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## The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carrier Regulation

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Fred B. Campbell, Jr.\*

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## I. INTRODUCTION

Is watching Netflix on the broadband Internet more like (A) watching cable television or (B) talking on the telephone? Common sense suggests the answer is “A,” the court that overturned the previous net neutrality rules<sup>1</sup> chose “A,”<sup>2</sup> and the First Amendment demands “A.”<sup>3</sup> The Federal Communications Commission (FCC) nevertheless chose “B” in its *Second Internet Order*,<sup>4</sup> which declared<sup>5</sup> that broadband In-

1. *See generally* Preserving the Open Internet, Report and Order, GN Docket No. 09-191, FCC 10-201, 25 FCC Rcd. 17905 (Dec. 23, 2010) [hereinafter *First Internet Order*] (adopting the initial net neutrality rules), *aff'd in part, rev'd in part sub nom.*, Verizon v. FCC, 740 F.3d 623, 636–42 (D.C. Cir. 2014).

2. *See Verizon*, 740 F.3d 623.

3. *See* discussion *infra* Part III.

4. *See* Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling and Order, GN Docket No. 14-28, FCC 15-24, 30 FCC Rcd. 5601 (Mar. 12, 2015) [hereinafter *Second Internet Order*].

5. *Id.* at para. 331.

ternet access services are “telecommunications services”<sup>6</sup> governed by the common carrier regulations in Title II of the Communications Act of 1934.<sup>7</sup> It gave no consideration to “A”—whether broadband Internet access is more like a “cable service.”<sup>8</sup> The FCC did not consider the Internet’s mass media capabilities at all.<sup>9</sup>

If the FCC had expressly acknowledged that the Internet offers communications capabilities that are functionally equivalent to the printing press, mail carriage, newspaper publishing, over-the-air broadcasting, and cable television combined,<sup>10</sup> it would have been obvious that classifying broadband Internet service providers (ISPs) as common carriers is an unconstitutional abridgment of the freedom of the press.<sup>11</sup> The FCC’s contrary determination that the Internet is equivalent to plain old telephone service gave traditional media access theorists and their net-neutrality heirs the victory they could not achieve at the Supreme Court, which has held that imposing common-carriage obligations on mass media violates the First Amendment.<sup>12</sup>

This Article concludes their victory will be short-lived. Like all other means of publishing and disseminating mass media communications, broadband Internet access service is a part of the “press” that the First Amendment protects from common carriage regulation,<sup>13</sup>

6. *Id.* at para. 308; *see also* 47 U.S.C. § 153(53) (2010) (defining “telecommunications service”).

7. 47 U.S.C. §§ 201–21 (1934). The FCC also concluded that the Internet is functionally equivalent to the public switched telephone network, because telephone numbers and Internet protocol addresses both “allow the public to send or receive messages to or from anywhere in the nation.” *See Second Internet Order*, *supra* note 4, para. 391 (quoting Implementation of Sections 3(n) & 332 of the Commc’ns Act, Second Report and Order, GN Docket No. 93-252, FCC 94-31, 9 FCC Rcd. 1411, para. 59 (Mar. 7, 1994) [hereinafter *CMRS Forbearance Order*]).

8. *See* 47 U.S.C. § 153(8) (2010) (defining “cable service”).

9. The *Second Internet Order* does not contain the term “mass media,” and its First Amendment analysis does not discuss the difference between mass media and common carrier communications. *Second Internet Order*, *supra* note 4, at paras. 544–59.

10. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

11. *See, e.g., Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 353 (2010) (“There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations.”).

12. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (indicating that compelling a newspaper to print that which it would not otherwise print is unconstitutional).

13. *See, e.g., Citizens United*, 558 U.S. at 353–54 (“The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.”); *see also* *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948) (“We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”).

and like all other press, ISPs have a right to exercise editorial discretion over the content they choose to disseminate.<sup>14</sup> The FCC's new net neutrality rules violate that right under any applicable level of First Amendment scrutiny by totally banning ISPs from exercising any degree of editorial discretion.

Part I of this Article briefly summarizes the FCC's historical approach to Internet regulation, the theories that drove the classification of broadband Internet access as a common carrier service, and the net neutrality<sup>15</sup> rules the FCC adopted in its *Second Internet Order*. Part II describes Supreme Court precedent holding that the dissemination of mass communications is entitled to First Amendment protection, explains the constitutional distinction between common carrier and mass media communications, and discusses the implications of denying First Amendment protection to ISPs. Part III explains why a reviewing court should apply strict scrutiny to the FCC's net neutrality rules. Finally, Part IV argues that the *Second Internet Order* cannot withstand either strict or intermediate scrutiny under the First Amendment.

## II. COMMUNICATIONS REGULATION AND NET NEUTRALITY

The Communications Act defines the subjects of its regulation in terms of particular communications services—e.g., “information service”<sup>16</sup> (governed by Title I), “telecommunications service”<sup>17</sup> (governed by Title II<sup>18</sup>), “mobile service”<sup>19</sup> (governed by Title III), and “cable service”<sup>20</sup> (governed by Title VI<sup>21</sup>)—not particular communications facilities or their operators. This distinction is express with respect to the definition of “telecommunications service,” which applies to the offering of “telecommunications” for a fee “regardless of the facilities used.”<sup>22</sup> As a result, the same communications facilities can be used to offer multiple communications services that are subject to different

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14. See discussion *infra* Part III.

15. The FCC refers to the rules it adopted in its *First* and *Second Internet Orders* as “Internet openness,” but they are popularly known as “net neutrality” rules. See *Verizon v. FCC*, 740 F.3d 623, 628–29 (D.C. Cir. 2014).

16. 47 U.S.C. § 153(24) (2010).

17. *Id.* § 153(53).

18. *Id.* § 153(51) (“[A] telecommunications carrier shall be treated as a common carrier only to the extent it is engaged in providing telecommunications services . . .”).

19. *Id.* § 153(34).

20. *Id.* § 153(8).

21. *Id.* §§ 521–61 (1984).

22. *Id.* § 153(53).

regulations. For example, Verizon uses its fiber-to-the-home facilities to provide voice, video, and broadband Internet services.<sup>23</sup>

The FCC's approach to Internet regulation was initially developed solely by reference to the common-carrier provisions in Title II that govern plain old telephone service (POTS)<sup>24</sup> because data processing services once relied on facilities provided by the public switched telephone network.<sup>25</sup>

### A. Regulation of Plain Old Telephone Service

Because POTS was long thought to be a natural monopoly, telephone service was typically a state-sponsored monopoly<sup>26</sup> when the Communications Act of 1934 (1934 Act) was adopted.<sup>27</sup> Congress chose to constrain this monopoly through Title II,<sup>28</sup> which requires that common carriers provide communications services at reasonable rates<sup>29</sup> and without unreasonable discrimination.<sup>30</sup> In the monopoly era, the reasonableness of common carrier communications services was determined through the tariff-filing requirement in Section 203<sup>31</sup>—the “centerpiece” of the Title II regulatory scheme<sup>32</sup>—which mandates that common carriers file their rates with the FCC and charge only their filed rates.<sup>33</sup> Much of Title II and the 1934 Act's

23. See Wireline Competition Bureau Short Term Network Change Notification Filed by Verizon New England Inc. d/b/a Verizon Mass., Report Nos. NCD-2365, 2372, 2373, 2014 WL 3547722, at \*2 (July 14, 2014).

24. See *Bell Atl. Network Servs., Inc. v. Covad Commc'ns Grp., Inc.*, 92 F. Supp. 2d 483, 487 (E.D. Va. 2000), *aff'd*, 262 F.3d 1258 (Fed. Cir. 2001) (“Common [non-mobile] residential telephone service is known as ‘POTS’ (‘Plain Old Telephone Service’).”).

25. See, e.g., *In re Core Commc'ns, Inc.*, 455 F.3d 267, 270 (D.C. Cir. 2006) (“Before high-speed broadband connections (such as cable modem and digital subscriber line (DSL) service) became widely available, consumers generally gained access to the Internet through ‘dial-up’ connections provided by local telephone companies.”).

26. See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (“Until the 1990's, local phone service was thought to be a natural monopoly” to which “States typically granted an exclusive franchise . . .”).

27. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 235 (1994) (Stevens, J., dissenting, joined by Blackmun & Souter, JJ.) (“At the time the [1934] Act was passed, the telephone industry was dominated by the American Telephone & Telegraph Company (AT&T) and its affiliates.”).

28. See *id.* (noting Title II was “clearly a response” to the market dominance of AT&T).

29. 47 U.S.C. § 201 (1938).

30. 47 U.S.C. § 202 (1989).

31. 47 U.S.C. § 203 (1990).

32. See *MCI Telecomms. Corp.*, 512 U.S. at 220.

33. See *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). Under the “filed rate doctrine,” once a tariff is approved by the governing regulatory agency, it is deemed reasonable per se, which protects the carrier from liability. See *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 19 (2d Cir. 1994).

overall procedural and administrative provisions are premised upon this tariff-filing requirement.<sup>34</sup>

When the FCC began permitting competitive entry into telephone markets in the 1970s,<sup>35</sup> it discovered that tariff filing promotes strategic behavior and inhibits innovation in markets that are subject to competition.<sup>36</sup> It found competitive communications carriers had "channeled considerable efforts toward delaying each other's attempts to implement price and service innovation [through strategic objections to tariff filings] rather than attempting primarily to improve upon their own performance in the marketplace."<sup>37</sup> The FCC ultimately concluded, "[I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power," and "[R]emoving or reducing regulatory requirements also tends to encourage market entry [i.e., deployment] and lower costs."<sup>38</sup>

34. See *MCI Telecomms. Corp.*, 512 U.S. at 230-31 (citing 47 U.S.C. §§ 201-28, 401-16).

35. See *Microwave Commc'ns, Inc. for Construction Permits to Establish New Facilities in the Domestic Public Point-to-Point Microwave Radio Service at Chi., Ill., St. Louis, Mo., and Intermediate Points*, Docket No. 19509, FCC 69-870, 18 F.C.C.2d 953 (Aug. 13, 1969).

36. See *Sw. Bell Corp. v. FCC*, 43 F.3d 1515, 1518 (D.C. Cir. 1995). The FCC made this determination in a series of rulemakings, collectively known as the *Competitive Carrier* proceedings, in which the FCC gradually deregulated non-dominant carriers. See generally *Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor*, Notice of Inquiry and Proposed Rule Making, CC Docket No. 79-252, FCC 79-599, 77 F.C.C.2d 308 (Sept. 27, 1979) [hereinafter *Notice of Proposed Rule Making*]; First Report and Order, Docket No. 79-525, FCC 80-629, 85 F.C.C.2d 1 (Nov. 28, 1980); Further Notice of Proposed Rule Making, CC Docket No. 79-252, FCC 80-742, 84 F.C.C.2d 445 (Jan. 16, 1981); Second Further Notice of Proposed Rule Making, 47 Fed. Reg. 17308-01 (Apr. 22, 1982); Second Report and Order, CC Docket No. 79-252, FCC 82-350, 91 F.C.C.2d 59 (July 29, 1982); Order and Reconsideration, CC Docket No. 79-252, FCC 83-69, 93 F.C.C.2d 54 (Mar. 21, 1983); Third Further Notice of Proposed Rule Making, 48 Fed. Reg. 28,292-03 (June 21, 1983); Third Report and Order, 48 Fed. Reg. 46,791-01 (Oct. 14, 1983); Fourth Report and Order, CC Docket No. 79-252, FCC 83-481, 95 F.C.C.2d 554 (Oct. 19, 1983), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); Fourth Further Notice of Proposed Rule Making, CC Docket No. 79-252, FCC 84-82, 96 F.C.C.2d 922 (1984); Fifth Report and Order, CC Docket No. 79-252, FCC 84-394, 98 F.C.C.2d 1191 (Aug. 8, 1984); Sixth Report and Order, CC Docket No. 79-252, FCC 84-566, 99 F.C.C.2d 1020 (Nov. 21, 1984), *rev'd*, *MCI Telecomm. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

37. *Notice of Inquiry and Proposed Rule Making*, *supra* note 36, at para. 30.

38. See *CMRS Forbearance Order*, *supra* note 7, at paras. 173-74. The FCC determined that, in a competitive environment, requiring (or merely permitting) tariff filings can:

(1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore

Because non-dominant carriers are “presumptively unlikely to discriminate unreasonably,”<sup>39</sup> the FCC decided to eliminate tariff filing requirements for wireline common carriers that lack market power.<sup>40</sup>

In 1993, Congress codified the FCC’s detariffing policy for mobile telephony service (traditionally known as “CMRS” in FCC parlance).<sup>41</sup> As amended, Section 332 authorizes the FCC to forbear from applying any Title II provision (with the exception of Sections 201, 202, and 208) to CMRS providers if its application is unnecessary to meet the reasonableness requirements in Sections 201 and 202 or to protect consumers, and forbearance is otherwise consistent with the public interest.<sup>42</sup> In evaluating whether forbearance is consistent with the public interest, the FCC must consider “whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile service . . . .”<sup>43</sup> The FCC forbore from tariffing CMRS in 2004 based on its findings that: (1) CMRS services did not operate in a monopoly market, (2) the continued applicability of Sections 201, 202, and 208 on a case-by-case basis would be sufficient to protect consumers in the event there was a market failure, and (3) tariffing imposes costs that can themselves be a barrier to competition.<sup>44</sup>

That same year, the Supreme Court vacated the FCC’s non-mobile detariffing policy as inconsistent with the statutory scheme applicable to POTs:<sup>45</sup> “For better or worse, the Act establishes a rate-regulation, filed-tariff system for common-carrier communications, and the Commission’s desire ‘to “increase competition” cannot provide [it] authority to alter the well-established statutory filed rate requirements.’”<sup>46</sup> The Court determined only Congress had authority to shift the fundamental premise of the Communications Act from scrutinizing the reasonableness of tariff filings to promoting free-market competition.<sup>47</sup>

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be quickly matched by competitors; (3) impose costs on carriers that attempt to make new offerings; (4) simplify tacit collusion as compared to when rates are individually negotiated; and (5) impose administrative costs.

*Id.* at paras. 177–78.

39. *Id.* at para. 8.

40. *See id.*

41. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103–66, 107 Stat. 312, 392 (1993). Mobile telephony is commonly known as cellular service and is termed “commercial mobile service” in the Communications Act. *See* 47 U.S.C. § 332(d)(1) (1996).

42. 47 U.S.C. § 332(c).

43. *Id.* § 332(c)(1)(C).

44. *See CMRS Forbearance Order*, *supra* note 7, at para. 175.

45. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231–34 (1994).

46. *Id.* at 234 (quoting *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 135 (1990)).

47. *See id.*



Congress legislated that shift two years later in the Telecommunications Act of 1996 (1996 Act)<sup>48</sup> “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>49</sup> The 1996 Act adopted Section 10<sup>50</sup>—a provision “[c]ritical to Congress’s deregulation strategy”<sup>51</sup>—to require the FCC to forbear from the application of any Title II provision that meets a forbearance standard that is substantially the same as the standard in Section 332.<sup>52</sup> The broad scope of Section 10 indicates that Congress envisioned an era in which market-based competition completely supplants Title II regulation as the means of ensuring that telephony services are provided in a manner that is just and reasonable.

### B. Regulation of Data Processing and Dial-Up Internet Services

The desire to promote competition in the emerging computing market drove the FCC’s approach to regulating the dial-up Internet. In the 1960s, the Bell System began using mainframe computers to operate the public switched telephone network. During network peaks, the available computing capacity was allocated to network operations, but during off-peaks, Bell System computers had excess capacity. The Bell System wanted to enter the computing services market, in part to take advantage of its excess off-peak mainframe capacity. The FCC initiated a series of rulemakings known collectively as the *Computer Inquiries*<sup>53</sup> to address concerns that the Bell System could leverage its

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48. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

49. *See id.* at Preamble; *see also* AT & T Inc. v. FCC, 452 F.3d 830, 836 (D.C. Cir. 2006) (citing the Preamble as delineating the 1996 Act’s purpose).

50. 47 U.S.C. § 160 (1996).

51. AT & T Inc., 452 F.3d at 832.

52. 47 U.S.C. § 160(a)–(b).

53. *See generally* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, Final Decision and Order, Docket No. 16979, FCC 71-255, 28 F.C.C.2d 267 (Mar. 18, 1971), *aff’d in part sub nom.*, GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), Decision on Remand, Order, FCC 73-342, 40 F.C.C.2d 293 (Apr. 3, 1973); Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), Final Decision, Docket No. 20828, FCC 80-189, 77 F.C.C.2d 384 (May 2, 1980) [hereinafter *Computer III*], *on reconsideration*, Memorandum Opinion and Order, FCC 80-628, 84 F.C.C.2d 50 (Dec. 30, 1980) and Memorandum Opinion and Order on Further Reconsideration, FCC 81-481, 88 F.C.C.2d 512 (Oct. 30, 1981), *aff’d sub nom.*, Computer and Comm’n. Indus. Ass’n v. FCC, 693 F.2d 198 (D.C. Cir. 1982); Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), Report and Order, CC Docket No. 85-229, FCC 86-252, 104 F.C.C.2d 958 (June 16, 1986), *on reconsideration*, Memorandum Opinion and Order on Reconsideration, FCC 87-102, 2 FCC Rcd. 3035 (May 22, 1987), Memorandum Opinion and Order on Reconsideration, FCC 88-9, 3 FCC

state-sponsored monopoly over the public switched telephone network to dominate the emerging market for computing services.<sup>54</sup>

1. *Forbearance from Regulating Enhanced and Information Services*

In the *Computer I*<sup>55</sup> proceeding, the FCC declined to regulate “pure data processing services.”<sup>56</sup> It recognized, however, that the primary purpose of some computing services was to offer communications capabilities that were substitutable for the “pure communications services” (i.e., circuit-switched telephony) that had always been subject to Title II regulation.<sup>57</sup> The FCC concluded:

[T]he imposition of regulatory constraints over what is clearly a data processing hybrid offering, even though it contains communications elements which are an integral part of and an incidental feature thereof, would tend to inhibit flexibility in the development and dissemination of such valuable offerings and thus would be contrary to the public interest.<sup>58</sup>

On the other hand, “[H]ybrid services which are ‘essentially communications’ under the principles enunciated in [the FCC’s] Tentative Decision, warrant appropriate regulatory treatment as common car-

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Rcd. 1135 (Feb. 18, 1988) and Memorandum Opinion and Order on Further Reconsideration and Second Further Reconsideration, FCC 89-226, 4 FCC Rcd. 5927 (Aug. 1, 1989), *vacated in part*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Report and Order, CC Docket No. 85-229, FCC 87-103, 2 FCC Rcd. 3072 (May 22, 1987), *on reconsideration*, Memorandum Opinion and Order on Reconsideration, FCC 88-10, 3 FCC Rcd. 1150 (Feb. 18, 1988), *vacated in part*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceedings, Report and Order, CC Docket No. 90-368, FCC 90-415, 5 FCC Rcd. 7719 (Dec. 17, 1990), *on reconsideration*, Memorandum Opinion and Order on Reconsideration, FCC 92-14, 7 FCC Rcd. 909 (Jan. 24, 1992); Computer III Remand Proceedings: Bell Operating Co. Safeguards and Tier I Local Exch. Co. Safeguards, Report and Order, CC Docket No. 90-623, FCC 91-381, 6 FCC Rcd. 7571 (Dec. 20, 1991), *vacated in part and remanded*, California v. FCC, 39 F.3d 919 (9th Cir. 1994); Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs.; 1998 Biennial Review—Review of Computer III and ONA Safeguards and Requirements, Further Notice of Proposed Rulemaking, Report and Order, CC Docket Nos. 95-20 & 98-10, FCC 98-8, 13 FCC Rcd. 6040 (Jan. 30, 1998), Report and Order, FCC 99-36, 14 FCC Rcd. 4289 (Mar. 10, 1999), *on reconsideration*, Order, FCC 99-387, 14 FCC Rcd. 21628 (Dec. 17, 1999) [collectively, hereinafter *Computer Inquiries*].

54. See Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm’n Servs. & Facilities, Notice of Inquiry, Docket No. 16979, FCC 67-239, 7 F.C.C.2d 19, para. 2 (Mar. 1, 1967) (initiating the *Computer Inquiries*).

55. Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm’n Servs. & Facilities, Final Decisions and Order, Docket No. 16979, FCC 71-255, 28 F.C.C.2d 267 (Mar. 10, 1971) [hereinafter *Computer I*].

56. See Regulatory and Policy Problems Presented by the Interdependence of Computer and Comm’n Servs. & Facilities, Tentative Decision of the Commission, Docket No. 16979, 28 F.C.C.2d 291, paras. 41–42 (Apr. 3, 1970).

57. *Id.*

58. *Computer I*, *supra* note 55, at para. 31.

rier services under the Act.”<sup>59</sup> The FCC thus determined that hybrid communications would be subject to Title II, and hybrid data processing would not.<sup>60</sup> The distinction depended on the extent to which “the data processing service was merely incidental to the [traditionally regulated] message switching.”<sup>61</sup>

The FCC reversed course in its *Computer II* proceeding.<sup>62</sup> “After three attempts to delineate a distinction between communications and data processing services and failing to arrive at any satisfactory demarcation point,” the FCC concluded that “further attempts to so distinguish enhanced services would be ultimately futile, inconsistent with our statutory mandate and contrary to the public interest.”<sup>63</sup> The FCC realized that “over the long run, any attempt to distinguish enhanced services will not result in regulatory certainty . . . because a definitional structure is not independent of advances in computer technology and its concomitant market applications.”<sup>64</sup> The FCC also noted that—because resellers who offered hybrid communications services were subject to Title II regulation, but resellers who offered hybrid data processing were not—the distinction between hybrid services in *Computer I* reduced competition by encouraging resellers to structure their services in a manner designed to avoid Title II regulation<sup>65</sup>: “The record in this proceeding makes clear that even when the Commission’s stated policies are in favor of open entry, *the very presence of Title II requirements inhibits a truly competitive, consumer responsive market.*”<sup>66</sup>

The FCC concluded that “all enhanced computer services should be accorded the same regulatory treatment and that no regulatory scheme could be adopted which would rationally distinguish and classify enhanced services as either communications or data processing.”<sup>67</sup> This conclusion left the FCC with two mutually exclusive categories of service: (1) “basic” or (2) “enhanced,” and two regulatory options: (1) “subject all enhanced services to regulation, or (2) refrain

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59. *Id.* at para. 32.

60. *Id.*

61. Regulatory Policies Concerning Resale & Shared Use of Common Carrier Servs. & Facilities, Report and Order, Docket No. 20097, FCC 76-641, 60 F.C.C.2d 261, para. 20 (July 1, 1976) [hereinafter *Common Carrier Resale Order*].

62. *Computer II*, *supra* note 53, at para. 107 (citations omitted).

63. *Id.*

64. *Id.*

65. *Id.* at para. 109.

66. *Id.* (emphasis added). A contemporary example of this phenomenon is Google Fiber, which declined to provide telephone service in order to avoid the application of Title II. See Fred Campbell, *What Google Fiber Says About Tech Policy: Fiber Rings Fit Deregulatory Hands*, CBIT BLOG (Aug. 7, 2012), <http://cbit.org/blog/2012/08/what-google-fiber-says-about-tech-policy-fiber-rings-fit-deregulatory-hands/>, archived at <http://perma.unl.edu/9WRF-ELAG>.

67. See *Computer II*, *supra* note 53, at para. 113.

from regulating them *in toto*.”<sup>68</sup> The FCC chose the latter option. It would regulate only a common carrier offering of “basic transmission services” under Title II of the Act.<sup>69</sup>

“In defining the difference between basic and enhanced services,” the FCC concluded that basic transmission services were “traditional common carrier communications services and that enhanced services are not.”<sup>70</sup> Like the other definitional categories in the Communications Act, the FCC based this distinction on the service that was being offered.<sup>71</sup> The FCC saw no need to impose Title II obligations on enhanced services, regardless of “whether or not such services employ communication facilities in order to link the terminals of the subscribers to centralized computers.”<sup>72</sup> *Computer II* thus created a bright-line distinction between (1) the traditional offering of the capability to place telephone calls over the public switched network, which would continue to be regulated as a common carrier service under Title II; and (2) all other services, which would remain unregulated.<sup>73</sup> A similar distinction was subsequently adopted by the United States District Court for the District of Columbia as part of the consent decree (known as the Modified Final Judgment or MFJ<sup>74</sup>) entered in the anti-trust proceeding against the Bell System,<sup>75</sup> though the MFJ separately defined point-to-point communications as “telecommunications” and referred to basic service as “telecommunications service” and enhanced service as “information service.”<sup>76</sup>

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68. *Id.* at para. 114.

69. *See id.*

70. *See id.* at para. 127.

71. *See id.*

72. *See id.* at para. 119.

73. *See id.* at para. 127.

74. *See* Connect Am. Fund, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, GN Docket No. 09-51, FCC 11-13, 26 FCC Rcd. 4554, para. 47 (Feb. 8, 2011) [hereinafter *CAF Notice*] (“The 1982 consent decree, as entered by the court, was called the Modification of Final Judgment because it modified a 1956 Final Judgment against AT&T stemming from a 1949 antitrust lawsuit.”).

75. *See generally* United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff’d sub nom.*, Md. v. United States, 460 U.S. 1001 (1983), *modified sub nom.*, United States v. W. Elec. Co., Inc., 890 F. Supp. 1 (D.D.C. 1995), *vacated*, 84 F.3d 1452 (D.C. Cir. 1996) *amended sub nom.*, United States v. W. Elec. Co., Inc., 714 F. Supp. 1 (D.D.C. 1988), *aff’d in part, rev’d in part sub nom.*, United States v. W. Elec. Co., 900 F.2d 283 (D.C. Cir. 1990).

76. *See* Am. Tel. & Tel. Co., 552 F. Supp. at 229. In its decision adopting the MFJ, the court distinguished between two different types of information services: (1) “computer-related” services that involve no control by the carrier over the content of the information other than for transmission purposes (such as the traditional data processing services addressed in the *Computer Inquiries*), and (2) “electronic publishing” services in which the carrier controls both the transmission of the information and its content (such as news or entertainment). *Id.* at 229. The court (1) permitted AT&T to provide computer-related services but prohibited it from providing electronic publishing services, and (2) prohibited the Bell Systems

The 1996 Act added these terms from the MFJ to the Communications Act's definitional section.<sup>77</sup> After conducting an in-depth analysis of their meaning in response to a Congressional directive, the FCC concluded the Act's new definitions merely built upon the regulatory dichotomy that had been established previously in *Computer II* and the MFJ:

Congress intended the categories of "telecommunications service" and "information service" to be mutually exclusive, like the definitions of "basic service" and "enhanced service" developed in our *Computer II* proceeding, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment that divested the Bell Operating Companies from AT&T.<sup>78</sup>

The FCC determined that Congress "intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'"<sup>79</sup>

## 2. *Regulations Subsidizing the Dial-Up Internet*

The market for dial-up Internet access resulted from a combination of the FCC's common carrier resale policies and its decision to exempt enhanced and information services from paying access charges.

### a. *Common Carrier Resale*

The FCC regulated common carriers as offering fully integrated services directly to end users until it began promoting competition in the 1970s, when it forced common carriers offering telephony services to "unbundle" their integrated service offerings.<sup>80</sup> In the *Common Carrier Resale Order*, the FCC concluded that tariffs of monopoly wireline common carriers that restricted or prohibited resale of communications services and facilities were unjust and unreasonable under Sections 201 and 202 of the Act.<sup>81</sup> The FCC recognized that requiring common carriers to offer unbundled access to their facilities "would be a departure from the tradition in the communications industry where carriers owning and operating transmission facilities generally supply a complete communications service directly to the ul-

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local operating companies (or BOCs) from providing either form of information service. *Id.* at 178-90.

77. See 47 U.S.C. § 153(24), (50), (53) (2010).

78. Fed.-State Joint Bd. on Universal Serv., Report to Congress, CC Docket No. 96-45, FCC 98-279, 13 FCC Rcd. 21312, para. 13 (Oct. 22, 1998).

79. *Id.*

80. See *Common Carrier Resale Order*, supra note 61.

81. See *id.* at paras. 6, 13. In effect, the FCC required monopoly common carriers offering public switched telephone service to offer their underlying communications facilities for lease so that other entities could use them to self-provision or to provide their own service offerings directly to end users in competition with the monopolists.

timate user.”<sup>82</sup> It concluded the departure was justified at that time to enable entities who did not own transmission facilities to aid in meeting an “untapped, growing need for non-voice communications.”<sup>83</sup> The government-mandated leasing of common carrier lines at regulated rates had the effect of providing dial-up ISPs with the use of local business lines at artificially low prices that were subsidized by plain old telephone services.<sup>84</sup>

*b. Access Charge Exemptions*

For nearly seventy years, the government enabled affordable, local telephone service (a concept known as “universal service”), including in rural areas that would otherwise be uneconomic to serve, by maintaining the monopoly status of the Bell System and other (primarily rural) telephone companies and manipulating their rates to subsidize the costs of operating local telephone networks.<sup>85</sup> In very simplified terms,<sup>86</sup> this is how the subsidy worked: The FCC permitted AT&T to charge above-market rates for long distance services (e.g., phone calls that crossed state lines).<sup>87</sup> AT&T then privately agreed to pay a portion of its resulting excess profits (more than \$10 billion per year in the early 1980s<sup>88</sup>) to the Bell System and independent local telephone companies to enable them to charge below-market prices for local telephone service.<sup>89</sup> As a result of this “settlements” system,<sup>90</sup> subscribers who paid higher rates for long distance calls (primarily businesses in that era) subsidized approximately 80% of the cost of local telephone infrastructure.<sup>91</sup>

This settlements system ended in the early 1980s after the MFJ forced AT&T to divest its local operating companies in order to pro-

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82. *See id.* at para. 10.

83. *See id.* at para. 81. The *Common Carrier Resale Order* excluded MTS and WATS services, but the FCC extended the resale obligation to all public switched network services in 1980. *See* Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Servs., Report and Order, CC Docket No. 80-54, FCC 80-607, 83 F.C.C.2d 167, para. 1 (Oct. 21, 1980).

84. *See infra* subsection II.B.2.b (describing how the FCC’s universal service policies subsidized the cost of local telephone infrastructure).

85. *See CAF Notice, supra* note 74, at para. 46.

86. Regulators also required local telephone companies to subsidize rural subscribers by requiring them to charge rural and urban subscribers the same rates, even though the cost of providing service in rural areas was higher (a concept known as “rate averaging”). *See id.*

87. *See id.*

88. MTS & WATS Mkt. Structure, Third Report and Order, CC Docket No. 78-72, FCC 82-579, 93 F.C.C.2d 241, paras. 11, 14 (Dec. 22, 1982) [hereinafter *MTS Mkt. Structure*].

89. *CAF Notice, supra* note 74, at para. 46.

90. *See id.* at para. 46 n.29.

91. *Id.* at para. 46; *see MTS Mkt. Structure, supra* note 88, at para. 11.

mote competition in the long distance market.<sup>92</sup> The system of subsidizing local telephone networks through excess profits generated by AT&T's monopoly on long distance services was no longer viable once competitors entered the long-distance market.<sup>93</sup> The FCC replaced settlements with a system of tariffed intercarrier compensation that, among other things, requires long distance carriers to pay explicit "access charges" at tariffed rates to local telephone companies for the origination and termination of long distance calls.<sup>94</sup>

The FCC exempted enhanced service providers (ESPs) who terminated long distance traffic from paying access charges in order to avoid a "rate shock" to data users who had been paying lower "local business exchange service" rates for long distance.<sup>95</sup> This "ESP exemption" was initially intended to be temporary, because it "forced [telephone subscribers] to bear a disproportionate share of the local [telephone network] costs that access charges are designed to cover."<sup>96</sup> The FCC subsequently extended the ESP exemption indefinitely, despite its discriminatory impact on telephone subscribers who did not use data services, because the enhanced services industry was "in a uniquely complex period of transition."<sup>97</sup> The FCC concluded that, "[T]o the extent the exemption for enhanced service providers may be discriminatory, it remains, for the present, not an unreasonable discrimination."<sup>98</sup>

After the 1996 Act was passed, the FCC exempted dial-up ISPs from paying access charges for terminating long distance Internet traffic.<sup>99</sup> The FCC deemed dial-up ISPs to be local "end user" telephone customers for regulatory purposes and permitted them to lease lines from telephone companies at the significantly lower, flat monthly rates applicable to business telephone lines used for local

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92. See *CAF Notice*, *supra* note 74, at para. 47.

93. See *MTS Mkt. Structure*, *supra* note 88, at para. 11 ("The MFJ requires the termination of this [settlement] system and its replacement by a generalized tariffed offering of access service.").

94. See *CAF Notice*, *supra* note 74, at paras. 47-54, 496-501. In 2011, the FCC decided to transition to a "bill and keep" regime that will eliminate terminating access charges over time, primarily to correct market distortions created by the rate averaging requirement imposed on interexchange carriers. See Connect Am. Fund, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 05-337, FCC 11-161, 26 FCC Rcd. 17663, paras. 741, 745 (Nov. 18, 2011) [hereinafter *CAF Notice II*].

95. See *MTS and WATS Mkt. Structure*, Memorandum Opinion and Order, CC Docket No. 78-72, FCC 83-356, 97 F.C.C.2d 682, para. 83 (Aug. 22, 1983).

96. See Amendments of Part 69 of the Comm'n's Rules Relating to Enhanced Serv. Providers, Order, CC Docket No. 87-215, FCC 88-151, 3 FCC Rcd. 2631, para. 2 (Apr. 27, 1988).

97. See *id.* at para. 13.

98. See *id.* at para. 19.

99. See Access Charge Reform, First Report and Order, CC Docket No. 95-72, FCC 97-158, 12 FCC Rcd. 15982, 16003, para. 50 (May 16, 1997).

calls.<sup>100</sup> Because dial-up ISPs could pay a flat monthly rate for the local termination of interstate data traffic rather than the per-minute charges that were then applicable to long distance telephone calls, ISPs offered unlimited dial-up Internet access to consumers at flat monthly rates that were artificially low in comparison to the rates charged for usage-sensitive long distance calls.<sup>101</sup> As a result, consumers who subscribed to plain old telephone services—including consumers who did not use online services—were forced to subsidize the costs of dial-up Internet access.<sup>102</sup>

### C. Pre-Common Carrier Regulation of Broadband Services

The impetus for net neutrality began when the commercial Internet began to shift from dial-up access, which relied on the public switched network to establish an Internet connection,<sup>103</sup> to broadband communications, which originate in Internet protocol and bypass entirely the circuit switches used for plain old telephone service.<sup>104</sup> As early as 1997, the FCC recognized that, though virtually all residential users then connected to the Internet through telephone facilities designed for circuit-switched voice calls,<sup>105</sup> it would need to modify its regulatory approach to “facilitate the development of the high-bandwidth data networks of the future.”<sup>106</sup> The FCC was concerned that its Title II rules “may hinder the development of emerging

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100. *See id.* at para. 342.

101. *See id.*

102. *See id.* at paras. 344–48. The FCC acknowledged that Internet traffic was causing network congestion, but decided to address the issue through means other than access charges. *See id.* at paras. 347–48.

103. *See, e.g.,* FRED B. CAMPBELL, BROADBAND TRANSMISSIONS ARE NOT “TELECOMMUNICATIONS” 18 (Feb. 2015), *archived at* <http://perma.unl.edu/R5QH-NANH> (“To establish an Internet connection, dial-up users make an ordinary, analog telephone call by dialing a 7-digit local telephone number (NXX-XXXX) that is assigned to a ‘toll free’ business line that is connected to the ISP’s server . . . . A dial-up connection to the Internet is only established *after* the telephone call is connected to the ISP’s server . . . .”); *see also, e.g.,* Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, Third Report and Order, Notice of Inquiry, CC Docket No. 96-262, FCC 96-488, 11 FCC Rcd. 21354, para. 313 (Dec. 24, 1996) [hereinafter *Access Charge Price Cap*] (“Many of the concerns now being raised about switch congestion caused by Internet usage arise because virtually all residential users today connect to the Internet—a packet-switched data network—through incumbent LEC switching facilities designed for circuit-switched voice calls.”).

104. *See* CAMPBELL, *supra* note 103, at 24 (citing Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm’n, Memorandum Opinion and Order, WC Docket No. 03-211, FCC 04-267, 19 FCC Rcd. 22404, paras. 4–9 (2004)).

105. *See Access Charge Price Cap*, *supra* note 103, at para. 313.

106. *See id.* at para. 311. The FCC noted, “The end-to-end dedicated channels created by circuit switches are unnecessary and even inefficient when used to connect an end user to an ISP.” *Id.* at para. 313.



packet-switched data networks” and initiated a new proceeding to consider whether it should use its forbearance or preemption authority to avoid hampering the deployment of new technologies.<sup>107</sup> Changes to the existing regime threatened to put an end to the system of regulatory subsidies on which most dial-up ISPs based their business plans.

### 1. *Competition Begets Net Neutrality Theory*

The issue quickly gained momentum when cable operators entered the market for broadband services.<sup>108</sup> Cable operators, who had never been considered common carriers under Title II and were not bound by the MFJ or the FCC regulatory regime that had subsidized the business model of over-the-top ISPs during the dial-up era, entered into exclusive arrangements with Excite@Home to provide Internet access to their subscribers.<sup>109</sup> This presented a threat to the business model of dial-up ISPs, such as America Online, who relied on FCC regulation to provide slower dial-up service.<sup>110</sup> Dial-up ISPs claimed these exclusive arrangements threatened the openness of the Internet. They argued that the FCC should (1) prohibit cable operators from entering into exclusive broadband arrangements, and (2) extend the common carrier resale policy to cable networks (i.e., mandate that cable operators provide “open access” by unbundling their networks).<sup>111</sup> Incumbent ISPs ignored the irony in asking the FCC to replicate the advantages they derived from the dial-up regulatory scheme—which was designed to address a monopoly—to counter a business threat posed by emerging competition in the Internet access market.

Though dial-up ISPs initiated the “open access” debate, it expanded to become a new front for the proponents of media access theory,<sup>112</sup> which posits that the private press is a greater threat to

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107. *See id.* at paras. 311–13.

108. *See, e.g.*, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Comm’n, Inc., Transferor, to AT&T Corp., Transferee, Memorandum Opinion and Order, CS Docket No. 98-178, 14 FCC Rcd. 3160, para. 9 (Feb. 18, 1999) (noting AT&T’s announcement that it would upgrade its cable networks to serve almost one-third of American households with broadband).

109. *See* Steven A. Augustino, *The Cable Open Access Debate: The Case for a Wholesale Market*, 8 GEO. MASON L. REV. 653, 653–54 (2000).

110. *See id.* at 654.

111. *See id.*

112. *See, e.g.*, Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 972 (2005) (listing Andrew Jay Schwartzman, Media Access Project, as counsel for the Center for Digital Democracy, who opposed the FCC’s decision to classify cable broadband as a non-common carrier service); Hannibal Travis, *The FCC’s New Theory of the First Amendment*, 51 SANTA CLARA L. REV. 417, 418 (2011) (attempting “to theorize mass media and Internet regulation as a solution to the problem of discriminatory, biased, and deceptive coverage of the nation’s most important political debates”).

freedom of expression than the government.<sup>113</sup> By 2000, some had begun to argue that “broadband is simply a transmission media, rather than an end user Internet service, as the ‘open access’ debate typically characterizes it.”<sup>114</sup> They shifted the argument from the horizontal competition concerns of dial-up ISPs to vertical concerns about the ability of content owners to access the “transmission capacity” of cable networks at wholesale rates.<sup>115</sup> Though it is rooted in media access theory,<sup>116</sup> the notion that broadband ISPs should be regulated as common carriers was given a catchy new name—“net neutrality”<sup>117</sup>—and described in positive terms calculated to appeal to ordinary consumers.<sup>118</sup> This clever rebranding<sup>119</sup> played a critical role in turning a failed media access strategy that had previously been focused on explicitly reversing First Amendment precedent in the courts into a debate about common carriage that would be decided by

113. See JOHN B. THOMPSON, *MEDIA AND MODERNITY: A SOCIAL THEORY OF THE MEDIA*, Ch. 8: Publicness Beyond the State (Stanford Univ. Press 1995).

114. See Augustino, *supra* note 109, at 654.

115. See *id.* at 654, 671.

116. Media access theory assumes that private media corporations are a bigger threat to free expression than the government, and its proponents believe the government should protect free expression from the private media. See AT&T Inc. & Bellsouth Corp. Application for Transfer of Control, Memorandum Opinion and Order, WC 06-74, FCC 06-189, 22 FCC Rcd. 5662, 5831 (Mar. 26, 2007) [hereinafter *Bellsouth Application for Transfer*] (Copps, Comm’r, concurring) (stating that corporations are a greater threat to the Internet than the government); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 247–48 (1974) (“[S]upporting advocates of an enforceable right of access to the press vigorously argue that government has an obligation to ensure that a wide variety of views reach the public.”).

117. Professor Timothy Wu is often credited with coining the term. See, e.g., Sheraz Syed, *Prioritizing Traffic: The Internet Fast Lane*, 25 DEPAUL J. ART, TECH. & INTELL. PROP. L. 151, 154 (2014) (“Professor Tim Wu of Columbia Law School popularized this principle in 2003.” (citing Timothy Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003))); see also Keith Wagstaff, *Net Neutrality: How Open-Internet Activists Won Big*, NBC NEWS (Feb. 26, 2015), <http://www.nbcnews.com/tech/internet/net-neutrality-how-open-internet-activists-won-big-n313406>, archived at <http://perma.unl.edu/7JJT-PQ89> (“The term ‘net neutrality’ was coined back in 2003 by Columbia law professor Tim Wu.”).

118. See, e.g., Fred Campbell, *Why Conservatives Must Heed Congressman Issa’s Call*, THE ATLANTIC (July 26, 2012), <http://www.theatlantic.com/technology/archive/2012/07/why-conservatives-must-heed-congressman-issas-call/260374/>, archived at <http://perma.unl.edu/UD5P-9UQP> (noting that the new narrative “uses the language of conservatism (they ‘preserve’ the open Internet), the language of liberty (they defend Internet ‘freedom’), the language of markets (they promote ‘competition’), and the language of modernization (they encourage ‘innovation’) in vague, sweeping principles”).

119. But see Nancy Scola, *Five Myths About Net Neutrality*, WASH. POST (June 12, 2014), [https://www.washingtonpost.com/opinions/five-myths-about-net-neutrality/2014/06/12/ff58ad7c-ec06-11e3-93d2-edd4be1f5d9e\\_story.html](https://www.washingtonpost.com/opinions/five-myths-about-net-neutrality/2014/06/12/ff58ad7c-ec06-11e3-93d2-edd4be1f5d9e_story.html), archived at <http://perma.unl.edu/S6D6-DEHU> (arguing net neutrality was “poorly branded”).

the FCC<sup>120</sup>—an agency with its own jurisdictional interests at stake.<sup>121</sup>

## 2. Initial Broadband Classification Decisions

The FCC handed media access and future net neutrality advocates an early victory in 1998, when it decided to regulate xDSL as a telecommunications service based on a cursory analysis.<sup>122</sup> With respect to the key question—whether xDSL service uses “telecommunications”<sup>123</sup>—the FCC merely repeated the statutory definition: “To the extent that an advanced service does no more than transport information of the user’s choosing between or among user-specified points, without change in the form or content of the information as sent and received, it is ‘telecommunications,’ as defined by the Act.”<sup>124</sup> The FCC made no attempt to quantify the “extent” to which advanced services “do no more than” that or to apply individually the elements of the statutory definition of “telecommunications” to xDSL. It instead relied on its pre-1996 Act decisions in the *Computer Inquiries* and related proceedings, which required the monopoly Bell System’s local operating companies to unbundle their telephone network facilities and offer them on a non-discriminatory basis to competing ISPs, as if there was no difference between plain old telephone service and the multimedia capabilities offered by broadband service.<sup>125</sup> The FCC did not address the First Amendment implications of its decision to treat xDSL services as common carrier communications, and its decision was never reviewed on appeal.<sup>126</sup>

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120. Derek E. Bambauer, *Orwell’s Armchair*, 79 U. CHI. L. REV. 863, 939–40 (2012) (“The debate is not one of common carriage versus unfettered discretion. Rather, it is a disagreement over what content can be blocked and over who makes that determination.”).

121. The FCC has acknowledged that the POTS network is being replaced by the Internet. See Tech. Transitions, Order, Report and Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90, 12-97, FCC 14-5, 29 FCC Rcd. 1433, 1435 (Jan. 31, 2014). The FCC’s decision to reclassify broadband Internet access service as a telecommunications service ensures the FCC will continue to have Title II authority after the POTS network is shut down.

122. See Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, Memorandum Opinion and Order, CC Docket No. 98-147, FCC 98-188, 13 FCC Rcd. 24012, para. 35 (Aug. 7, 1998) [hereinafter *Deployment of Wireline*].

123. 47 U.S.C. § 153(50) (2010); Fred Campbell, *CBIT White Paper: Broadband Transmissions Are Not “Telecommunications,”* CTR. FOR BOUNDLESS INNOVATION IN TECH. (Feb. 19, 2015), <http://cbit.org/blog/2015/02/cbit-white-paper-broadband-transmissions-are-not-telecommunications/>, archived at <http://perma.unl.edu/LR8N-6FE9>.

124. See *Deployment of Wireline*, *supra* note 122, at para. 35.

125. See *id.* at para. 37.

126. In an unpublished decision, the D.C. Circuit Court of Appeals remanded the case without addressing the merits in order to allow the FCC to reconsider its decision based on the Supreme Court’s opinion in *AT&T Corp. v. Iowa Utilities Board*.

In response to the subsequent open access debate, however, the FCC concluded that broadband Internet access offered by cable operators was an “information service” that could not be regulated as a common carrier service.<sup>127</sup> The FCC’s statutory analysis of cable broadband service impliedly admitted that its previous decision to unbundle xDSL was premised primarily on its monopoly-era common carrier resale requirement rather than an analysis of the 1996 Act’s new statutory terms: The FCC noted that the “relevant definitions” in the 1996 Act focus “on the single, integrated information service” that a broadband subscriber receives,<sup>128</sup> and on that basis, declined to extend the *Computer II* unbundling requirements to cable networks.<sup>129</sup> The FCC subsequently reclassified wireline broadband access (xDSL and fiber) as a telecommunications service,<sup>130</sup> and classified broadband over power line<sup>131</sup> and wireless broadband services as telecommunications services.<sup>132</sup> It did not address the First Amendment in these classification decisions.

### 3. Adjudicatory Net Neutrality Decisions

The campaign to classify broadband as a common carrier service intensified after the Supreme Court affirmed the FCC’s classification of cable broadband as an information service.<sup>133</sup> In 2005, former FCC Commissioner Michael Copps demanded the adoption of an *Internet*

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*See* US W. Commc’ns, Inc. v. FCC, No. 98-1410, 1999 WL 728555 (D.C. Cir. Aug. 25, 1999). In its order on remand, the FCC did not address its previous analysis regarding the classification of xDSL and the analysis was not considered in the appeal of the FCC’s order on remand. *See* Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 99-48, 14 FCC Rcd. 4761 (Mar. 31, 1999), *vacated*, GTE Serv. Corp. v. FCC, 205 F.3d 416 (D.C. Cir. 2000).

127. Inquiry Concerning High-Speed Access to Internet Over Cable & Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185, FCC 02-77, 17 FCC Rcd. 4798, para. 7 (2002) [hereinafter *Inquiry Concerning High-Speed Access*], *aff’d*, Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005).

128. *See id.* at para. 41.

129. *See id.* at para. 43.

130. *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 05-150, 20 FCC Rcd. 14853, 14855, para. 1 (Sept. 23, 2005) [hereinafter *Wireline Broadband Order*].

131. *See* United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Serv. as an Info. Serv., Memorandum Opinion and Order, WC Docket No. 06-10, FCC 06-165, 21 FCC Rcd. 13281 (Nov. 7, 2006).

132. Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, Declaratory Ruling, WT Docket No. 07-53, FCC 07-30 (Mar. 23, 2007).

133. Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1002 (2005).

*Policy Statement*<sup>134</sup> announcing neutrality principles as a condition for his concurring vote in a merger proceeding.<sup>135</sup> His concurring statement in a 2007 merger proceeding removed any doubt that net neutrality had become a brand name for the application of media access theory to the Internet:

[I]n an age when the Internet is increasingly controlled by a handful of massive private network operators, the source of centralized authority that threatens the Internet has dramatically shifted. The tiny group of corporations that control access to the Internet [not the government] is the *greatest threat* to Internet freedom in our country today.<sup>136</sup>

A year later the FCC embraced this theory in the *Comcast Order*.<sup>137</sup> The FCC declared that Comcast Corporation had violated the *Internet Policy Statement* by routing some Internet connections based on their contents rather than their destinations and ordered it to change its Internet routing practices.<sup>138</sup> But the D.C. Circuit vacated the order because the FCC had relied on its ancillary authority<sup>139</sup> to

134. See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Policy Statement, CC Docket No. 01-337, FCC 05-151, 20 FCC Rcd. 14986 (Sept. 23, 2005) [hereinafter *Internet Policy Statement*].

135. See SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, WC Docket No. 05-65, FCC 05-183, 20 FCC Rcd. 18290 (Nov. 17, 2005) [hereinafter *SBC and AT&T Applications*] (Copps, Comm'r, concurring). He continued to insist that the FCC impose net neutrality conditions in subsequent merger proceedings. See, e.g., *Bellsouth Application for Transfer*, *supra* note 116, at 5836 ("One hallmark of this Order is that it applies explicit, enforceable provisions to preserve and protect the open and interconnected nature of the Internet, including not only a commitment to abide by the four principles of the FCC Internet Policy Statement but also an historic agreement to ensure that the combined company will maintain a neutral network and neutral routing in its wireline broadband Internet access service.").

136. *Bellsouth Application for Transfer*, *supra* note 116, at 5831 (emphasis added).

137. See Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, Memorandum Opinion and Order, WC Docket No. 07-52, FCC 08-183, 23 FCC Rcd. 13028, paras. 41, 54 (Aug. 20, 2008) [hereinafter *Comcast Order*], *vacated*, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

138. See *id.* Though the FCC's analysis mirrored certain aspects of the First Amendment's strict scrutiny standard, the FCC applied the narrow tailoring test to a private entity (Comcast), not the agency's own action. See *id.* at para. 48 (asking whether Comcast's practices were "carefully tailored to its interest in easing network congestion"). The FCC expressly mentioned the First Amendment only once in the Order's text and solely in relation to the agency's statutory authority. See *id.* at para. 21. The FCC dismissed First Amendment issues in a footnote. See *id.* at para. 43 n.203; see also Travis, *supra* note 112 (construing footnote 203 in the *Comcast Order* as "a stunning victory to advocates of media reform").

139. For a discussion of the FCC's ancillary authority, see Christopher S. Yoo, *Wickard for the Internet? Network Neutrality After Verizon v. FCC*, 66 FED. COMM. L.J. 415, 433-35 (2014).

enforce mere policy statements rather than a statutorily mandated responsibility.<sup>140</sup>

#### 4. First Internet Order

In its *First Internet Order*, the FCC responded to the court's decision by adopting net neutrality rules.<sup>141</sup> The FCC again had relied on its ancillary authority to regulate ISPs, but this time it determined its authority was supported by a statutory obligation in Section 706 of the 1996 Act to accelerate broadband deployment.<sup>142</sup> The FCC concluded that (1) creating additional demand for broadband services through the "virtuous circle of innovation" promotes broadband deployment,<sup>143</sup> (2) the virtuous circle is the best way to create additional demand for broadband access services,<sup>144</sup> and (3) to protect the virtuous circle, the FCC must prohibit ISPs from controlling the content, applications, and services transmitted on their networks and the devices attached to their networks.<sup>145</sup>

The FCC's virtuous circle theory is predicated on the benefits of creating additional demand for broadband Internet access services.<sup>146</sup> According to this theory, Internet openness creates additional demand for Internet access services by enabling "new uses of the network—including new content, applications, services, and devices—[which] lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses."<sup>147</sup>

The FCC identified the threat to the virtuous circle as the ability of broadband providers to exercise "gatekeeper control" over access to their subscribers.<sup>148</sup> The gatekeeper theory posits that, in the absence of net neutrality regulation, any ISP could "force edge providers to pay inefficiently high fees because that [ISP] is typically an edge provider's only option for reaching a particular end user."<sup>149</sup> These fees would reduce innovation at the edge, which would reduce consumer demand for broadband Internet access and, in turn, the likely rate of improvements to network infrastructure.<sup>150</sup> Put more simply,

140. See *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (quoting *Am. Library Ass'n. v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)). The court did not mention the First Amendment. See *id.*

141. *First Internet Order*, *supra* note 1.

142. See 47 U.S.C. § 1302(b) (2008).

143. *First Internet Order*, *supra* note 1, at para. 14.

144. See *id.* at paras. 28, 38–42.

145. See *id.* at para. 43.

146. See *id.* at para. 14.

147. *Id.*

148. See *id.* at para. 15.

149. *Id.* at para. 24.

150. See *id.* at para. 14.

the theory presumes that, “[W]hen a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply.”<sup>151</sup>

In contrast to the competition-based theories that underlie communications regulation in the 1934 (regulating natural monopoly) and 1996 Acts (promoting competition), the FCC’s gatekeeper theory “do[es] not depend upon broadband providers having market power with respect to end users,”<sup>152</sup> because:

- The costs of switching from one ISP to another are too high for competition to prevent ISPs from setting “inefficiently high fees” for edge providers;<sup>153</sup> and
- Even when end users already have access to multiple ISPs without incurring switching costs, “the end user, not the edge provider, chooses which broadband provider the edge provider must rely on to reach the end user” at any particular time.<sup>154</sup>

Because the FCC’s theory conclusively presumes an ISP presents a threat of gatekeeper control whenever an end user chooses to use that ISP as their means of accessing the Internet at any given point in time—i.e., that broadband deployment would be harmed unless “the market for [edge provider] offerings include[s] all U.S. end users” at all times<sup>155</sup>—the FCC determined there was no need to conduct a market power analysis before imposing net neutrality rules on ISPs.<sup>156</sup>

The FCC adopted three net neutrality rules to ensure that edge providers could always reach all end users on ISPs networks:

1. Transparency. Fixed and mobile ISPs must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services;<sup>157</sup>
2. No blocking. Fixed ISPs may not block lawful content, applications, services, or non-harmful devices; and mobile ISPs may

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151. *Second Internet Order*, *supra* note 4, at para. 20.

152. *First Internet Order*, *supra* note 1, at para. 32.

153. *See id.* at paras. 27, 34.

154. *See id.* at para. 24 n.65.

155. *Id.* at para. 30.

156. *See id.* at para. 32 n.87.

157. These disclosures are substantially the same as those required by the tariff filing requirement applicable to common carriers, except that the FCC is not required to act on ISP disclosures in a particular timeframe and the transparency requirement does not have the effect of exempting ISPs from liability. *See* 47 U.S.C. § 203 (1990); *see also* Fred Campbell, *FCC’s First Net Neutrality Fine Heralds the Big Internet Chill*, *FORBES* (Jul. 29, 2015, 8:00 AM), <http://www.forbes.com/sites/fredcampbell/2015/07/29/fccs-first-net-neutrality-fine-heralds-the-big-internet-chill/> (explaining that the differences between Title II’s tariff filing requirement and the FCC’s net neutrality rules are primarily procedural).

not block lawful websites, or block applications that compete with their voice or video telephony services;<sup>158</sup> and

3. No unreasonable discrimination. Fixed broadband providers only may not unreasonably discriminate in transmitting lawful network traffic.<sup>159</sup>

The FCC also provided an exemption to the rules against blocking and unreasonable discrimination for “reasonable network management” and determined that the rules did not prevent ISPs from offering “specialized services” that use Internet Protocol.<sup>160</sup>

The rules applied only to “broadband Internet access service,” which was defined as a “mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints . . . but exclud[ed] dial-up Internet access service.”<sup>161</sup> The FCC excluded other services that act as gatekeepers between edge providers and end users.<sup>162</sup> It determined ISPs are “distinguishable from other participants in the Internet marketplace”<sup>163</sup> because ISPs are “capable of blocking, degrading, or favoring any Internet traffic that flows to or from a particular subscriber,”<sup>164</sup> but did not expressly consider whether other service providers have the same capabilities.<sup>165</sup>

On review, the D.C. Circuit Court of Appeals upheld the transparency rule, but struck down the blocking and non-discrimination rules.<sup>166</sup> The court held that the FCC’s virtuous circle theory was a reasonable interpretation of its statutory obligation to accelerate broadband deployment and its prediction that protecting the virtual circle would actually accelerate deployment was rational and supported by substantial evidence.<sup>167</sup> The court nevertheless vacated the blocking and unreasonable discrimination rules because those rules constituted common carriage regulations, and the Communications Act prohibits the FCC from imposing common carriage regulations on information services.<sup>168</sup>

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158. The FCC permitted mobile ISPs to discriminate against and block certain content because the mobile broadband market was rapidly evolving and more competitive than the fixed market. *See First Internet Order*, *supra* note 1, at para. 49.

159. *See id.* at para. 1.

160. *Id.* at para. 39.

161. *Id.* at para. 44.

162. *Id.* at para. 50.

163. *Id.* at para. 50 n.160.

164. *Id.* at para. 50.

165. *See id.*

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

167. *See id.* at 643–44.

168. *See id.* at 650, 655, 657–59.



#### D. Reclassification of Broadband as a Common Carrier Service

In its *Second Internet Order*, the FCC declared that broadband Internet access service is a telecommunications service subject to common carriage regulation under Title II of the Communications Act and adopted expanded net neutrality rules.<sup>169</sup> The FCC concluded that blocking, throttling, and paid prioritization of Internet traffic “invariably harm the open Internet” and imposed a “bright-line” ban on each of them<sup>170</sup>:

1. No-blocking. The no-blocking rule is substantially similar to the blocking ban adopted in the *First Internet Order* except that it applies equally to fixed and mobile ISPs.<sup>171</sup>
2. No throttling. The no-throttling rule bans “conduct that is not outright blocking, but inhibits the delivery of particular content, applications, or services, or particular classes of content, applications, or services,” or “impairs or degrades lawful traffic to a non-harmful device or class of devices.”<sup>172</sup>
3. No paid prioritization. The no-paid prioritization rule (also known as “fast lanes”) bans ISPs from accepting payment (monetary or otherwise) to manage their networks “in a way that benefits particular content, applications, services, or devices.”<sup>173</sup> This rule is similar to the rule prohibiting unreasonable discrimination in the *First Internet Order* with a notable exception—it presumes all discrimination within particular classes of applications, content, and services is unreasonable,<sup>174</sup> but provides ISPs an opportunity to rebut that presumption through a waiver process.<sup>175</sup>

All three bans apply equally to both fixed and mobile ISPs.<sup>176</sup>

In addition to these bright-line bans, the FCC imposed a “catch-all” rule prohibiting ISPs from unreasonably interfering with or unreasonably disadvantaging (1) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice; or (2) edge providers’ ability to make lawful content, applications, services, or devices avail-

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169. See *Second Internet Order*, *supra* note 4.

170. See *id.* at para. 14.

171. See *id.* at para. 15.

172. *Id.* at para. 120.

173. *Id.* at para. 18.

174. The “no-blocking and no-throttling rules apply to particular classes of applications, content and services as well as particular applications, content, and services.” *Id.* at para. 17 n.17. However, the no-paid prioritization ban apparently does not. See *id.* at para. 125.

175. See *id.* at para. 129.

176. See *id.* at para. 14.

able to end users.<sup>177</sup> The FCC determined this standard was necessary because “[g]atekeeper power can be exercised through a variety of technical and economic means”<sup>178</sup> that might not otherwise be captured by its bright-line bans.<sup>179</sup>

The FCC reaffirmed its previous conclusion that an exception for reasonable network management “is necessary for broadband providers to optimize overall network performance and maintain a consistent quality experience for consumers while carrying a variety of traffic over their networks.”<sup>180</sup> But the FCC strictly limited the exception to practices that have technical justifications. “For a practice to *even be considered* under this exception, a broadband Internet access service provider must first show that the practice is primarily motivated by a technical network management justification rather than other business [or content-related] justifications.”<sup>181</sup> The FCC did not apply the reasonable network management exception to the no-paid prioritization rule “because paid prioritization is inherently a business [or content related] practice rather than a network management practice.”<sup>182</sup> The FCC’s new neutrality rules thus constitute a total ban on the exercise of editorial discretion by ISPs.

### III. DISSEMINATION OF MASS MEDIA COMMUNICATIONS

It is a fundamental principle of the First Amendment that the operators of mass media communications systems have a right to exercise editorial discretion. Well over a century ago the Supreme Court held that the government’s decision to act as a conduit for the dissemination of mass media communications by carrying newspapers in the mail “necessarily involves the right to determine what shall be excluded” from carriage.<sup>183</sup> The Court has since applied this same principle to each mass media communications system it has considered.<sup>184</sup> Based on its existing precedent, there is no reason to doubt the Court will similarly hold that ISPs have the same right to discriminate

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177. *See id.* at para. 21.

178. *Id.*

179. *See id.*

180. *Id.* at para. 215.

181. *Id.* at para. 216 (emphasis added). The FCC also increased its disclosure requirements, and concluded that the exchange of traffic between a broadband Internet access provider and connecting networks (known as “interconnection”) is a telecommunications service subject to Title II regulation. *Id.* at paras. 24, 29. The FCC did not apply its bright-line net neutrality rules to interconnection, however, due to its lack of experience with business practices in the market for interconnection. *Id.* at paras. 30–31.

182. *Id.* at para. 18 n.18.

183. *Ex parte Jackson*, 96 U.S. 727, 732 (1877).

184. *See Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 123–25 (1973); *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994).

against the speech of others through the exercise of editorial discretion.

There is no question that the Internet is a means of disseminating mass media communications.<sup>185</sup> It simultaneously offers functionality that is substitutable for the delivery of newspapers through the mail, over-the-air broadcast of radio and television programming, the transmission of cable video programming, and the distribution of books. The Internet is replacing broadcast and cable services as means to disseminate music, video, and talk radio programming—a development that has prompted the FCC to consider whether online video distribution should be regulated like a multichannel video programming distribution (MVPD) service (e.g., satellite television)<sup>186</sup>—and it has already eclipsed the traditional role of the postal service in the dissemination of newspapers to the reading public.<sup>187</sup> Though they have been available on a widespread basis for less than a decade, electronic books distributed primarily via the Internet now account for about thirty percent of all book sales.<sup>188</sup>

The ongoing shift of text from paper to digital media has seismic implications for the freedom of the press. The convergence of electronic publishing and distribution on the Internet has blurred the traditional boundaries between textual media and the government-regulated communications businesses that once distributed only audio and visual media.<sup>189</sup> “The declining dominance of print media is a cause for concern, for they are the media that in the United States and elsewhere in the free world enjoy autonomy from government. It matters that people are increasingly getting their news and ideas through governmentally controlled media.”<sup>190</sup> The Internet has slowly been breaking down the “dikes that in the past held government back from exerting control on the print media . . . .”<sup>191</sup> The FCC’s decision to

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185. See, e.g., Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, 7 COMM.LAW CONSPECTUS 37, 42 (Winter 1999) (“The Internet is . . . a world-wide broadcasting capability . . .”).

186. See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Dist. Servs., Notice of Proposed Rulemaking, MB Docket No. 14-261, FCC Rcd. 15995 (Dec. 19, 2014) [hereinafter *Promoting Innovation*].

187. According to the Newspaper Association of America, more Americans are now reading newspapers online than in print. See *The Evolution of Newspaper Innovation*, NEWSPAPER ASS’N OF AM. (Apr. 9, 2014), <http://www.naa.org/innovation>, archived at <http://perma.unl.edu/Q6HU-EDR4>.

188. See George Packer, *Cheap Words*, THE NEW YORKER (Feb. 17, 2014), <http://www.newyorker.com/magazine/2014/02/17/cheap-words>, archived at <http://perma.unl.edu/HUN8-QRZK>.

189. See ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 24–28 (Belknap Press, Harvard Univ. Press ed. 1983) (discussing convergence in the pre-Internet era and noting that “[a]ll media are becoming electronic”).

190. *Id.* at 22.

191. *Id.* at 24; see also *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 352 (2010) (“With the advent of the Internet and the decline of print and broadcast

regulate ISPs as common carriers threatens to blow the dikes wide open.

These concerns about the loss of First Amendment protections raised by the shift from print to digital media are exacerbated by the conduciveness of the Internet to disguising governmental censorship and its susceptibility to censorship by proxy or soft censorship.<sup>192</sup> Governmental interference with the dissemination of speech over the Internet can occur via manipulation of the distribution architecture without the knowledge of an end user, who might be unable to discern that government censorship has occurred.<sup>193</sup> The exercise of extensive regulatory jurisdiction over the Internet also enhances the government's ability to pressure ISPs and other third-party intermediaries to accede to government demands for censorship by proxy in order to protect themselves from regulatory sanctions or overreach.<sup>194</sup> Though the dangers of censorship by proxy were widely recognized after the excesses of the McCarthy era, proxy censorship of the Internet in the United States has been growing with little fanfare.<sup>195</sup> The FCC's assertion of comprehensive jurisdiction to impose costly economic regulations on ISPs and other Internet companies combined with its conclusion that ISPs have no right to First Amendment protection threatens to worsen this problem.<sup>196</sup>

#### A. Application of the Press Clause to Dissemination

To the extent ISPs disseminate mass media communications, there should be no doubt they are speakers who are entitled to First Amendment protection. The FCC's contention that ISPs do not deserve protection because they are mere "conduits for the speech of others"<sup>197</sup> is both factually and legally erroneous.

It is a matter of fact that ISPs have exercised editorial discretion while providing broadband Internet access service. "Extensive ISP fil-

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media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.").

192. See Enrique Armijo, *Kill Switches, Forum Doctrine, and the First Amendment's Digital Future*, 32 CARDOZO ARTS & ENT. L.J. 411, 450–52 (2014) (noting the "regulation behind the screen" problem with respect to Internet censorship). A complete discussion of censorship by proxy is beyond the scope of this Article. For a detailed discussion of its history and dangers, see Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006).

193. See Armijo, *supra* note 192, at 451.

194. See Kreimer, *supra* note 192, at 17.

195. See *id.* at 22–27, 46; see also Bambauer, *supra* note 120, at 866 ("America has begun to censor the Internet.").

196. See Kreimer, *supra* note 192, at 57–65 (discussing proxy censorship issues in Supreme Court decisions applying the First Amendment to cable operators).

197. *Second Internet Order*, *supra* note 4, at para. 544.

tering was much more common in the 1990s but still exists today.”<sup>198</sup> A prime example is Jnet, a broadband ISP that automatically blocks access to certain Internet sites based on their content.<sup>199</sup> According to Jnet, it engages in viewpoint-based discrimination because “there is a large segment of the Jewish community that has avoided the Internet entirely, and many more that are rightly concerned about using the Internet” due to its objectionable content.<sup>200</sup> Jnet does *not* offer its end users the ability to bypass, disable, or route around its filtering system—a decision that appears to be Jnet’s primary selling point.<sup>201</sup> The content curation provided by Jnet and other ISPs is thus similar in scope to that provided by television broadcasters and cable systems.<sup>202</sup>

It is constitutionally irrelevant that Jnet and others that actively promote their content curation appear to be outliers among ISPs. To the extent ISPs have refrained from exercising their right to editorial discretion, the FCC’s factual findings in the *Second Internet Order* indicate that their restraint was induced or compelled by the government.<sup>203</sup> The FCC found there is a continuing need for open Internet rules because ISPs would have exercised editorial discretion if the FCC had not previously prohibited or discouraged it. According to the FCC, the previous open Internet rules “helped to deter [ISPs’ exercise of editorial discretion] while they were in effect” and, but for those rules, ISPs would already be engaging in “such conduct.”<sup>204</sup>

Previous FCC decisions show it has been chilling ISP speech ever since it began deregulating broadband Internet services.

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198. Brent Skorup, *The First Amendment, ISPs, and Net Neutrality: Will the Open Internet Order Survive a First Amendment Challenge?*, PLAIN TEXT (Sept. 3, 2015), <https://readplaintext.com/the-first-amendment-isps-and-net-neutrality-7b5ec56b795>, archived at <http://perma.unl.edu/EMS2-TU7G>.

199. Other examples of ISPs that routinely block legal content include Dnet and Clean Internet. *See id.*

200. *Frequently Asked Questions*, THE JEWISH INTERNET ACCESS (2015), <http://www.thejnet.com/faq.asp>, archived at <http://perma.unl.edu/73KG-NB85>.

201. *Id.*

202. ISPs and other Internet companies have also blocked or removed potentially offensive content on an ad hoc basis in response to requests from the Anti-Defamation League. *See* Skorup, *supra* note 198 (citing Jessica S. Hendry, *Beyond Free Speech: Novel Approaches to Hate on the Internet in the United States*, 18 INFO. & COMM. TECH. L. 235 (2009)).

203. In contrast to the FCC, Congress encourages ISPs to exercise editorial discretion in 47 U.S.C. § 230(c) (1998), which immunizes ISPs from liability for any causes of action due to ISPs’ dissemination of information originating with a third-party and from civil liability for “Good Samaritan” blocking and screening of offensive material. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (stating that Congress enacted § 230 to remove ISP disincentives to self-regulation of offensive content).

204. *See Second Internet Order*, *supra* note 4, at para. 8.

- When the FCC declared that cable ISPs are not common carriers in 2002 it simultaneously asked whether and to what extent it should restrict their editorial discretion.<sup>205</sup>
- When the FCC extended the cable broadband ruling to telephone companies in 2005<sup>206</sup> it simultaneously issued an *Internet Policy Statement* announcing that it would take enforcement action if it observed ISPs exercising editorial discretion<sup>207</sup>—a threat the FCC fulfilled in 2008 when it ruled that an ISP had acted unreasonably by interfering with peer-to-peer traffic.<sup>208</sup>
- From 2005 to 2011, the FCC used its merger review process to impose binding open Internet obligations on the largest ISPs, including AT&T, Verizon, and Comcast.<sup>209</sup>

In these circumstances, the FCC's assertion that ISPs do not exercise editorial discretion evidences nothing more than their compliance with FCC rules and policies. It has no probative value with respect to their constitutional status as speakers.

The FCC's theory that ISPs are not speakers based on their past conduct also has no basis in law. The protections of the First Amendment would be rendered meaningless if the people could be forced to forfeit their rights to free expression by virtue of their compliance with government restrictions on speech. Assume English law had required colonial newspapers to publish all community opinions in the order received, and that most newspapers had maintained the practice for some period of time after the First Amendment was ratified. Based on the FCC's reasoning in the *Second Internet Order*, newspapers would not be entitled to the freedom of the press: they would have forfeited that right by acting as conduits for the speech of others during their transition from the customs of English rule to liberty.

It would be similarly absurd to conclude that ISPs had forfeited their right to speak even if they had chosen to remain silent on a purely voluntarily basis. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."<sup>210</sup> Silence itself can be a powerful form of

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205. See *Inquiry Concerning High-Speed Access*, *supra* note 127.

206. See *Wireline Broadband Order*, *supra* note 130.

207. See *Internet Policy Statement*, *supra* note 134.

208. See *Comcast Order*, *supra* note 137. Though this order was subsequently vacated by an appellate court, the vacatur of the *Comcast Order* in early 2010 quickly led to the issuance of a new FCC proceeding and the adoption of the *First Internet Order* later that same year.

209. See *Second Internet Order*, *supra* note 4, at para. 65.

210. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70 (1995).

expression.<sup>211</sup> Holding that a voluntary vow of silence is enough to foreclose the constitutional right to speak in the future would chill silence as a means of sending a message. If the First Amendment is to protect the full panoply of expression, the past silence of a speaker can have no legal relevance.

The only constitutionally relevant question is whether ISPs have the ability to speak prospectively, a fact the FCC conceded. In the *Second Internet Order*, the FCC found that ISPs have the “technical ability” to speak through the exercise of editorial discretion.<sup>212</sup> It could hardly have done otherwise. If ISPs could act as nothing more than conduits for the speech of others in the absence of government intervention, the FCC’s net neutrality rules would have been unnecessary. The inherent contradiction between the FCC’s factual finding that ISPs have the ability to speak and its legal conclusion that ISPs are not deserving of First Amendment protection is a self-serving attempt by the Commission to have its constitutional cake and eat it too. If the open Internet rules are necessary to prevent ISPs from exercising editorial discretion, then it is axiomatic that ISPs are constitutionally protected speakers.

## B. The Distinction Between Speech and Conduct

Even if the FCC’s conduit theory might have merit in some circumstances, it is inapplicable to the transmission of mass media content by ISPs.<sup>213</sup> There is no constitutional distinction between conduct and speech with respect to the dissemination of mass media communications.<sup>214</sup> The operators of mass media conduits do not need to separately demonstrate “status as a speaker”<sup>215</sup> to invoke the protections of the Press Clause, because their conduct is inextricably intertwined with speech.<sup>216</sup> “The free press clause protects not only the words

211. *See generally* We Day, *We Are Silent*, FREE THE CHILDREN (2015), <http://www.weday.com/we-schools/campaigns/we-are-silent/>, archived at <http://perma.unl.edu/X3DA-4TVZ> (encouraging twenty-four hours of silence to support “the millions of girls around the world facing poverty, exploitation and the denial of their right to education”).

212. *Second Internet Order*, *supra* note 4, at para. 78.

213. For example, it may be constitutional for the FCC to regulate Internet services that do not involve mass media communications, such as point-to-point voice over Internet protocol (VoIP) services, as common carrier services. *See, e.g.*, Vonage Holdings Corp. v. Fed. Comm’n Comm’n, 489 F.3d 1232, 1235 (D.C. Cir. 2007) (holding that it was reasonable as a matter of statutory interpretation for the FCC to regulate VoIP services by analogy to plain old telephone service).

214. *See* First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 800 (1978) (Burger, C.J., concurring) (“[T]here is no fundamental distinction between expression and dissemination.”).

215. *See Second Internet Order*, *supra* note 4, at para. 547.

216. *See, e.g.*, Sec’y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 959 (1984) (noting that charitable solicitations are so intertwined with speech that they are

which appear on a newspaper's pages, but its printing and circulation as well."<sup>217</sup> The "press" merited disjunctive mention in the First Amendment because governments historically restricted speech through laws controlling the physical machinery of the printing press itself.<sup>218</sup> The Press Clause ensures that mere operation of the "potentially dangerous technology" of the printing press and its modern equivalents is "protected alongside direct in-person communications."<sup>219</sup>

In the *Second Internet Order*, the FCC relied on the *O'Brien* distinction between conduct and speech to conclude that the transmission of Internet communications is "pure" conduct that is not protected by the First Amendment because ISP transmissions do not intrinsically require the exercise of editorial discretion.<sup>220</sup> According to this "editorial quality theory," the conduct of disseminating speech is protected only if it consistently requires editorial discretion of sufficiently high quality.

The FCC's attempt to define the boundaries of the Press Clause based solely on a theory of editorial quality is not supported by the text of the First Amendment or the law interpreting it. Just as the Speech Clause contains no distinctions based on the relative eloquence of different speakers, the Press Clause does not distinguish among different members of the press based on the relative intensity of the editing processes they perform.<sup>221</sup> A printer who offers wholesale publishing services with minor copy editing is as entitled to First Amendment protection as the *New York Times*.<sup>222</sup> The same is true with respect to the particular content published by any particular member of the press: the First Amendment is applicable to eloquently

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entitled to the protections of the First Amendment); see also *Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty., Fla.*, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000) ("In arguing that the conduit or transmission capability of speech can be separated from its content, the [government] ignores the relationship between the two.").

217. *Comcast Cablevision*, 124 F. Supp. 2d at 693.

218. See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); see also *Comcast Cablevision*, 124 F. Supp. 2d at 694–95 (describing the historical context for the adoption of the Press Clause).

219. Eugene Volokh, *Is the Freedom of the Press "Redundant" of the Freedom of Speech?*, THE VOLOKH CONSPIRACY (Apr. 4, 2011, 11:54 AM), <http://volokh.com/2011/04/04/is-the-freedom-of-the-press-redundant-of-the-freedom-of-speech/>, archived at <http://perma.unl.edu/QGA5-TCKB>.

220. See *Second Internet Order*, *supra* note 4, paras. 547–49 (citing *United States v. O'Brien*, 391 U.S. 367 (1968) and subsequent cases that rely on the *O'Brien* distinction).

221. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

222. See *id.*



written editorials and crude advertisements alike.<sup>223</sup> The Constitution gives the government no role in evaluating whether it is appropriate or necessary for the press to exercise editorial discretion, because experience has shown that the "liberty of the press is in peril as soon as the government tries to compel" the press to speak.<sup>224</sup>

The distinction between speech and conduct articulated by the Court in *O'Brien* was intended as a means of determining the level of First Amendment scrutiny applicable to "symbolic speech" involving speech and nonspeech elements, not the dissemination of speech under the Press Clause.<sup>225</sup> The Court rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," because "a sufficiently important governmental interest in regulating the nonspeech element can justify *incidental* limitations upon First Amendment freedoms."<sup>226</sup> As Justice Harlan noted in his concurring opinion, however:

[This rationale does not foreclose the application of strict scrutiny] in those rare instances when an "incidental" restriction on expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate.<sup>227</sup>

The conduct protected by the Press Clause is one of those instances.<sup>228</sup> If disseminating mass communications was, in and of itself, considered mere conduct that is undeserving of First Amendment protection, then the Press Clause would lose all meaning.

The Press Clause does not limit its protection to the conduct of editorializing during initial publication.<sup>229</sup> Even assuming the distributors of mass communications do not intend to express anything by

223. See *Comcast Cablevision*, 124 F. Supp. 2d at 695 ("[T]he First Amendment, as [the Founders] wrote it, leaves no room for equivocation.").

224. See *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (quoting 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 633 (1947)) (internal quotation marks omitted).

225. See *O'Brien*, 391 U.S. at 376-77.

226. *Id.* at 376 (emphasis added).

227. *Id.* at 388-89 (Harlan, J., concurring).

228. Few Supreme Court cases have involved outright bans on speech. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 809 (Kennedy, J., dissenting).

229. See *id.*; see also *City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 768 (1988) (holding the conduct of placing newsracks involves "the circulation of newspapers, which is constitutionally protected"); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (holding a city ordinance prohibiting the dissemination of circulars "cannot be saved because it relates to distribution and not to publication"); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936) (invalidating tax specifically targeting newspapers because the First Amendment "was meant to preclude the national government . . . from adopting any form of previous restraint upon printed publications, or their circulation" (emphasis added)).

their choice of what to sell, such distributors would “still serve a vitally important communications function protected by the First Amendment.”<sup>230</sup> The government is capable of repressing speech “by silencing certain voices at any of the various points in the speech process,” including the process of disseminating mass communications.<sup>231</sup> Beginning with *Ex parte Jackson* in 1877, Supreme Court cases that address systems for the dissemination of mass media communications have uniformly held that their owners have a First Amendment right to exercise editorial discretion. In *Ex parte Jackson*, the Court held a postal statute prohibiting the mailing of lottery documents did not violate the First Amendment.<sup>232</sup> It concluded that the power of Congress “to establish post-offices and post-roads” includes the power to designate “what should be carried,” and that “[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded.”<sup>233</sup> The Court derived the right of the postal service to discriminate against the speech of others from the rights of private carriers. As Justice Holmes later described it, “[I]f the Government chose to offer a means of transportation which it was not bound to offer it could choose what it would transport.”<sup>234</sup> The Court subsequently held that this right to discriminate applies to over-the-air broadcasting<sup>235</sup> and cable television systems as well.<sup>236</sup> It has consistently recognized:

[T]he First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so *ordinarily* even where those decisions take place within the framework of a regulatory regime such as broadcasting.<sup>237</sup>

The same principle is equally applicable to mass media communications disseminated by ISPs on the Internet.

### C. The Distinction Between Mass Media and Common Carrier Communications

Those who subscribe to the editorial quality theory contend that applying First Amendment protection to ISPs would be inconsistent with precedent applying common carrier obligations to telegraph and

230. Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the “Speaker” Within the New Media*, 71 NOTRE DAME L. REV. 79, 86 (1995).

231. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010).

232. *Ex parte Jackson*, 96 U.S. 727, 728 (1877).

233. *Id.*

234. *See Leach v. Carlile*, 258 U.S. 138, 141 (1922) (Holmes, J., dissenting).

235. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969).

236. *See Turner I*, 512 U.S. 622, 639 (1994).

237. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996).

telephone companies.<sup>238</sup> In their view, the distinction between communications systems that are entitled to First Amendment protection (e.g., broadcast and cable television) and those that are not (e.g., telegraphy and telephony) is based on the quality of editorializing offered by those services.<sup>239</sup> They argue that, if courts were to hold that ISPs are entitled to First Amendment protection, it would then invalidate the application of common carrier principles to telephone as well.

If the editorial quality theory of the First Amendment were valid, this concern might warrant consideration. There is no need for a court to address this hypothetical concern, however, because there is no inconsistency between the protection of dissemination afforded by the Press Clause and the law of common carriage under existing precedent. The constitutional distinction between the transmission of video programming on the one hand and telephony on the other is based on the type of speech they disseminate, not the degree of editorial discretion carriers choose to exercise or are capable of exercising. Non-discrimination obligations were applied to telegraphy and telephony because these services traditionally offered a means of private “intercommunication” between individuals only.<sup>240</sup> Telegraphy and plain old telephone service were technologically incapable of publicly disseminating speech directly to the masses in a manner similar to broadcast and cable television. The courts treated telegraph and telephone companies as common carriers because they transmitted purely private communications.

*Jackson* impliedly recognized this critical distinction in its constitutional analysis of mail carriage. The Court began by distinguishing between the transportation of privately sealed mail that is intended to be kept free from inspection (e.g., letters) and unsealed mail that is open to public inspection (e.g., newspapers). It concluded that sealed

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238. Final Brief for Tim Wu as Amicus Curiae Supporting Respondents, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (No. 11-1355), 2012 WL 5830083. Even those who concede that distribution is fully protected in the traditional print context have nevertheless fallen into the analytical trap of assuming that the *O'Brien* distinction and the editorial quality theory are relevant with respect to electronic distribution under the Press Clause. See, e.g., Meyerson, *supra* note 230, at 84–100.

239. Barbara Cherry has posited an “essentiality of access” standard. See Barbara A. Cherry, *Utilizing “Essentiality of Access” Analyses to Mitigate Risky, Costly and Untimely Government Interventions in Converging Telecommunications Technologies and Markets*, 11 COMM.LAW CONSPECTUS 251 (2003). However, her First Amendment analysis has been superseded by the Supreme Court’s decision in *Citizens United*. See Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483, 506–07 (2006) (arguing the application of common carrier regulation to ISPs would be consistent with the First Amendment to the extent the speech rights of corporations are not coextensive with those of natural persons).

240. See *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 8 (1877).

mail is protected by the Fourth Amendment right against searches and seizures “as if they were retained by the parties forwarding them in their own domiciles,” but that the “transportation” (i.e., dissemination) of unsealed mail by the postal service was protected by the First Amendment.<sup>241</sup> The Court held that the postal service was entitled to the freedom of the press with respect to its carriage of unsealed mail even though mail carriage does not require the same degree of editorializing as initial publication.<sup>242</sup> The Court held the freedom of the press includes the dissemination of mass media communications because the “[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.”<sup>243</sup>

The *Jackson* distinction between sealed and unsealed mail recognized that “restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest.”<sup>244</sup> It also recognized that, as a practical matter, the content of private communications is generally protected from government interference by the Fourth Amendment, whereas mass media content is not.<sup>245</sup>

The Court applied this distinction to telephony in *Katz v. United States*, which held that government surveillance of words spoken into a telephone receiver by a person who was using an otherwise public telephone booth constituted a “search and seizure” under the Fourth Amendment.<sup>246</sup> In *Katz*, a case that has been described as “the most important [Fourth Amendment case involving networks] since *Ex parte Jackson*,”<sup>247</sup> the Court concluded that a person making a telephone call is “entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.”<sup>248</sup> *Katz* determined that, like the transportation of sealed letters in the mail, telephone calls are inherently private communications with no public aspect.

This distinction is also reflected in *Jackson*-era court decisions analogizing telegraphy and telephony to the common carriage of goods and persons by railroads. For example, the Sixth Circuit Court of Appeals considered these services to be close analogs because telegraphy and telephony services are capable of transmitting a particular communication from only one person to one other person, just as railroads

241. *Ex parte Jackson*, 96 U.S. 727, 728–33 (1877).

242. *See id.* at 733.

243. *Id.*

244. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

245. The First Amendment applies to private communications to the extent associational rights are implicated. *See Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 802 (2d Cir. 2015).

246. *Katz v. United States*, 389 U.S. 347, 352 (1967).

247. *See United States v. Choate*, 576 F.2d 165, 174 (9th Cir. 1978).

248. *Katz*, 389 U.S. at 352.

transported a particular good or person from one place to another.<sup>249</sup> The Sixth Circuit thought the analogy was even more “applicable to telegraph companies than to telephone companies, for the one receives and sends a message, the other merely supplies the facilities by which the user may extend the compass of his own voice.”<sup>250</sup> The Sixth Circuit’s description of telephony as a means of extending the range of one’s voice is consistent with *Katz*’s treatment of telephone calls and *Jackson*’s treatment of sealed mail as inherently private communications.

Similarly, in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, a case decided the same year as *Jackson*, the Supreme Court considered the transmission of communications by telegraphy or telephony to be a commercial activity with more similarity to the delivery of sealed mail or the transportation of packages by rail than a means of expressing ideas through mass communications.<sup>251</sup> Though it did not expressly address the First Amendment, the Court held that telegraphy was a form of “commercial intercourse” that could be regulated by Congress under the Commerce Clause.<sup>252</sup> The Court noted that more than eighty percent of all the messages sent by telegraph related to commercial transactions,<sup>253</sup> but made no mention of the use of telegraphy to disseminate communications directly to the masses. This silence, coupled with the Court’s contemporaneous decision in *Jackson*, indicates telegraphy was not considered part of the press protected by the First Amendment because the telegraph did not offer a means of publishing or disseminating mass communications.

In *Turner I*, the Supreme Court implicitly held that the Press Clause protects the mere dissemination of mass media communications in the cable television context.<sup>254</sup> As a factual matter, the Court acknowledged that, “Once the cable operator has selected the programming sources, the cable system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers.”<sup>255</sup> It nevertheless held that both the Speech and Press Clauses applied to the operation of cable television systems. “There can be no disagreement on an initial premise: Cable program-

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249. See *Cumberland Tel. & Tel. Co. v. Kelly*, 160 F. 316, 318 (6th Cir. 1908); see also *Olmstead v. United States*, 277 U.S. 438, 465 (1928) (“By the invention of the telephone 50 years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place.”), *overruled by Katz*, 389 U.S. 347.

250. *Cumberland*, 160 F. at 318.

251. See *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1 (1877).

252. See *id.* at 9.

253. See *id.* at 8.

254. See *Turner I*, 512 U.S. 622, 629 (1994) (noting that cable systems in essence function as conduits for the speech of others).

255. See *id.*

mers and cable operators engage in *and* transmit speech, and they are entitled to the protection of the speech *and* press provisions of the First Amendment.”<sup>256</sup> Just as the decision to carry the mail “necessarily involves the right to determine what shall be excluded,”<sup>257</sup> the Court held a cable operator’s decision to transmit programming necessarily includes a constitutionally protected right to exercise editorial discretion.<sup>258</sup>

Supreme Court precedent thus indicates the constitutional line drawn between sealed and unsealed mail in *Jackson* is the basis for the traditional distinction between common carrier and mass media communications, respectively. A plain old telephone service provider does not have a First Amendment right to exercise editorial discretion over an ordinary telephone call because it is a private, one-to-one communication that is not intended for public consumption. In contrast, a cable operator has a First Amendment right to exercise editorial discretion over the video programming it disseminates, even if the cable operator is essentially acting as a conduit for the speech of others, because cable content is intended for consumption by the masses.<sup>259</sup> Like mail carriers and cable operators, ISPs are entitled to First Amendment protection to the extent they disseminate mass media communications. The degree of editorial discretion that ISPs choose to exercise over the mass media communications they transmit is constitutionally irrelevant.

#### **D. The Implications of Denying First Amendment Protection to ISPs**

The question of whether ISPs have a right to invoke the First Amendment has enormous constitutional implications. If the FCC’s decision were allowed to stand, the government would be free to prohibit content providers and consumers from transmitting particular viewpoints by enacting regulations that censor ISP transmissions based on content. The FCC’s decision to grant content providers and consumers a right of access to ISP networks through regulatory decree does not grant them a corresponding constitutional right to invoke the protection of the First Amendment for content they transmit over ISP networks. No one has a First Amendment right to communicate using mass communications systems or facilities owned or operated by an-

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256. *Id.* at 636 (emphasis added).

257. *Ex parte Jackson*, 96 U.S. 727, 732 (1877).

258. *See Turner I*, 512 U.S. at 636 (“Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable . . . operators ‘seek to communicate messages on a wide variety of topics and in a wide variety of formats.’” (quoting *Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 494 (1986))).

259. *See id.* at 629.

other person, and in the absence of a constitutional right to send and receive ISP transmissions, no one has standing to challenge government efforts to censor them.<sup>260</sup>

1. *No Constitutional Right to Access Mass Media Communications Systems*

Supreme Court cases involving the freedom of the press have dealt with governmental efforts to restrict the operators of mass media communications systems, not governmental efforts to protect the right of other people to access such systems,<sup>261</sup> because there is no First Amendment right to access mass media facilities.<sup>262</sup>

Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular bookstore without the store owner's consent. Nor can government force the editor of a collection of essays to print other essays on the same subject.<sup>263</sup>

Even in the broadcast context, which has traditionally been subject to a lower level of First Amendment protection, the Supreme Court has refused to hold that the government or any individual member of the public has a right to use private broadcast systems to transmit their views on any particular matter.<sup>264</sup>

The Court has repeatedly refused to recognize a constitutional right of access to mass media facilities even when the facilities are operated or controlled by the government itself. In its decision upholding a federal statute prohibiting the mailing of lottery materials in *Jackson*, the Court considered the possibility that, because the government had given itself a monopoly over the delivery of the mail, its exercise of editorial discretion could have the effect of completely foreclosing the transportation of speech with respect to lotteries.<sup>265</sup> The Court recognized that if Congress could prohibit the transportation of newspapers over postal-routes by mail and private carrier alike, then "the circulation of the documents would be destroyed, and a fatal blow given to the freedom of the press."<sup>266</sup> The Court concluded that this possibility was insufficient to overcome the government's exercise of editorial privilege, however, because Congress lacks the power to pro-

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260. See *United States v. W. Elec. Co.*, 900 F.2d 283, 310–11 (D.C. Cir. 1990).

261. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737–38 (1996).

262. See, e.g., *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 126–27 (1981).

263. *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 816 (Thomas, J., concurring in part and dissenting in part).

264. See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 112–13 (1973).

265. See *Ex parte Jackson*, 96 U.S. 727, 733–35 (1877).

266. *Id.* at 735.

hibit the private transportation of matters that it chooses to exclude from the mail.<sup>267</sup>

In *Greenburgh*, the Court held the First Amendment does not guarantee the people a “right to deposit, without payment of postage, their notices, circulars, and flyers in letterboxes which have been accepted as authorized depositories of mail by the Postal Service.”<sup>268</sup> The Court affirmed that the First Amendment does not guarantee access to property used to disseminate mass media communications even when the communications service is owned or controlled by the government, because “the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”<sup>269</sup> It further concluded that designating a letterbox as an “authorized depository” for the mail does not transform it into a “‘public forum’ of some limited nature to which the First Amendment guarantees access to all comers,” because mail service is not a traditional First Amendment forum such as the public streets or a park.<sup>270</sup> The Court concluded that “it is a *giant leap* from the traditional ‘soapbox’ to the letter-box designated as an authorized depository of the United States mails,” and that the First Amendment did not require it to make that leap.<sup>271</sup>

The Court has also recognized that a constitutional right to access mass media communications would necessarily entangle the government and the press. If content providers and consumers had a First Amendment right to access the Internet, it could result in a myriad of new constitutional claims with potentially adverse consequences for other government objectives. Courts might have to “face the difficult, and potentially restrictive, practical task of deciding which, among any number of private parties involved in providing a program (for example, networks, station owners, program editors, and program producers), is the ‘speaker’ whose rights may not be abridged, and who is the speech-restricting ‘censor.’”<sup>272</sup> The interconnection dispute between Netflix and certain ISPs provides a timely example of the challenges involved when making such determinations with respect to the Internet, a network of networks that disseminates content on a global scale. In a petition filed with the FCC, Netflix asserted that, when it refused to pay Comcast for the provision of additional interconnection

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267. *See id.*

268. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 126–27 (1981).

269. *Id.* at 129–30 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).

270. *See id.* at 128–31; *see also* Armijo, *supra* note 192, at 436–37 (“[T]he conclusion that a State-offered communications network would not be a traditional public forum seems beyond meaningful dispute.”).

271. *Greenburgh*, 453 U.S. at 131 (emphasis added).

272. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996).



capacity and Comcast refused to provide it for free, their mutual customers were effectively denied access to Netflix's streaming video service.<sup>273</sup> Assuming their mutual customers had a First Amendment right to access Netflix's streaming video service, who abridged it—Netflix or Comcast? The FCC, citing “competing narratives,” has not determined who should bear responsibility for degrading Netflix's streaming speeds.<sup>274</sup> When an expert agency struggles to decide such cases, it is difficult to see how the courts could be expected to resolve them as a matter of constitutional law.

The concerns discussed above indicate there is no constitutional right to access facilities operated by the press because such a right would be antithetical to the purpose served by the Press Clause. Justice Stewart aptly illustrated the dangers of attempting to second-guess the separation of government and press embedded in the First Amendment:

The First Amendment prohibits the Government from imposing controls upon the press. Private broadcasters are surely part of the press. Yet here the Court of Appeals held, and the dissenters today agree, that the First Amendment requires the Government to impose controls upon private broadcasters—in order to preserve First Amendment “values.” The appellate court accomplished this strange convolution by the simple device of holding that private broadcasters are Government. This is a step along a path that could eventually lead to the proposition that private newspapers “are” Government. Freedom of the press would then be gone. In its place we would have such governmental controls upon the press as a majority of this Court at any particular moment might consider First Amendment “values” to require. It is a frightening specter.<sup>275</sup>

This specter is no less frightening with respect to the Internet. The *fundamental* value of the First Amendment is avoiding the specter of government control over mass media communications. That value cannot be reconciled with a government-protected right of the people to access the Internet.

## 2. *Lack of Standing to Invoke First Amendment Against Government Censorship*

In the absence of a First Amendment right, there is no standing to bring a constitutional challenge against a government restriction on speech. It is an “established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a *direct* injury as the result of that ac-

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273. See Applications of Comcast Corp. & Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorization, Petition to Deny of Netflix, Inc., MB Docket No. 14-57, 29 FCC Rcd. 13597, 57 (Nov. 4, 2014).

274. See *Second Internet Order*, *supra* note 4, at para. 200.

275. See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 133 (1973) (Stewart, J., concurring).

tion.”<sup>276</sup> “The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party . . . .”<sup>277</sup> To invoke the jurisdiction of a federal court, a complainant must have more than a “generalized grievance” and “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”<sup>278</sup> The essential standing question “is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.”<sup>279</sup> End users who object to government censorship of ISP transmissions cannot meet the direct injury requirement in their own right because they have no constitutional right to speak using ISP networks,<sup>280</sup> and they cannot object on behalf of ISPs under the overbreadth exception because the FCC ruled that ISPs do not have a constitutional right to control their transmissions either.

In First Amendment cases involving allegations of overbreadth, the Court has permitted complainants to assert the rights of another party due to the possibility that the party who is actually engaged in protected activity will refrain from that activity rather than risk punishment for his conduct in challenging the restriction.<sup>281</sup> This exception “has been employed by the Court sparingly and only as a last resort,” because declaring a statute overbroad on its face totally forbids its application “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.”<sup>282</sup> To avoid unduly limiting the government’s ability to proscribe conduct that incidentally involves speech, the Court has held that this already limited exception to the standing requirement attenuates further as the restricted behavior moves from “pure speech” toward conduct that is otherwise constitutionally unprotected.<sup>283</sup> According to the FCC, ISP transmissions have moved so far toward “pure conduct” that they warrant no constitutional protection at all, which means there is no constitutional right for end users to assert on behalf of ISPs under the overbreadth exception even if it would otherwise apply.

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276. *Laird v. Tatum*, 408 U.S. 1, 13 (1972) (emphasis added) (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937)).

277. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

278. *Id.*

279. *Id.* at 500.

280. *See United States v. W. Elec. Co.*, 900 F.2d 283, 310 (D.C. Cir. 1990) (holding consumers and non-federal regulators lacked standing to challenge the district court’s lifting of certain provisions in the antitrust consent decree that led to the breakup of the Bell telephone system).

281. *See Sec’y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956–57 (1984).

282. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

283. *See id.* at 615.

If end users have no constitutional right to access ISP networks and ISPs are not constitutional speakers, then cases involving the First Amendment right to receive information do not apply.<sup>284</sup> The right of a listener to receive information sought to be communicated is a *reciprocal* right, not an independent one.<sup>285</sup> For example, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court addressed whether the recipients of drug price information had standing to challenge a restriction on commercial drug advertising.<sup>286</sup> “Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients.”<sup>287</sup> Based on this reasoning, the Court concluded that the recipients’ standing was contingent on the right of pharmacists to advertise: “If there is a right to advertise, there is a reciprocal right to receive the advertising.”<sup>288</sup> But, as noted above, a sender of information on the Internet has no right to speak using an ISP and, according to the FCC, ISPs are not speakers. This leaves Internet users with no reciprocal First Amendment right to receive information via the Internet upon which a First Amendment challenge might stand.<sup>289</sup>

If the total lack of standing to challenge government censorship of the Internet seems absurd, the absurdity is not in the standing requirement—it is in the FCC’s notion that the operators of conduits used for the transmission of mass media communications have no First Amendment right to exercise editorial discretion like any other member of the press. A reviewing court could, in theory, attempt to avoid this absurd standing result by overturning or ignoring Supreme Court precedent holding there is no constitutional right to access mass media communications. But, given the strong preference of lower courts for following Supreme Court precedent when deciding constitu-

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284. See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (“This right [to receive information] is an inherent *corollary* of the rights of free speech and press that are explicitly guaranteed by the Constitution.” (emphasis added)).

285. The right to receive information does not extend to the use of another person’s property (in this instance, ISPs) for its receipt. See, e.g., *Martin v. City of Struthers, Oh.*, 319 U.S. 141, 143 (1943) (“No one supposes . . . that the First Amendment prohibits a state from preventing the distribution of leaflets in a church against the will of the church authorities.”). If the government is permitted to censor speech on another person’s property (ISPs or, in the Court’s example, a church), the right to receive information does not apply.

286. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

287. *Id.*

288. *Id.* at 757.

289. See *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981) (indicating that end users of the mail had no right to receive unstamped materials in their mailboxes because the distributors of unstamped mail had no right to use mailboxes).

tional issues, it is unlikely that a reviewing court would choose that route.

#### IV. LEVEL OF FIRST AMENDMENT SCRUTINY

Applying the First Amendment to ISPs does not automatically invalidate the FCC's net neutrality rules. Government restrictions on speech are upheld if the government justifies them under the applicable level of judicial scrutiny. A government restriction on protected speech that is based on content or disfavors certain speakers is subject to "strict scrutiny" and will be tolerated only upon a showing that the restriction is narrowly tailored to promote a compelling government interest and that no less restrictive alternative would serve the government's purpose.<sup>290</sup> A government restriction that is speaker- and content-neutral is subject to "intermediate scrutiny" and will be permitted if it advances important governmental interests unrelated to the suppression of free speech or the freedom of the press and does not burden substantially more speech than necessary to further those interests.<sup>291</sup>

##### A. ISPs Disseminate Print Media

In the mid-to-late twentieth century, the Supreme Court indicated that the applicable level of First Amendment scrutiny depends in part on the nature of the mass media in question. The Court has traditionally applied the strictest scrutiny to restrictions on the print media (e.g., newspapers)<sup>292</sup> and lesser levels of scrutiny to audiovisual media (e.g., broadcast and cable television).<sup>293</sup> Some believe the only way to reconcile this differential treatment is by examining differences among the media at issue.<sup>294</sup> According to this school of thought, the

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290. See *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 155 (2d Cir. 2013).

291. See *id.* at 155, 160.

292. See, e.g., *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936) (stating the First Amendment "was meant to preclude the national government . . . from adopting any form of previous restraint upon printed publications, or their circulation"); see also *Smith v. California*, 361 U.S. 147, 150 (1959) ("And it also requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms [of speech and press]."); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (holding the constitutional guarantee of freedom of the press includes the distribution of books in bookstores).

293. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969) ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").

294. See, e.g., Richard A. Hindman, *The Diversity Principle and the MFJ Information Services Restriction: Applying Time-Worn First Amendment Assumptions to New Technologies*, 38 CATH. U. L. REV. 471, 486–88 (1989) ("The Court's decision to uphold government mandated access to the electronic media under the FCC's

applicable level of First Amendment scrutiny is determined by evaluating whether the mass media technology at issue more closely resembles print or broadcast television.<sup>295</sup>

More recently, the Court has indicated that the nature of a particular mass media technology should be irrelevant to First Amendment analysis.<sup>296</sup> Though the Court has not directly overruled earlier opinions justifying differential treatment of different types of mass media, its reasoning in recent cases is inconsistent with the late twentieth century pattern of applying lower levels of scrutiny to video media. It has indicated that “[r]apid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers,”<sup>297</sup> and “whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”<sup>298</sup> In 2010, the Court acknowledged that both newspapers and television networks are “important means of mass communication in modern times,” and that modern speakers and media are entitled to the same First Amendment protection as “those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.”<sup>299</sup> That same year, the Court held the government cannot create new categories of unprotected speech the government considers “too harmful to be tolerated.”<sup>300</sup>

With respect to the FCC’s net neutrality rules, however, the courts need not pass on the validity of late twentieth century precedent that applies lower levels of scrutiny to the exercise of editorial discretion over video programming. Even if that precedent remains valid, strict scrutiny would apply to the total ban on ISPs because broadband Internet access services implicate the same core First Amendment rights as traditional print media. The Internet is a means of publish-

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personal attack rules, and strike down a Florida personal attack statute mandating access to a newspaper, cannot be reconciled except by looking at the medium involved.”).

295. *See id.* at 488.

296. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 814 (1996) (Thomas, J., concurring in part and dissenting in part) (“Over time, however, we have drawn closer to recognizing that cable operators should enjoy the same First Amendment rights as the nonbroadcast media.”).

297. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 315 (2010).

298. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

299. *Citizens United*, 558 U.S. at 353–54.

300. *Brown*, 131 S. Ct. at 2734 (citing *United States v. Stevens*, 559 U.S. 460, 472 (2010) (holding that depictions of animal cruelty are constitutionally protected)) (holding that video games are protected by the First Amendment).

ing and disseminating newspapers and other texts that contain the same type of purely political speech in the same type of media (print) that has always been accorded strict First Amendment scrutiny. The Supreme Court recognized this reality nearly twenty years ago when it described the Internet as a “dynamic, multifaceted category of communication [that] includes . . . traditional print and news services.”<sup>301</sup>

The FCC misses the point when it claims that ISP services “more closely resemble the ‘conduit for news, comment, and advertising’ from which the Court distinguishes newspaper publishing.”<sup>302</sup> There is “no American tradition” of reviewing government restrictions on the dissemination of newspapers or other textual media under intermediate scrutiny.<sup>303</sup> The act of disseminating the news in print has been subject to strict scrutiny since at least 1877, when the Court ruled in *Jackson* that the transportation of newspapers through the mail is as essential to freedom of the press as their initial printing.<sup>304</sup> In contrast to broadcast and cable television, the Internet is capable of delivering newspaper print directly to the masses, and it can do so more rapidly than the mail. Data from 2014 indicates the Internet has completely displaced the traditional role of the Postal Service in delivering printed news for 18% of newspaper readers, with only 56% reading newspapers exclusively in print and only 65.7% of daily newspaper circulation occurring in print.<sup>305</sup> According to the Newspaper Association of America, 137 million U.S. adults read a hardcopy newspaper in a typical week while newspapers printed and disseminated on the Internet reached more than 145 million unique visitors in January 2014 alone.<sup>306</sup> The shift toward digital consumption of newspapers is particularly pronounced for the nation’s largest newspapers, whose digital circulation is much greater than their circulation in print. In 2014, the *New York Times* reported an average weekday print circulation of fewer than 650,000 newspapers but boasted 1.4 million in paid circulation from digital editions.<sup>307</sup>

As an alternative means of disseminating newspapers, the Internet functions as a modern equivalent to the unsealed mail at issue in *Jackson*. As such, the Internet should be entitled to the same level of strict scrutiny that has always been applied to the publication and dissemination of print media.

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301. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

302. *Second Internet Order*, *supra* note 4, at para. 548 n.1694 (quoting *Turner I*, 512 U.S. 622, 636 (1994)).

303. *See Brown*, 131 S. Ct. at 2734.

304. *See Ex parte Jackson*, 96 U.S. 727, 733 (1877).

305. *See Newspapers: Fact Sheet*, PEW RESEARCH CTR. (Apr. 29, 2015), <http://www.journalism.org/2015/04/29/newspapers-fact-sheet/>, archived at <http://perma.unl.edu/BZS4-LD76>.

306. *See The Evolution of Newspaper Innovation*, *supra* note 187.

307. *See Newspapers: Fact Sheet*, *supra* note 305.

## B. The Rules Are Content-Based

Strict scrutiny is also applicable to the FCC's net neutrality rules because they are not content- or speaker-neutral. The rules are speaker- and content-based restrictions of speech on their face, because they eliminate any opportunity for an ISP to exercise its right of editorial discretion while permitting the exclusion of speech for purely technical reasons. The rules prohibit blocking, throttling, or unreasonably interfering with or disadvantaging lawful content *unless* the ISP can demonstrate that it has a "primarily technical network management justification" for the exclusion.<sup>308</sup> Permitting ISPs to discriminate solely for content-neutral reasons indicates the real government interest in the open Internet rules is to prohibit the exercise of editorial discretion by ISPs.

### 1. The Rules Are Content-Based on Their Face

The reasonable network management exception reflects the FCC's finding that ISPs must exercise some control over their networks to ensure "network security and integrity."<sup>309</sup> The FCC expressly found that ISPs need the ability to alleviate network congestion by blocking, throttling, or disadvantaging certain speech.<sup>310</sup> This finding implicitly recognizes several facts:

1. Congestion—a form of blocking, throttling, and disadvantaging speech without human agency—can and does occur on the Internet;
2. To mitigate Internet congestion, ISPs might be required to block, throttle, or disadvantage certain speech; and
3. If ISPs were prohibited from employing these practices to mitigate congestion, Internet users would be harmed.

These facts demonstrate that blocking, throttling, and disadvantaging speech are not intrinsically harmful; these conditions are an inherent and expected consequence of the Internet's decentralized design.<sup>311</sup> The FCC only deems these conditions to be harmful when they are directed by ISPs for business-related reasons.<sup>312</sup> Permitting ISPs to block, throttle, and disadvantage certain speech for technical reasons

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308. *Second Internet Order*, *supra* note 4, at paras. 283–84.

309. *Id.* at para. 220.

310. *See id.* at paras. 218–20.

311. *See, e.g.*, Predictable Network Solutions Ltd. & Martin Geddes Consulting Ltd., *Response to Department for Culture, Media & Sport Consultation on Digital Communications Infrastructure Strategy* (Sept. 2014), <http://www.martingeddes.com/wp-content/uploads/Response-to-Digital-Communications-Infrastructure-Strategy-Consultation.pdf>, *archived at* <http://perma.unl.edu/9U8Q-NSTQ> ("ICT and broadband services are affordable because they are statistically shared. This has the consequence of making them 'rivalrous' resources, i.e. use for one purpose impinges on the ability to support others.").

312. *See Second Internet Order*, *supra* note 4, at para. 216.

only is another way of saying that the FCC considers these activities to be harmful *only* when they constitute ISP speech.

The inapplicability of the reasonable network management exception to the prohibition against paid prioritization is an independent reason the rules must be considered content-based. In addition to muzzling ISPs, the ban on paid prioritization restricts the speech of end users who want to avoid naturally occurring Internet congestion in an effort to ensure their particular viewpoint is heard. The FCC's justification for restricting end-user speech in this manner—that paid prioritization could have “chilling effects” on end users who are unwilling or unable to pay for prioritization<sup>313</sup>—is inconsistent with fundamental First Amendment principles. The Supreme Court has rejected the notion that the government has an interest in equalizing the relative ability of individuals or groups to speak<sup>314</sup>: “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>315</sup>

It is constitutionally irrelevant that the content-related restrictions in the open Internet rules also implicate ISP business concerns.<sup>316</sup> The commercial nature of the press does not deprive it of First Amendment protection, because there is no constitutionally permissible way for the government to separate the business interests of the press from its editorial function.<sup>317</sup> The existence of “commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment,”<sup>318</sup> in part because even the earliest printers were capitalists who were regarded as innovators.<sup>319</sup> The combination of the profit motive “with other motives that were self-serving *and* altruistic, and even evangelistic, at times,” played a role in the “rapid expansion of early printing industries.”<sup>320</sup> The editorial and business interests of the press have always been in-

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313. *See id.* at para. 127.

314. *See* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350 (2010).

315. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

316. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (“The existence of ‘commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.’” (quoting *Ginzburg v. United States*, 383 U.S. 463, 474 (1966))).

317. *See* *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see also* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (“That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.”).

318. *Bigelow*, 421 U.S. at 818 (quoting *Ginzburg*, 383 U.S. at 474) (internal quotation marks omitted).

319. *See* ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* 22 (Cambridge Univ. Press et al. eds., 2009).

320. *Id.* at 23.



extricably intertwined,<sup>321</sup> and the First Amendment forbids government attempts to unravel them.<sup>322</sup>

## 2. *The Purpose of the Rules Is Content-Based*

Even if the rules could be considered neutral on their face, strict scrutiny applies because the virtuous circle theory and the gatekeeper ideology on which it is premised are inherently related to the suppression of free expression. When determining whether a regulation is content-based “[t]he government’s purpose is the controlling consideration.”<sup>323</sup> Speech that does not burden or benefit speech of particular content on its face is nevertheless content-based if “the Government’s asserted *interest* is related to the suppression of free expression.”<sup>324</sup> The government interests cited by the FCC in the *Second Internet Order* are *all* related to the suppression of speech. The rationale in the *Second Internet Order* indicates that the purported benefits of the virtuous circle theory—encouraging broadband deployment and “promoting the continued development of the Internet and other interactive computer services and other interactive media”<sup>325</sup>—are all dependent on prohibiting ISPs from exercising editorial discretion in order to promote the speech of others.<sup>326</sup> According to the FCC, ISPs have the power to “limit Internet openness” *because* “[b]roadband providers’ networks serve as platforms for Internet ecosystem participants to communicate . . . .”<sup>327</sup>

Though it describes the virtuous circle theory in terms of edge “innovation,”<sup>328</sup> the FCC’s factual findings indicate that, in this context, “innovation” is doublespeak for “speech.” According to the FCC’s *Sixteenth Report* on video competition, online video distribution accounted for 63.87% of downstream Internet traffic on North American fixed access networks in March 2014, with Netflix alone accounting

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321. *See id.* (“It seems more accurate to describe many publishers as being *both* businessmen *and* literary dispensers of glory.”).

322. *See, e.g.,* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 580 (1980) (Stevens, J., concurring in the judgment) (“Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward.”); *see also* Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty., Fla., 124 F. Supp. 2d 685, 693 (S.D. Fla. 2000) (noting newspapers and cable operators are entitled to First Amendment protection despite selling advertising).

323. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

324. *United States v. Eichman*, 496 U.S. 310, 315 (1990) (quoting *Ward*, 491 U.S. at 791).

325. *Second Internet Order*, *supra* note 4, at para. 554.

326. *See Eichman*, 496 U.S. at 315–16.

327. *Second Internet Order*, *supra* note 4, at paras. 79–80 (emphasis added).

328. *Id.* para. 7.

for over 34% of peak Internet traffic.<sup>329</sup> This video traffic is not “innovation”—it is the same type of mass media content that is distributed by broadcasters and cable operators, as evidenced by the fact that this online video content competes with television and cable content for viewers.<sup>330</sup> The FCC’s finding that most Internet traffic is the same type of video content that has long been considered speech when it is distributed by broadcast and cable television systems indicates that the FCC considers “innovation” in the virtuous circle theory to be largely synonymous with “speech.” For the purpose of First Amendment analysis, what the virtuous circle theory actually posits is that non-ISP *speech* “enhances consumer demand, leading to expanded investments in broadband infrastructure that, in turn spark new [*speech*] at the edge.”<sup>331</sup>

The FCC’s total ban on ISP speech is unconstitutional even if some activity at the Internet’s edge is innovation that is unrelated to speech. The FCC has described the Internet as a “General Purpose Technology” (GPT) that has an inherent potential for “innovational complementarities,” and it is presumably these complementarities the FCC seeks to promote through its net neutrality rules.<sup>332</sup> That might be a legitimate government interest in some contexts, but it is unconstitutional to the extent the GPT is used to disseminate mass communications. The First Amendment already accounts for the fact that mass communications systems have “innovational complementarities.”

The abundance of speech enabled by mass communications has been a catalyst for innovation since the invention of the Internet’s predecessor GPT—the printing press. In her two-volume masterwork, *The Printing Press as an Agent of Change*, Elizabeth Eisenstein details how the invention of the printing press “revolutionized all forms of learning”<sup>333</sup> by fundamentally “alter[ing] methods of data collection, storage and retrieval systems and communications networks used by learned communities throughout Europe.”<sup>334</sup> Eisenstein makes a persuasive case that the advent of printing “inaugurat[ed] a new cultural era in the history of Western man”<sup>335</sup> and, as Francis Bacon described it in the seventeenth century, ultimately “changed the appearance and state of the whole world”<sup>336</sup> by enabling a

329. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Sixteenth Report, MB Docket No. 14-16, FCC 15-41, para. 260 (Mar. 31, 2015).

330. *See id.* at paras. 96–100.

331. *Second Internet Order*, *supra* note 4, at para. 7.

332. *See* FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, Pt. I, at 29 (Mar. 16, 2010), *archived at* <http://perma.unl.edu/V4LV-Z2EQ>.

333. EISENSTEIN, *supra* note 319, at 3.

334. *Id.* at xvi.

335. *Id.* at 33.

336. *Id.* at 43 (quoting FRANCIS BACON, NOVUM ORGANUM, Aphorism 129).

“marked increase in the output of books and [a] drastic reduction in the number of man-hours required to turn them out.”<sup>337</sup> This ability to disseminate more information with less labor meant that “a given purchaser could buy more books at lower cost,”<sup>338</sup> which in turn spurred greater demand for books.<sup>339</sup>

It is no coincidence that Elizabeth Eisenstein’s analysis of early printing’s impact on Europe’s culture and economy is remarkably similar to the FCC’s virtuous circle theory of the Internet. The primary difference between the Internet and the printing press is that the Internet can disseminate even more information even more quickly at an even lower cost than physical printing. The benefits described by the virtuous circle theory are the history of the printing revolution repeating itself in the Internet era. Such history provides guidance regarding the limits of appropriate government response to such revolutions in the form of the First Amendment.

The Framers were undoubtedly aware of the myriad benefits offered by mass communications when they drafted the Press Clause.<sup>340</sup> Their primary concern was preserving the freedom of the press itself from government influence.<sup>341</sup> The right to free expression embodied in the Speech and Press Clauses is a “precondition to enlightened self-government and a necessary means to protect it,”<sup>342</sup> and it is for these reasons that free expression must prevail against government efforts to censor particular content or particular speakers,<sup>343</sup> including laws that censor the operation of the press and the dissemination of the mass communications it enables. Whatever merit it might otherwise have, the virtuous circle theory is not a valid justification for trumping the First Amendment, because the Framers implicitly rejected the very same theory when they drafted the Press Clause.

### 3. *The Gatekeeper Theory Is Content-Based*

Judicial precedent also indicates the “key insight” of the virtuous circle theory—that ISPs have the ability to act as gatekeepers standing between edge providers and consumers<sup>344</sup>—is neither new nor content-neutral. The net neutrality rules based on this “insight” pre-

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337. *Id.* at 44–45.

338. *Id.* at 72.

339. *Id.* at 73–75.

340. The effects of the printing press on culture and innovation were recognized as early as the seventeenth century. *Id.* at 43–45.

341. *See Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty., Fla.*, 124 F. Supp. 2d 685, 694–95 (S.D. Fla. 2000) (noting that concerns expressed by the anti-Federalists led to the adoption of the Bill of Rights, including the First Amendment).

342. *Id.*

343. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010).

344. *See Second Internet Order*, *supra* note 4, at para. 20.

sume that (1) the operators of mass media communications systems are an intrinsic threat to expression, rather than an enabler of it; (2) the government has authority to establish an enforceable right of access to private mass media communications systems that eviscerates the editorial discretion of the press; and (3) the government should exercise that authority without regard to the scarcity of the medium (e.g., the availability of competing alternatives) or the free expression interests of ISPs. These presumptions reveal the virtuous circle theory as a cleverly repackaged and far more expansive version of the traditional media access arguments the Supreme Court rejected in *Miami Herald Publishing Co. v. Tornillo*.<sup>345</sup>

*Tornillo* held that a statute requiring newspapers to give political candidates a right to equal space to respond to criticism of their records violated the Press Clause. The Court rejected arguments submitted by media access proponents in *Tornillo* that are substantially the same as those cited by the FCC in support of its gatekeeper theory.<sup>346</sup> The Court detailed the contentions of access proponents that (1) “economic factors” had made “entry into the marketplace of ideas served by the print media almost impossible,” (2) competing newspapers had been “eliminated in most of our large cities,” and (3) most consumers subscribed to or read only their locally available newspapers.<sup>347</sup> Nevertheless, the Court concluded: “However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism” for enforcement, and “if it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment,” including its prohibition on government efforts to abridge the freedom of the press.<sup>348</sup>

*Tornillo* denied the claim that government restrictions on editorial discretion in the form of compelled speech are content-neutral so long as the press remains free to publish its own content.

The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and

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345. 418 U.S. 241 (1974).

346. Compare *id.* at 247–54, with *Second Internet Order*, *supra* note 4, at paras. 80–84.

347. *Tornillo*, 418 U.S. at 247–54. Media access proponents theorize that when the First Amendment was ratified “the press was broadly representative of the people it was serving” and “[e]ntry into publishing was inexpensive.” *Id.* at 248. Recent scholarship posits that this account is “ahistorical, a postindustrial fantasy of preindustrial print’s efficacy . . . .” TRISH LOUGHRAN, *THE REPUBLIC IN PRINT: PRINT CULTURE IN THE AGE OF U.S. NATION BUILDING, 1770–1870*, at xx (2007). Loughran’s research reveals that, “Even in 1800, most Americans lived beyond the reach of any printed matter that was not produced by their own local printer or privately sent to them through personal connections.” *Id.* at 21.

348. *Tornillo*, 418 U.S. at 256.

materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.<sup>349</sup>

In the *Second Internet Order*, the FCC attempted to avoid *Tornillo*'s rationale by claiming that ISPs do not face the same economic limitations as newspapers, because providing an Internet end user with "access to one edge provider does not displace another."<sup>350</sup> This attempt to distinguish *Tornillo* is inconsistent with the FCC's most recent factual findings in other proceedings that were aimed specifically at (1) the technological capabilities of ISP networks, (2) consumer demand for access to Internet content, and (3) the economics of deploying more capable Internet networks.

One month before it issued the *Second Internet Order*, the FCC found in its *Broadband Progress Report* that most ISP networks are currently incapable of providing most consumers with "access to the extensive and ever-expanding [voice, data, graphics, and video] offerings available today or on the near horizon."<sup>351</sup> Based on its examination of the actual household usage of today's consumers,<sup>352</sup> the FCC found that one edge provider does displace another when an end user does not have "access to actual download speeds of at least 25 Mbps and actual upload speeds of at least 3 Mbps (25 Mbps/3 Mbps),"<sup>353</sup> because:

- "Americans increasingly rely on broadband to perform multiple functions, and consumers within a household routinely use multiple applications simultaneously;"<sup>354</sup> and
- ISP offerings that do not meet the 25 Mbps/3 Mbps benchmark cannot adequately support the simultaneous use of multiple content services that consumers demand.<sup>355</sup>

In other words, when one member of a household is using a sub-25 Mbps Internet connection to access the content of a particular content provider, other members of the same household are precluded from simultaneously accessing content offered by other providers.<sup>356</sup> This

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349. *Id.* at 256–57 (citations omitted).

350. *See Second Internet Order*, *supra* note 4, at para. 559 n.1698.

351. 2015 Broadband Progress Report & Notice of Inquiry on Immediate Action to Accelerate Deployment, GN Docket No. 14-126, FCC 15-10, para. 20 (Feb. 4, 2015).

352. *Id.* at para. 29.

353. *Id.* at para. 3.

354. *Id.*

355. *See id.* at para. 47.

356. *See id.*

factual finding directly implicates the same editorial concerns that drove the Court's opinion in *Tornillo*.

Separate FCC findings indicate it is "a matter of economic reality"<sup>357</sup> that the virtuous circle does not create enough demand for all ISPs to expand their bandwidth to meet the 25 Mbps/3Mbps benchmark even when the government provides financial assistance. In its *Connect America* proceeding, the FCC determined that it must provide governmental financial support for the deployment of Internet infrastructure in rural areas because deployment is commercially uneconomic,<sup>358</sup> but it has refused to provide funding for broadband infrastructure that is capable of supporting simultaneous access to multiple content streams.<sup>359</sup> Two months before it issued the *Second Internet Order*, the FCC found it would be too costly for the government to support the deployment of rural Internet infrastructure at the 25 Mbps/3 Mbps level<sup>360</sup> that the FCC found consumers demand.<sup>361</sup>

The FCC's findings in its *Broadband Progress Report* and *Connect America Fund* proceeding demonstrate that the economic reality faced by ISPs is consistent with the economic considerations cited by the Court in *Tornillo*. Like newspapers, ISPs cannot "proceed to infinite expansion of [their network] space to accommodate the [content] that a government agency determines or a statute commands [Internet end users] should have available."<sup>362</sup>

*Tornillo* also forecloses the FCC's contention that its rules are content-neutral because they "do not burden any identifiable speech."<sup>363</sup> The Court would have reached the same result even if the compulsion to publish at issue had not been limited to the publication of rebuttals by political candidates:

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with

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357. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

358. See *CAF Notice II*, *supra* note 94, paras. 4–10.

359. See *Connect America Fund*, Report and Order, WC Docket No. 10-90, FCC 14-190, paras. 27–28 (Dec. 18, 2014).

360. *Id.*

361. *Id.* at para. 3.

362. *Tornillo*, 418 U.S. at 257.

363. See *Second Internet Order*, *supra* note 4, at para. 556.

First Amendment guarantees of a free press as they have evolved to this time.<sup>364</sup>

This passage indicates that it does not matter whether a government restriction on the editorial function of the press is related to the suppression of identifiable speech: strict scrutiny applies.<sup>365</sup>

### C. The Rules Are Speaker-Based

The record in the *Second Internet Order* proceeding demonstrates that the FCC's net neutrality rules impermissibly discriminate between ISPs and other Internet intermediaries that have the same ability to act as gatekeepers between consumers on the one hand, and service, device, application, and content providers on the other.<sup>366</sup> Non-ISP gatekeepers, a category that includes the providers of mobile operating systems and Internet search engines, have substantially the same incentives and ability as ISPs to exercise gatekeeper control over end users because:

- End users rely on these non-ISP gatekeepers to reach other end users on the Internet;
- The end users of non-ISP gatekeeper services bear switching costs that are substantially similar to those borne by ISP subscribers;
- The markets for non-ISP gatekeeper services are typically more concentrated (i.e., less competitive) than markets for broadband internet access; and
- Non-ISP gatekeepers are routinely using their market position to block or otherwise disadvantage lawful services, devices, applications, and content.<sup>367</sup>

This evidence—which was not disputed by the FCC—indicates that non-ISP gatekeepers are indistinguishable from ISPs with respect to the government interests identified in the *Second Internet Order*.<sup>368</sup>

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364. *Tornillo*, 418 U.S. at 258 n.24 (“[H]ow can the state force abstention from discrimination in the news without dictating selection?” (quoting *Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS* 633 (1947))).

365. This principle applies to ISPs even if the holding in *Tornillo* is properly limited to newspapers or print media, because ISPs disseminate newspapers, books, and other print media. See *supra* section IV.A.

366. See *Second Internet Order*, *supra* note 4, at para. 80.

367. See, e.g., Protecting & Promoting the Open Internet, Reply Comments of the Center for Boundless Innovation, GN Docket No. 14-28, at 27–33 (Sept. 15, 2014) [hereinafter *CBIT Reply Comments*], archived at <http://perma.unl.edu/D7JG-CSB8> (noting, among other things, that Apple uses its exclusive control over its mobile operating system to decide which applications it will allow iPhone and iPad users to access over the Internet); see also Bambauer, *supra* note 120, at 874 (noting that Apple has blocked apps it considers offensive, including Pulitzer Prize-winning cartoonist Mark Fiore's app).

368. See, e.g., Armijo, *supra* note 192, at 414 (“[ISPs] like Comcast and AT&T; application companies like Facebook, Twitter, Flickr, and Apple; and search and email

The FCC nevertheless exempted all non-ISP gatekeepers from the restrictions in its net neutrality rules without providing a reasoned explanation for its decision.<sup>369</sup> In its *First Internet Order*, the FCC asserted that ISPs are “distinguishable from other participants in the Internet marketplace” because ISPs “control access to the Internet for their subscribers and for anyone wishing to reach those subscribers.”<sup>370</sup> But the concerns underlying the FCC’s virtuous circle and gatekeeper theories are not limited to control over access to the Internet per se; they are concerned with access to particular content, applications, services, or non-harmful devices (or classes thereof). How can rules ensuring that mobile ISPs do not block, throttle, prioritize, or disadvantage broadband applications protect the virtuous circle when, as the undisputed evidence shows, the dominant providers of mobile operating systems are currently engaging in those very same practices?<sup>371</sup> A more ominous possibility is that the exercise of government control over ISP networks is sufficient to enable government censorship of Internet communications. The FCC does not say, presumably because it does not like the answer: gatekeeper control at any level of the Internet’s chain of distribution presents the same threat on which the FCC rested its net neutrality rules, but it chose to apply those rules to ISPs only.<sup>372</sup> Whatever its stated intent, this discriminatory choice “raises serious doubts” about whether the FCC was in fact interested in protecting the virtuous circle or instead providing a government-conferred advantage to the speech (and business plans) of its favored Internet gatekeepers at the expense of ISPs.<sup>373</sup>

The FCC’s failure to offer a rationale for the discriminatory application of its net neutrality rules is alone sufficient to support the application of strict scrutiny. Laws designed or intended to suppress or restrict the expression of specific speakers require strict scrutiny<sup>374</sup> because government discrimination “among different speak-

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service providers like Google all retain the authority to make decisions affecting the content and reach of digital speech.”).

369. See *Second Internet Order*, *supra* note 4, at paras. 186–224.

370. *First Internet Order*, *supra* note 1, at para. 50 n.160.

371. The 30% “toll” on gross revenues that Apple Computer charges for every mobile application that is accessed using its mobile operating systems is two to three times higher than the returns the FCC has traditionally permitted telecommunications carriers to earn under its rate of return policies.

372. See, e.g., *CBIT Reply Comments*, *supra* note 367, at 28 (“By its own logic, the gatekeeper theory applies to any participant in the Internet marketplace that is capable of exercising gatekeeper control—which includes the provider of any service that is capable of acting as an intermediary between (1) end users and (2) other service, application, and content providers who access end users through that intermediary service.”).

373. *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2740 (2011).

374. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812 (2000).



ers . . . may be a means to control content,”<sup>375</sup> and “[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”<sup>376</sup> In the absence of a reasoned basis for the FCC’s discriminatory treatment of Internet gatekeepers, the rules must be deemed speaker-based.<sup>377</sup>

#### D. Cable Television Precedent Is Inapplicable

The FCC argues that strict scrutiny is inapplicable to the editorial discretion of ISPs based on the Court’s decision to apply intermediate scrutiny to cable television operators in *Turner I*. This argument misses the critical distinction between the mandatory access rights at issue in *Turner I* and the FCC’s net neutrality rules: the “must carry” rules at issue in *Turner I* are relatively limited in scope, whereas the FCC’s net neutrality rules impose a total ban on the editorial discretion of ISPs.

The “must carry” rules require cable operators to carry the signals of a specified number of local broadcast television stations.<sup>378</sup> *Turner I* applied intermediate scrutiny to these rules because “the number of channels a cable operator must set aside depends only on the operator’s channel capacity,” which means there is no danger that a cable operator could avoid or mitigate its obligations by altering the programming it offers subscribers.<sup>379</sup> The *Turner I* Court expressly contrasted these circumstances with its holding in *Tornillo*, in which the Court expressed concern that a newspaper could avoid its access obligations by refraining from speech critical of political candidates.<sup>380</sup>

The total ban on editorial discretion imposed by the FCC’s net neutrality rules creates incentives for ISPs like those in *Tornillo*, not *Turner I*. In its *Second Internet Order*, the FCC admitted its net neutrality rules give ISPs an incentive to shift content, services, and applications from the open Internet to an excluded category the FCC dubbed “non-broadband Internet access services” (BIAS).<sup>381</sup> It acknowledged that these services “could be used to evade the open Internet rules,”<sup>382</sup> and emphasized that it would “act decisively in the event that a broadband provider attempts to evade open Internet protections (e.g., by claiming that a service that is the equivalent of In-

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375. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 312 (2010).

376. *Brown*, 131 S. Ct. at 2740.

377. *See id.* at 2740 (noting that the state had singled out purveyors of video games for disfavored treatment without giving a persuasive reason why).

378. *See Turner I*, 512 U.S. 622, 630–32 (1994).

379. *Id.* at 644.

380. *Id.* (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974)).

381. *Second Internet Order*, *supra* note 4, at paras. 207–12.

382. *Id.* at para. 212.

ternet access is a non-BIAS data service not subject to the rules we adopt today).”<sup>383</sup> The FCC’s finding that ISPs could attempt to avoid their access obligations by altering their approach to content is flatly inconsistent with the Court’s justification for applying intermediate scrutiny in *Turner I*. Because the FCC’s net neutrality rules create content-based incentives similar to those in *Tornillo*, strict scrutiny applies.

### E. The *O’Brien* Distinction Between Speech and Conduct Is Inapplicable

The FCC also contends that intermediate scrutiny applies because “they are triggered by a broadband provider offering broadband Internet access services,”<sup>384</sup> an activity that arguably combines speech and nonspeech elements. In *United States v. O’Brien*, the Supreme Court distinguished between government restrictions aimed at suppressing speech (content-based restrictions to which strict scrutiny applies) and restrictions aimed primarily at conduct that “incidentally” burdens speech (content-neutral restrictions to which intermediate scrutiny applies).<sup>385</sup> The Court was concerned that the application of strict scrutiny to symbolic speech would require it to “accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>386</sup>

*Jackson* and its progeny indicate that the distinction between conduct and speech the Court adopted in *O’Brien* is not applicable to restrictions on the liberty of circulation. First, regulations (e.g., net neutrality) that strip the owners of mass media communications systems (e.g., ISPs) from exercising any degree of editorial control cannot be considered “incidental” limitations on First Amendment freedoms.<sup>387</sup> Treating mere ownership and operation of a printing press or its modern equivalents (e.g., Internet infrastructure) as mere conduct undeserving of strict scrutiny would destroy the liberty of circulation. The Press Clause could not serve its intended purpose—to ensure the government cannot control speech by controlling the physical means of publishing and disseminating mass communications—if less-than-strict scrutiny were automatically applied to the act of operating a mass communications system. Otherwise, government practices the Framers plainly intended to abolish (e.g., press licensing

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383. *Id.* at para. 207.

384. *Id.* at para. 553.

385. *See United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

386. *Id.* at 376.

387. *See id.*

laws<sup>388</sup>) would be accorded less demanding scrutiny than the dissemination of pornographic material.<sup>389</sup> Second, applying strict scrutiny to restrictions on the dissemination of mass communications by ISPs or any other member of the press would not require the Court to “accept the view that an apparently limitless variety of conduct can be labeled ‘speech.’”<sup>390</sup> The Supreme Court has applied strict scrutiny to restrictions on the liberty of circulation since 1877 without accepting that view, and applying strict scrutiny to the FCC’s net neutrality rules would not require the Court to accept that view now. The dividing line between the dissemination of mass communications and “symbolic speech” is not difficult to discern.

## V. APPLICATION OF FIRST AMENDMENT SCRUTINY

If a court applies strict scrutiny to the FCC’s net neutrality rules, the reasoning in *Tornillo* indicates the reviewing court would be bound to hold that the rules are unconstitutional. Though it requires additional analysis, a reviewing court should reach the same result even if it decides to apply intermediate scrutiny. To meet its burden under an intermediate scrutiny analysis, the FCC must demonstrate that its net neutrality rules will in fact advance the government’s asserted interests in a direct and material way without burdening substantially more speech than necessary.<sup>391</sup> The FCC failed to meet this burden<sup>392</sup> with respect to all three government interests it asserted: (1) promoting broadband deployment, (2) encouraging Internet innovation, and (3) assuring a diversity of non-ISP speech.<sup>393</sup>

### A. Assuring a Diversity of Non-ISP Speech

The government’s interest in assuring diversity of speech is easily dismissed even under less stringent, intermediate scrutiny, because the total ban on editorial discretion of ISPs in the net neutrality rules

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388. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 335 (2010) (“These onerous restrictions thus function as the equivalent of . . . licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.”).

389. See *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004) (applying strict scrutiny to a statute restricting sexually explicit materials on the Internet). Though it applies strict scrutiny, the Court has indicated that pornographic material lies at the periphery of First Amendment concern. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 84 (1994) (Scalia, J., dissenting) (citing cases indicating the same).

390. See *O’Brien*, 391 U.S. at 376.

391. *Turner I*, 512 U.S. 622, 664 (1994).

392. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000) (“When First Amendment compliance is the point to be proved, the risk of non-persuasion . . . must rest with the Government, not with the citizen.”).

393. See *Second Internet Order*, *supra* note 4, at paras. 554–55.

does not meet the narrow tailoring requirement. The FCC's declaration that its net neutrality "rules are structured to operate in such a way that no speaker's message is either favored or disfavored"<sup>394</sup> erroneously assumes that ISPs have no right to exercise editorial discretion.<sup>395</sup> With nary a hint of irony, the FCC concluded in its *Second Internet Order* that bright-line rules banning the editorial discretion of the press have only a "minimal" effect on speech<sup>396</sup> and suggested that the ability of the press to exercise editorial discretion is intrinsically inimical to the "values central to the First Amendment."<sup>397</sup> The FCC's analysis thus embraced the application of traditional media access theory to the Internet—that "the source of centralized authority that threatens" speech has shifted from the government to private corporations<sup>398</sup>—and that the values embodied in the First Amendment should similarly shift.

The Constitution cannot be shifted so easily. Though the Supreme Court has permitted the government to impose limited restrictions on the editorial discretion of cable television operators, it has refused to "ignore the expressive interests of cable operators altogether."<sup>399</sup> Whatever interest the government has in assuring a diversity of speech generally cannot be used to justify a total ban on a particular type of speech or a particular category of speaker—especially when that type and category is an essential part of the press.

A contrary view would invite the government to pick and choose among speakers based on its own cost-benefit analysis: in this instance, that edge speech is more valuable than ISP speech. The Supreme Court has repeatedly and "emphatically rejected [the] 'startling and dangerous' proposition" that the First Amendment permits the government to balance the social costs of suppressing the speech of some with the purported benefits it might have for others.<sup>400</sup> "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."<sup>401</sup> The FCC's notion that the ability of ISPs to exercise editorial discretion

394. *Id.* at para. 553.

395. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 747 (1996) (noting that cable operators have legitimate expressive interests in the First Amendment context).

396. *See Second Internet Order*, *supra* note 4, at para. 556.

397. *See id.* at paras. 556–57 (concluding the ability of ISPs to exercise editorial discretion is a "special characteristic justifying differential treatment" of ISPs as compared to other speakers).

398. *See SBC and AT&T Applications*, *supra* note 135.

399. *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 747–48.

400. *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2734 (2011) (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

401. *Stevens*, 559 U.S. at 470.

while providing a means of mass communications is a “special characteristic” that justifies government restraint is anathema to the purpose of the Press Clause, which is to protect the editorial discretion of the press from government interference, not to protect private individuals from the press. Neither a federal agency nor a reviewing court is permitted to revise the judgment of the American people—embodied in the First Amendment—that the benefits of the First Amendment’s restrictions on the government outweigh its costs.<sup>402</sup>

### **B. The Gatekeeper Theory Is Unsupported by Substantial Evidence**

With respect to the government’s interests in promoting innovation and broadband deployment, the FCC failed to meet its burden of demonstrating that the harms posited by the gatekeeper theory are real or that its net neutrality rules will advance<sup>403</sup> the government’s asserted interests in promoting broadband deployment and innovation. The FCC must do more than claim the virtuous circle and gatekeeper theories are reasonable in the abstract. “[I]f intermediate scrutiny is to have any bite, we can’t just trot out all of the reasons the government advances in support of the regulation and salute.”<sup>404</sup> The government must prove that “the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>405</sup> The evidence the FCC presented in support of its virtuous circle and gatekeeper theories falls well short of this standard.

The core of the virtuous circle theory—that activity at the edge of a communications network tends to increase demand for the network’s services—describes a positive form of the economic principle commonly known as “network effects.” “For example, [a]n individual consumer’s demand to use (and hence her benefit from) the telephone network . . . increases with the number of other users on the network whom she can call or from whom she can receive calls.”<sup>406</sup> Acknowledging this principle’s mere existence, however, is not enough to justify the complete abnegation of ISPs’ First Amendment right to

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402. *See Brown*, 131 S. Ct. at 2734. Those who claim the government can force “new media” to “carry the expression of others” ignore issues related to governmental censorship by proxy. *See Meyerson*, *supra* note 230, at 83.

403. *Turner I*, 512 U.S. 622, 664 (1994).

404. *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1212 (9th Cir. 2013) (Kozinski, C.J., dissenting), *cert. denied*, 134 S. Ct. 2874 (2014).

405. *Turner I*, 512 U.S. at 664.

406. *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001) (quoting Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 8 (2001)).

exercise editorial discretion.<sup>407</sup> At a minimum, the FCC must examine all relevant data and articulate satisfactory explanations for its actions.<sup>408</sup> It did not do so in the *Second Internet Order*.

The FCC failed to consider that, like all two-sided markets that are subject to network effects, the potential benefits of positive network effects on the Internet “can go either way.”<sup>409</sup> The gatekeeper theory’s conclusive presumption—that permitting ISPs to exercise editorial discretion would reduce innovation and demand for broadband Internet access service—contradicts the “the most famous law in economics, and the one economists are most sure of,” the law of demand.<sup>410</sup> This law “states that when the price of a good rises, the amount demanded falls, and when the price falls, the amount demanded rises.”<sup>411</sup> Absent a showing that ISPs have market power, demand theory presumes that ISPs have strong economic incentives to create additional consumer demand for Internet access services by lowering their prices or increasing their output (e.g., upgrading their network infrastructure) using revenue gleaned from edge providers.<sup>412</sup> In competitive markets, ISPs have their own incentives to promote the positive network effects described by the virtuous circle theory, and their incentives to increase demand for their own broadband access services tend to offset whatever incentives they might have to disfavor particular content.<sup>413</sup> The question is, to what extent and in what circumstances do the incentives of ISPs to promote the virtuous circle theory offset their incentives to undermine it—a question that requires the type of market analysis the FCC declined to undertake.<sup>414</sup>

The FCC’s conclusion that market power is irrelevant to the gatekeeper theory of harm apparently assumed the law of demand does not exist. In its *Second Internet Order*, the FCC determined that *all* ISPs act as gatekeepers even in competitive markets, and that “when

407. See *id.* at 83–84 (noting failure to demonstrate that network effects were significant enough to confer monopoly power).

408. See *Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009) (citing *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 968 (D.C. Cir. 1999)) (applying the arbitrary and capricious standard to the Administrative Procedure Act).

409. See DE SOLA POOL, *supra* note 189, at 76 (“[T]he synergy between postal delivery and other businesses, like newspaper publishing, can go either way.”).

410. David R. Henderson, *The Concise Encyclopedia of Economics: Demand*, LIBR. OF ECON. & LIBERTY (2008), <http://www.econlib.org/library/Enc/Demand.html>, archived at <http://perma.unl.edu/6H32-5PKV>.

411. *Id.*

412. *Id.*

413. See, e.g., *MTS Mkt. Structure*, *supra* note 88, at para. 109 (noting that when there are competitive alternatives, forcing heavy users to pay inefficiently high rates gives such users incentives to switch to another network).

414. Economists answer this question based on relative market power, but the FCC refused to conduct a market-power analysis.

a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply.”<sup>415</sup> This determination is directly inconsistent with the law of demand, yet the FCC did not attempt to articulate why the otherwise universally accepted law of demand is inapplicable to ISPs.

- The FCC concluded there was “no persuasive reason to believe”<sup>416</sup> that ISPs would actually lower prices or increase output if they were permitted to charge edge providers for access to ISP networks without considering how the law of demand would influence ISPs’ pricing and investment decisions.<sup>417</sup>
- The FCC did not attempt to quantify the extent to which edge “innovation” would be reduced in the absence of net neutrality rules or the extent to which any such reduction would be offset by operation of the law of demand.<sup>418</sup>
- The FCC concluded that net neutrality rules prohibiting ISPs from controlling their networks would prompt ISPs to invest substantial capital in new broadband infrastructure without considering the market-based incentives for investment described by the law of demand.<sup>419</sup>
- The FCC concluded the potential benefits of its virtuous circle and gatekeeper theories outweigh the benefits of lower retail prices and increased output of ISPs predicted by the law of demand, but it reached this conclusion without attempting to quantify either.<sup>420</sup>

In the absence of this analysis, it is impossible to know whether net neutrality rules are likely to produce any broadband deployment or innovation at all, let alone a direct and material increase.

To the extent the FCC considered the investment incentives of ISPs, its consideration of the issue was limited to the reclassification of BIAS as a Title II service.<sup>421</sup> The FCC’s decision to analyze the law of demand separately from the FCC’s justification for imposing net

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415. *Second Internet Order*, *supra* note 4, at para. 20.

416. *See First Internet Order*, *supra* note 1, at para. 40.

417. In its *Second Internet Order*, the FCC did not discuss the incentives of ISPs to promote the virtuous circle in order to create additional demand for their broadband services. *See Second Internet Order*, *supra* note 4, at paras. 79–84.

418. *See id.*

419. *See id.*

420. *See id.* The FCC did not acknowledge that the 1996 Act presumes communications companies will lower prices or increase output in competitive markets, which indicates that, to the extent there was a lack of evidence in this respect, it was due at least in part to the FCC’s refusal to conduct a proper market analysis. The FCC also failed to acknowledge the lack of any evidence that edge providers would actually lower their prices or increase their output as a result of the FCC’s decision to exempt them from paying ISPs for access to their networks or for the prioritization of edge services.

421. *See id.* at paras. 409–25.

neutrality rules disguises the fact that the law of demand gives ISPs incentives to support the virtuous circle that tend to offset their incentives to disfavor content. The FCC's analysis of demand in the context of the reclassification issue—which found that demand for increased Internet traffic would “provide a strong incentive for broadband providers to continue to invest in their networks” irrespective of the FCC's net neutrality rules—appears to be at odds with the FCC's finding that its net neutrality rules are justified by the need to promote broadband deployment.<sup>422</sup> It was unreasoned decision-making to ban ISPs' editorial discretion merely because ISPs “could act in ways that would ultimately inhibit” demand for their broadband services<sup>423</sup> without considering whether, or to what extent, that possibility is reduced or eliminated by the benefits ISPs would derive from increased demand.<sup>424</sup>

If the FCC had analyzed ISPs' competing incentives, then it would have been required to acknowledge evidence that the imposition of strict common carrier regulation on ISPs tends to shift the potential benefits of additional broadband deployment from ISPs to so-called edge companies, which also tends to inhibit the deployment of new infrastructure.<sup>425</sup> It is well known that access regulations deter investment by imposing the highest risk on network operators while shifting the highest returns to access seekers.<sup>426</sup> In the context of network unbundling, Congress and the courts have both recognized that government-mandated access “is not an unqualified good”<sup>427</sup> and permitted its use only when “necessary” to remedy a market impairment, because mandatory access rights create disincentives to innovation and investment in networks.<sup>428</sup> This evidence indicates that, to the extent the open Internet rules enable content providers to extract more profit from the potentially risky network investments of ISPs,

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422. *See id.* at para. 412.

423. *See Verizon v. FCC*, 740 F.3d 623, 645 (D.C. Cir. 2014) (emphasis added).

424. Standard economic theory indicates that market forces ultimately balance these incentives in effectively competitive markets.

425. *See, e.g.*, European Comm'n, *Commission Staff Working Document: Impact Assessment*, SWD(2013) 329 Final, at 44–45 (Nov. 9, 2013), *archived at* <http://perma.unl.edu/78PA-32MX> (noting that investment in next generation networks requires “large and sunk investment” coupled with uncertainty regarding the potential to obtain an adequate return on those investments and that prohibiting wholesale price regulation for access to next generation networks “would allow the network operators and access seekers to share some of the risk”); Commission Recommendation on Consistent Non-Discrimination Obligations and Costing Methodologies to Promote Competition and Enhance the Broadband Investment Environment 2013/466/EU, 2013 O.J. (L 251), *archived at* <http://perma.unl.edu/VL34-ZW6C>.

426. *See id.*

427. *U.S. Telecomm. Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002).

428. *See U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554, 563 (D.C. Cir. 2004).



the rules will in fact deter broadband deployment and innovation, not advance it.

### C. The Gatekeeper Theory Is Inconsistent with Established Precedent

The FCC's gatekeeper theory is also inconsistent with well-established judicial precedent and statutory provisions governing common carriers that the agency did not consider. Though agencies are not irrevocably bound by precedent, "reasoned decisionmaking necessarily requires consideration of relevant precedent."<sup>429</sup> The *First* and *Second Internet Orders* did not "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."<sup>430</sup>

#### 1. Telegraphy and Telephony

The prohibitions in the FCC's net neutrality rules extend well beyond what has previously been considered reasonable under common carrier laws governing telegraphy and telephony services. There is no traditional common carrier counterpart to the FCC's new bright-line rule prohibiting ISPs from accepting payment or other consideration for the prioritization of content, applications, services, or devices.<sup>431</sup> The FCC's claim that paid prioritization practices invariably "harm consumers, competition, and innovation, as well as create disincentives to promote broadband deployment"<sup>432</sup> is directly contradicted by over a century of jurisprudence. In *Western Union*, a 1901 case addressing alleged discrimination by a telegraph operator, the Supreme Court noted that the non-discrimination obligation applicable to carriers at common law permitted them to charge one end user a higher rate than another when differences affecting the expense or difficulty in performing the services fairly justify the difference in rates.<sup>433</sup> In stark contrast to the FCC's conclusion in the *Second Internet Order*, the Court declared that "no one can doubt the *inherent justice*" of permitting a common carrier to offer different services and to charge different rates for them.<sup>434</sup> At common law, which draws its weight and authority from customs that have proven successful since time out of mind,<sup>435</sup> "There is no cast iron line of uniformity which prevents a

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429. *Williams Gas Processing-Gulf Coast Co., L.P. v. F.E.R.C.*, 475 F.3d 319, 326 (D.C. Cir. 2006).

430. *Id.* (quoting *Nuclear Energy Inst., Inc. v. Env'tl. Prot. Agency*, 373 F.3d 1251, 1296 (D.C. Cir. 2004)).

431. See *Second Internet Order*, *supra* note 4, at para. 125.

432. *Id.*

433. See *W. Union Tel. Co. v. Call Pub. Co.*, 181 U.S. 92, 97–100 (1901).

434. *Id.* at 99 (emphasis added).

435. See *id.* at 101–02 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 67 (1765)).

charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines.”<sup>436</sup>

Congress has not imposed cast iron lines of uniformity on common carriers either. The Communications Act does not require a common carrier to provide “[a]bsolute equality of access” to its facilities.<sup>437</sup> It prohibits only “unjust or unreasonable discrimination” by common carriers,<sup>438</sup> requires them to provide service only when the request is “reasonable,”<sup>439</sup> and mandates that their charges and practices be “just and reasonable.”<sup>440</sup> The Communications Act expressly provides that “communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications.”<sup>441</sup> The public interest standard applicable to common carriers is “essentially one of reasonableness” with respect to business practices, not absolutes.<sup>442</sup> This “necessarily implies that departures from total equality are permissible and may be required to achieve Communications Act goals other than the elimination of discrimination or preferences.”<sup>443</sup>

The net neutrality rules’ bright lines and the gatekeeper theory’s repudiation of competition and the law of demand are inconsistent with the statutory standard of reasonableness and its emphasis on competition and private negotiation in the first instance.<sup>444</sup> As discussed in section II.A above, Congress expressly presumed that the law of demand is applicable to communications services when it adopted the 1996 Act,<sup>445</sup> and expressed a statutory preference for private negotiation of individualized agreements to determine the rea-

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436. *Id.* at 100.

437. *See* *S. Pac. Commc’ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 1009–10 (D.C. Cir. 1984).

438. *See* 47 U.S.C. § 202(a) (1989).

439. *See* 47 U.S.C. § 201(a) (1934).

440. *See id.* § 201(b).

441. *Id.*

442. *See* *Rogers Radio Commc’ns Servs., Inc. v. FCC*, 751 F.2d 408, 414 (D.C. Cir. 1985); *see also* *MTS Mkt. Structure*, *supra* note 88, at para. 97 (“Section 202(a) of the Communications Act does not require total equality of rates at all times or under all circumstances.”).

443. *MTS Mkt. Structure*, *supra* note 88, at para. 97.

444. *See, e.g.*, 47 U.S.C. §§ 251(c)(1) (1999), 252(a) (1996) (requiring incumbent local exchange carriers to provide access to their networks by privately negotiating in good faith the terms and conditions of individualized agreements in the first instance).

445. The Preamble to the 1996 Act states that its purpose is “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services,” which describes the impact of the law of demand (lower prices or increased output) in deregulated, competitive markets. Pub. L. No. 104-104, 110 Stat. 56 (1996).

sonableness of particular business practices related to network access.<sup>446</sup> Congress's decision to exempt "information services" from Title II regulation was based on the FCC's own decision that, in markets subject to competition, "*the very presence of Title II requirements inhibits a truly competitive, consumer responsive market.*"<sup>447</sup> The 1996 Act's Preamble and its provisions embraced the FCC's earlier decisions to limit invasive Title II regulation to monopoly markets and to deregulate competitive markets. The FCC's casual rejection of the law of demand signals its return to the natural monopoly theory of communications regulation accompanied by a newfound disregard for the constitutional distinction between common carrier and mass media communications and prior precedent interpreting the reasonableness limit in Sections 201 and 202 of the Communications Act.

It is impossible to square prior precedent interpreting the Communications Act's reasonableness standard with the *Second Internet Order's* conclusion that it is inherently unreasonable for an ISP to manage Internet traffic for "business" reasons.<sup>448</sup> The FCC and the courts have long authorized common carriers to block, prioritize, and discriminate against particular traffic, end users, or other carriers for *purely* business reasons. For example, in *Rogers Radio v. FCC*, the D.C. Circuit Court of Appeals held that the refusal of a wireline carrier (IBT) to provide additional Inward-bound Wide Area Telephone Service (INWATS) lines to a requesting wireless carrier (Rogers) on a non-compensatory basis did not violate the reasonableness requirement in Section 201 of the Communications Act. The court "could divine no basis" for concluding that it would be "reasonable" to require IBT to either (1) provide additional lines to Rogers at a loss, or (2) raise its own subscriber rates.<sup>449</sup>

First, it cannot reasonably be disputed that IBT could provide INWATS interconnection to Rogers' machines only at a loss. If IBT were to incur such a loss, it is also undisputed that it would be necessary to offset that loss by increased charges to other IBT customers. It simply *cannot reasonably be said* that the ALJ erred in finding that IBT's refusal to require, in effect, its other customers to subsidize Rogers was reasonable and in the public interest.<sup>450</sup>

What the D.C. Circuit considered irrefutably unreasonable in *Rogers* is exactly what the FCC's net neutrality rules now require of ISPs. For example, if Netflix decides to provide its video programming in a higher definition format than a particular ISP's network can accommodate, and the ISP upgrades its facilities in order to transmit that traffic, the net neutrality rules require the ISP to recover the cost of

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446. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999).

447. See *Computer II*, *supra* note 53, at para. 109 (emphasis added).

448. See *Second Internet Order*, *supra* note 4, at para. 18 n.18, para. 32.

449. See *Rogers Radio Commc'ns Servs., Inc. v. FCC*, 751 F.2d 408, 415 (D.C. Cir. 1985).

450. *Id.* (emphasis added) (citations omitted).

upgrading its facilities from its own subscribers only. The ISP would thus be required to “increase its rates for all of its subscribers to cover the additional costs imposed by Netflix—including its subscribers who don’t use the Netflix service.”<sup>451</sup> As a result, ISP subscribers who do not use Netflix as their video programming service provider would be required to subsidize the delivery of Netflix content to their neighbors while giving Netflix a significant price advantage over its competitors.<sup>452</sup> This is a very different version of “just and reasonable” than that recognized by the Supreme Court in *Western Union* and the D.C. Circuit in *Rogers*.

## 2. Broadcast and Cable Television

The FCC’s virtuous circle and gatekeeper theories are also inconsistent with judicial and statutory law governing the delivery of audio and video content, which has always been exempt from comprehensive common carriage requirements on First Amendment grounds.<sup>453</sup> The Communications Act expressly exempts broadcasters from regulation as common carriers,<sup>454</sup> and requires that the FCC regulate cable service and multichannel video programming distribution (MVPD) services under Title VI, not the common carrier provisions in Title II.<sup>455</sup> Congress exempted television and radio broadcasting from Title II regulation because “in the area of discussion of public issues Congress chose to leave broad journalistic discretion to the licensee.”<sup>456</sup> Congress exempted cable and MVPD services for the same reason.<sup>457</sup>

“Congress’ flat refusal to impose a ‘common carrier’ right of access for all persons wishing to speak out on public issues,” was perceived as consistent with other provisions of the 1934 Act evincing “a legislative desire to preserve values of private journalism.” Notable among them was § 326 of the Act, which enjoins the Commission from exercising “the power of censorship over the radio communications or signals transmitted by any radio station,” and commands that “no regulation or condition shall be promulgated or fixed by the

451. Fred Campbell, *Netflix Blocking Internet Access to HD Movies*, CBIT BLOG (Jan. 17, 2013), <http://cbit.org/blog/2013/01/netflix-blocking-internet-access-to-hd-movies/>, archived at <http://perma.unl.edu/W6PC-NRZV> (emphasis omitted).

452. *Id.*

453. See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 702–03 (1979); see also CLARENCE C. DILL, *RADIO LAW: PRACTICE AND PROCEDURE* 102 (1938) (“The provisions of Title II relating to Service and Charges do not apply to broadcasting stations.”).

454. See 47 U.S.C. § 153(11) (2010) (“[A] person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”).

455. See 47 U.S.C. § 522(6), (13) (1996). The common carrier exemption for broadcast services does not explicitly limit the regulation of cable and MVPD services, but the definitions of cable service and MVPD accomplish the same end result. See *Midwest Video Corp.*, 440 U.S. at 706.

456. *Midwest Video Corp.*, 440 U.S. at 703 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 105 (1973)).

457. Esbin, *supra* note 185, at 84.

Commission which shall interfere with the right of free speech by means of radio communication.”<sup>458</sup>

The Supreme Court has determined that exempting broadcasting services from common carriage regulation “manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters [and MVPDs] would overshadow any benefits associated with the resulting public access.”<sup>459</sup> The Court noted that the force of this congressional reasoning “is not diminished by the variant technology involved in cable transmissions.”<sup>460</sup> Yet, in its *Second Internet Order*, the FCC reached the exact opposite conclusion with respect to the dissemination of audio and video programming by ISPs.<sup>461</sup>

Though Congress imposed some common carrier-like restrictions on cable operators (e.g., must-carry rules), Title VI does not impose a bright-line prohibition on discrimination by MVPDs against content providers via exclusive programming agreements.<sup>462</sup> Title VI imposed a temporary, per se prohibition on certain discrimination by cable television operators who have traditionally had substantial market power, but in 2012, the FCC allowed this prohibition to expire.<sup>463</sup> The FCC found that, because cable operators now have less market power than when the non-discrimination provision was adopted, “a preemptive ban on exclusive contracts sweeps too broadly.”<sup>464</sup> It is strange that the FCC reached the opposite conclusion in the *Second Internet Order*, especially when it had already proposed to define on-line video distributors as MVPDs only a few months previously.<sup>465</sup>

The Communications Act has never subjected broadcasters or non-cable MVPDs to rate regulation or broad transparency requirements. Cable operators are subject to rate regulation when they have market power, but the FCC recently adopted a rebuttable presumption that cable operators are now subject to effective competition in all markets, which prohibits a local franchising authority from regulating cable rates unless it demonstrates the cable operator in fact has market

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458. See *Midwest Video Corp.*, 440 U.S. at 704 (citations omitted) (quoting *Columbia Broad. Sys., Inc.*, 412 U.S. at 110).

459. *Id.*

460. *Id.* at 706.

461. See *Second Internet Order*, *supra* note 4, at paras. 555–56 (finding the Internet platform is different and “[t]he effect on speech imposed by these [net neutrality] rules is minimal”).

462. 47 U.S.C. § 548(c)(2)(C) (1996) (limiting temporary exclusive contract prohibition to cable operators and their affiliates).

463. See Revision of the Comm’n’s Program Access Rules, Report and Order, Further Notice of Proposed Rulemaking, Order on Reconsideration, MB Docket Nos. 12-68, 07-18, 05-192, 07-29, FCC 12-123, 27 FCC Rcd. 12,605 (Oct. 5, 2012).

464. *Id.* at para. 2.

465. See *Promoting Innovation*, *supra* note 186.

power.<sup>466</sup> Chairman Wheeler noted that, based on a “sizable cohort of real life examples, not hypotheses,” the FCC’s more recent cable report concluded that average cable rates are lower in deregulated markets.<sup>467</sup> In another example of inconsistent reasoning, the FCC concluded that “competition results in lower prices for consumers” in the cable market,<sup>468</sup> but not in the market for broadband Internet access services.<sup>469</sup>

### 3. *Mail Carriage*

Congress and the courts have rejected the rationale of the virtuous circle and gatekeeper theories in the context of mail carriage as well. For example, in *Greenburgh*, the Supreme Court upheld the constitutionality of a congressional prohibition on the deposit of mailable material in letter boxes without the payment of postage under the First Amendment, because the practice deprived the postal service of considerable revenue that it needed to maintain efficient service.<sup>470</sup> Neither Congress nor the Court considered the ability of the postal service’s end users to receive additional, unstamped material to be beneficial to the delivery of the mail to all Americans. To the contrary, the Court thought it particularly ironic that the challenged regulation’s role in supporting the overall success of the postal service was a causal factor in the First Amendment challenge:

For it is because of the very fact that virtually every householder wishes to have a mailing address and a receptacle in which mail sent to that address will be deposited by the Postal Service that the letterbox or other mail receptacle is attractive to those who wish to convey messages within a locality but do not wish to purchase the stamp or pay such other fee as would permit them to be transmitted by the Postal Service.<sup>471</sup>

It is implicit in the findings of Congress and the Court that granting end users a right to access mailboxes for free would harm the ability of the postal service to deliver the mail, and in turn, would ultimately harm end users.

This rationale is directly analogous to the FCC’s findings with respect to broadband before its adoption of the *First Internet Order*—that the broadband Internet’s success was premised on the ability of

466. See Amendment to the Comm’n’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, Report and Order, MB Docket No. 15-53, FCC 15-62, 2015 WL 3533156, para. 1 (June 3, 2015).

467. See *id.* at para. 20.

468. See *id.* at para. 21.

469. See *First Internet Order*, *supra* note 1, at para. 40.

470. U.S. Postal Serv. v. Council of Greenburgh Civic Ass’n, 453 U.S. 114, 125 (1981) (quoting S. REP. NO. 73-742, 2d Sess. 1 (1934)) (finding the practice of depositing materials in mailboxes without paying postage “depriv[ed] the Post Office Department of considerable revenue on matter which would otherwise go through the mail”).

471. *Id.* at 123–24.

ISPs to exercise control over their networks and that common carriage regulation would inhibit new investments in Internet infrastructure.<sup>472</sup> *Greenburgh* indicates that the FCC's new decision to prohibit ISPs from managing their networks for "business" reasons is equivalent to killing the golden goose. ISPs have no less interest in preserving the value of their Internet investments than the postal service has in preserving the service it controls, and there is no reason to believe that the government-mandated right of free access to ISP networks granted to content providers by the FCC is any less harmful to the Internet than permitting the deposit of letters without postage was to the postal service. Whether it is a hen (the postal service) or a goose (the Internet), a farmer is deprived of the opportunity to gather eggs when the golden fowl is smothered with good intentions.

The FCC's conclusion that paid prioritization is inherently harmful is also inconsistent with the government's traditional approach to mail carriage. The postal service has a long tradition of prioritizing and charging different rates for the delivery of different types of content without regard to differences in the cost of their delivery. Content-based discrimination in the carriage of the mail was official congressional policy for nearly a hundred years:

Congress, which legislated postage rates until 1970, encouraged the exchange of newspapers and magazines by allowing them to travel through the mail at extremely low rates of postage—in some cases for free. Congress subsidized postage on periodicals by over-charging for letter postage and, when necessary, digging deep into the U.S. Treasury.<sup>473</sup>

The Supreme Court has recognized that "[t]he second-class [mail] privilege is a form of subsidy," and that "[f]rom the beginning Congress has allowed special rates to certain classes of publications."<sup>474</sup> Rather than declare such practices inherently harmful, however, the Supreme Court has upheld the government's right to engage in paid prioritization of the mail for the purpose of subsidizing particular forms of speech.<sup>475</sup>

Though the Supreme Court has changed course since *Jackson* with respect to the right of the Postal Service to engage in express viewpoint-based discrimination, the change was based on statutory interpretation and the Court's reappraisal of unique factual circumstances that in no way diminish the First Amendment rights of private carri-

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472. See *Wireline Broadband Order*, *supra* note 130, at paras. 41–46.

473. U.S. Postal Serv., *Postage Rates for Periodicals: A Narrative History*, ABOUT U.S. POSTAL SERV. (June 2010), <https://about.usps.com/who-we-are/postal-history/periodicals-postage-history.htm>, archived at <http://perma.unl.edu/U7BH-DZ94>; see generally, Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671 (2007) (describing the history of franking privileges (free mail delivery) and subsidized newspaper delivery in the United States).

474. *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151 (1946).

475. See *id.*

ers.<sup>476</sup> The Court permitted the Postal Service to discriminate against particular views in *Jackson* and its progeny based on its holding that the government could not prohibit the transportation of such views by private delivery services. By the 1940s, however, it had become apparent that the combination of the government-enforced postal monopoly and government-subsidized delivery of newspapers had produced an artificial scarcity of private alternatives for the delivery of periodicals.<sup>477</sup> The government had not expressly run afoul of *Jackson*'s prohibition on government attempts to foreclose the private transportation of non-mailable materials, but the subsidized delivery of newspapers through the monopoly postal service had rendered the postal service the only economical means of delivering them as a practical matter.<sup>478</sup> "To refuse the second-class [subsidized] rate to a newspapers [was] to make its circulation impossible . . . ."<sup>479</sup>

In the abstract, paying less for the delivery of newspapers and other periodicals probably seemed like a good deal to most consumers, but newspaper publishers and particularly voracious readers were the primary beneficiaries. Robert Heinlein's admonition that "there ain't no such thing as a free lunch" proved just as applicable to the postal service as at the local diner.<sup>480</sup> While Congress ran the post office with the intent to increase federal revenue (from its founding until the mid-nineteenth century) it was usually profitable, but once Congress shifted its priority toward subsidizing periodicals, the post office became a perennial drain on the Treasury.<sup>481</sup> After "the emergence of this activist welfare orientation," the Postal Service recorded a profit only eight times in the 130 years from 1850 to 1980.<sup>482</sup> Whether or not they realized it, the people ultimately paid the price for this gov-

476. See *id.* at 155–56. Justice Frankfurter's concurring opinion indicates the First Amendment was not necessary to the Court's disposition of the case. *Id.* at 159 (Frankfurter, J., concurring).

477. See *United States ex rel. Milwaukee Soc. Democratic Publ'g Co. v. Burleson*, 255 U.S. 407, 430 (1921) (Brandeis, J., dissenting) ("But to carry newspapers generally at a sixth of the cost of the service, and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression.").

478. See *Hannegan*, 327 U.S. at 155–56; see also *Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 305 (1965) ("The United States may give up the [monopoly] post-office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ." (quoting *Burleson*, 255 U.S. at 437 (Holmes, J., dissenting))); Desai, *supra* note 473, at 695–96 (noting the government's legal monopoly over the mail "was strengthened as a monopoly in practice by a whole host of other factors").

479. *Burleson*, 255 U.S. at 437 (Holmes, J., dissenting).

480. See ROBERT A. HEINLEIN, *THE MOON IS A HARSH MISTRESS* 162 (1st Tor ed. 1966).

481. See DE SOLA POOL, *supra* note 189, at 77.

482. See *id.*



ernment policy through higher postal rates for first-class mail and taxes.<sup>483</sup>

#### D. Issue Preclusion Does Not Apply

Citing the court's acceptance of the virtuous circle theory in *Verizon v. FCC* is insufficient to meet the standard for intermediate scrutiny.<sup>484</sup> First, the net neutrality rules reviewed by the *Verizon* Court were substantially less burdensome than the common carrier regulations adopted in the *Second Internet Order*. The previous rules did not impose a bright-line ban on paid prioritization, apply strict non-discrimination obligations to mobile providers, or include a vague prohibition on other conduct that might result in a disadvantage. Second, the *Verizon* Court reviewed the FCC's previous open Internet rules using the statutory standard prescribed by the Administrative Procedure Act, which is "highly deferential" to congressionally delegated authority,<sup>485</sup> not the heightened degree of scrutiny required by the First Amendment.<sup>486</sup>

#### E. There Is No Factual Finding of Scarcity

*Red Lion* and *Turner*—the leading cases in which the Supreme Court has upheld restrictions on the freedom of the press under a less-than-strict standard of scrutiny—are readily distinguishable from the *Second Internet Order*.<sup>487</sup> Neither case involved a presumptively invalid total ban on the editorial discretion of the press, and the limited government restrictions in these cases were justified by detailed factual findings of scarcity.<sup>488</sup>

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483. See Desai, *supra* note 473, at 694.

484. See *Second Internet Order*, *supra* note 4, at para. 554.

485. See *Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009).

486. See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041 (D.C. Cir.) (stating intermediate scrutiny under the First Amendment "is more demanding than the arbitrary and capricious standard of the APA"); see also *Syracuse Peace Council v. FCC*, 867 F.2d 654, 658–59 (D.C. Cir. 1989) (noting the FCC receives broad deference on issues of fact and policy, but not with respect to First Amendment questions).

487. Other cases upholding restrictions on the freedom of the press have typically involved some form of express agreement. See, e.g., *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (noting that cable operators typically agree to provide programming access to municipalities during the local franchising process).

488. Those who argue that "scarcity is no longer relevant in the age of broadband Internet" do not explain how their theory would address the problem of censorship by proxy discussed in Part III, *infra*. See Amit M. Schejter & Moran Yemini, "Justice, and Only Justice, You Shall Pursue": *Network Neutrality, the First Amendment and John Rawls's Theory of Justice*, 14 MICH. TELECOMM. & TECH. L. REV. 137, 173 (2007).

In *Red Lion*, the Court relied on the intrinsic scarcity of available broadcast frequencies to justify the constitutionality of a regulation requiring broadcasters to give “fair coverage” to public debates.<sup>489</sup> The Court has since affirmed that the “justification for [its] distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium,” a rationale that “does not readily translate into a justification for regulation of other means of communication.”<sup>490</sup> The Court has also clarified that its limited holding in *Red Lion* did *not* create a right of access that trumps the editorial discretion of broadcasters. The Court instead held that “broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.”<sup>491</sup>

The Supreme Court’s decision to uphold limited rights of access to cable systems was also based on a finding of scarcity.<sup>492</sup> Congress extended must-carry rights only to local, over-the-air broadcasters who are permitted to access only up to two-thirds of a cable operator’s total channel capacity.<sup>493</sup> In *Turner II*, a plurality of the Court held that Congress had justified these limited access rights based on “substantial evidence” that cable operators possessed monopoly market power sufficient to cause “significant financial hardship” to broadcasters.<sup>494</sup> Only one Justice believed the government could justify even the limited restriction on editorial discretion imposed by the must-carry rules without a finding of monopoly market power,<sup>495</sup> whereas four Justices would have held that the facts regarding cable market power were *insufficient* to demonstrate that the must-carry rules were narrowly tailored.<sup>496</sup> The *Turner* decisions indicate that, in the absence of a finding of significant market power, even limited intrusions on the editorial discretion of the press are unconstitutional.

There are significant distinctions between the open Internet rules and the regulations at issue in *Red Lion* and *Turner II*. First, the total ban on ISPs’ exercise of editorial discretion in the *Second Internet Or-*

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489. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969).

490. *Turner I*, 512 U.S. 622, 639 (1994) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983)).

491. *See Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998); *see also Columbia Broad. Sys., Inc. v. Democratic Nat’l. Comm.*, 412 U.S. 94, 112–14 (1973) (“The basic principle underlying that responsibility is ‘the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter . . .’” (quoting *Report on Editorializing by Broad. Licensees*, 13 F.C.C. 1246, 1249 (1949))).

492. *Turner II*, 520 U.S. 180, 197 (1997).

493. *See Turner I*, 512 U.S. 622, 630–32 (1994).

494. *See Turner II*, 520 U.S. at 211.

495. *See id.* at 225 (Breyer, J., concurring).

496. *See id.* at 229 (O’Connor, J., dissenting).

*der* is not limited in scope like the “fairness doctrine” in *Red Lion* or the must-carry rules in *Turner II*. The total ban benefits *all* content providers, even those that possess significant market power themselves, and restricts *all* ISPs, even those who have no appreciable market power or lack the capacity to transmit more than one video stream at a time. Second, the *Second Internet Order* lacks substantial evidence that ISPs have sufficient market power to harm edge providers or consumers. The FCC erroneously relied on the D.C. Circuit Court’s opinion in *Verizon v. FCC* to conclude that the open Internet rules were justified without finding that ISPs have market power.<sup>497</sup> As noted above, however, the D.C. Circuit addressed only the FCC’s statutory authority, not the First Amendment, and the previous rules did not impose a total ban on editorial discretion. Congress is free to authorize FCC regulation in the absence of scarcity, but that does not mean the delegation is constitutional. Congress has no more authority to abridge the freedom of the press than the FCC, and Supreme Court precedent that requires a detailed factual showing of scarcity to justify restrictions on the editorial discretion of the press binds Congress and the FCC alike.<sup>498</sup>

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497. See *Second Internet Order*, *supra* note 4, at para. 11 n.12.

498. See *Turner I*, 512 U.S. at 666–67.