless-carriers/group-challenges-regs-requiring-phone-companies-to-maintain-copper-networks.html (quoting IIA Honorary Chairman and former congressman Rick Boucher, who stated that "[m]ore than half of the $154 billion spent by established telephone companies from 2006 to 2011 went to 'outdated' copper-based networks").

228. *See, e.g.*, Google, *Google Fiber City Checklist*, 7 (Feb. 2014), *available at* https://fiber.storage.googleapis.com/legal/googlefibercitychecklist2-24-14.pdf (providing a checklist of things cities can do to make them prime candidates for fiber deployment).

- Build smart infrastructure, starting with Dig Once policies of the sort described in President Obama's 2012 Executive Order: Accelerating Broadband Infrastructure Deployment.[230]
- Subsidize "Homes with Tails" to lower deployment costs over the last mile.[231]
- Open up more spectrum for commercial wireless broadband services to increase both network coverage and capacity.[232]
- Fund development of new wireless broadband technologies, like millimeter wave frequencies, spectrum sharing techniques, and HetNets.[233]

8. Subsidizing Neutral Networks

As discussed above, through the Solomon Amendment, the Federal government encouraged law schools to allow military recruiters on their campuses, despite the military's ban on gay soldiers.[234] The Court upheld this subsidization of speech even though it affected the way that

229. *See* 47 U.S.C. § 224(a)(4) (2012) ("Pole attachment [means] any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.").

230. *See* Fed. Highway Admin., Dep't of Transp., *Policy Brief: Minimizing Excavation Through Coordination* (Oct. 2013), *available at* http://www.fhwa.dot.gov/policy/otps/policy_brief_dig_once.pdf.

231. Derek Slater, *Homes with Tails: What if You Could Own Your Internet Connection?* (New Am. Found. Wireless Future Program Working Paper No. 23, 2008), *available at* http://www.newamerica.net/files/HomesWithTails_wu_slater.pdf.

232. *See, e.g.*, Phil Goldstein, *Rubio Introduces Legislation to Free Up Federal Spectrum for Commercial Use*, FIERCE WIRELESS (June 12, 2014), http://www.fiercewireless.com/story/rubio-introduces-legislation-free-federal-spectrum-commercial-use/2014-06-12 (describing a recent proposal to reallocate up to 200 MHz of government-owned spectrum for commercial use and extend the FCC's spectrum auction authority starting in 2018).

233. *See, e.g.*, Lou Frenzel, *Millimeter Waves Will Expand the Wireless Future*, ELECTRONIC DESIGN (Mar. 6, 2013), http://electronicdesign.com/communications/millimeter-waves-will-expand-wireless-future (describing millimeter waves and various other prospective wireless technologies).

234. *See supra* notes 97–101 and accompanying text.

law schools exercised their editorial discretion.[235] Similarly, if the government fears that market forces will not discipline non-neutral behavior, it could subsidize more neutral networks.

The FCC has already attempted to do this by imposing conditions similar to net neutrality on the C and D blocks of spectrum in the lower 700 MHz band, which was auctioned several years ago.[236] This may well be unwise from a policy perspective, especially if it causes auctions to fail, but from a constitutional perspective, it constitutes yet another less restrictive alternative to regulation. (The subsidy scheme discussed above—giving away spectrum in exchange for requiring either content filtering or at least age verification—would have infringed on the First Amendment rights of *users*,[237] while subsidizing neutral networks would instead involve bribing ISPs to cede their editorial discretion.)

Similarly, the Federal government could condition Universal Service or other broadband subsidies on compliance by the broadband provider (fixed or mobile) with net neutrality requirements. Congress could also amend federal pole attachment rules, and states could amend their own rules to deny pole statutory attachment rights (at reasonable, non-discriminatory rates)[238] to broadband providers that do not comply with the FCC's net neutrality rules—thus leaving them at the mercy of the utilities that own the poles broadband providers often need to make deployment cost-effective.

Finally, the federal, state, and local governments could subsidize the construction of government-owned broadband networks run on a neutral basis, or backhaul infrastructure made available to private retail networks on condition of neutrality. Government-run networks raise a host of policy[239] and free-speech concerns,[240] but funding alternative

---

235. Rumsfield v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 64 (2006).

236. *See* Sarah Leggin, *Condition-Free Auctions Promote Economic Efficiency and Successful Outcomes*, FREE STATE FOUNDATION BLOG (Nov. 25, 2013), http://freestatefoundation.blogspot.com/2013/11/condition-free-auctions-promote.html (relaying Free State Foundation President Randy May's thoughts in decrying the open access conditions imposed by the FCC on the C and D block licenses in the lower 700 MHz band auction).

237. *See supra* Part III.B.8.

238. 47 U.S.C. § 224 (2012).

239. *See, e.g.*, Int'l Ctr. For Law & Econ. & TechFreedom, *Pleading Cycle Established for Comments on Electric Power Board and City of Wilson Petitions,*

speech mechanisms is certainly a less restrictive alternative to dictating how private speech mechanisms operate.

CONCLUSION

The debate over the First Amendment is essentially a conflict of visions. While some think that we need a new First Amendment for the digital age, we think the First Amendment of the Constitution and existing case law will serve just fine in this century. Net neutrality regulation is not required by the First Amendment; if anything, the First Amendment actually forbids many versions of net neutrality (including the forms proposed thus far). The FCC has not yet established a significant problem in the marketplace, nor has it pursued less restrictive alternatives. Instead, it has offered an unconstitutional solution in search of largely conjectural problem.

Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, COMMENTS OF ICLE & TECHFREEDOM, (Aug. 29, 2014), http://apps.fcc.gov/ecfs/document/view?id=7521826211 (describing the various dangers presented by government-run broadband networks).

240. Enrique Armijo, *Government-Provided Internet Access: Terms of Service as Speech Rules* (Elon University Law Legal Studies Research Paper No. 2014-04, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457231.