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Protecting a Right to Access Internet Content

THE FEASIBILITY OF JUDICIAL ENFORCEMENT IN A NON-NEUTRAL NETWORK

INTRODUCTION

If information is a weapon for change, then the Internet arms every man, woman, and child on the planet. Now more than ever, the disruptive power of viral mass-communication is palpable.

The spread of information networks is forming a new nervous system for our planet. When something happens in Haiti or Hunan, the rest of us learn about it in real time—from real people. And we can respond in real time as well. . . . As we sit here, any of you—or maybe more likely, any of our children—can take out the tools that many carry every day and transmit this discussion to billions across the world.¹

This cosmopolitan nervous system manifested itself in early 2011, when the Egyptian citizenry used Facebook to organize thousands in Tahrir Square to engage in antigovernment protest.² As a defensive measure, the Egyptian government took the rare and startling step of “switching off” Internet connectivity for its eighty million residents.³ Concurrently, embassy cables disclosed on WikiLeaks exasperated the uprising in Tunisia when the population

¹ Hillary Rodham Clinton, U.S. Sec’y of State, Remarks on Internet Freedom (Jan. 21, 2010) (transcript available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>).

² Catherine Smith, *Egypt’s Facebook Revolution*, HUFFINGTON POST (Feb. 11, 2011, 3:36 PM), http://www.huffingtonpost.com/2011/02/11/egypt-facebook-revolution-wael-ghonim_n_822078.html; Ben Wedeman & Amir Ahmed, *3 Dead After Thousand Protest in Rare Egypt Outpouring*, CNN (Jan. 26, 2011, 3:33 AM), <http://www.cnn.com/2011/WORLD/africa/01/25/egypt.protests/index.html>.

³ Kyle VanHemert, *How Egypt Turned Off the Internet*, GIZMODO (Jan. 28, 2011, 3:14 PM), <http://gizmodo.com/5746121/how-egypt-turned-off-the-internet>.

discovered the “mafia-esque” corruption that yielded “massive profits” for the nation’s government elite.⁴

Reliance on Internet connectivity obviously extends well beyond national protest; reliance presents itself several times over in varying facets of everyday life, especially in the nascence of ubiquitous computing. Over a quarter of the world’s population accesses the Internet.⁵

Unsurprisingly, an international sentiment has emerged clearly indicating that Internet access is desired by all.⁶ And of course, the public’s sentiment is not powerless: in June 2009, France’s Constitutional Council denied President Sarkozy’s power to create an Internet police force and ruled that Internet access is a basic human right.⁷ The Council opined, “In the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services.”⁸ In recent history, the United Nations has warned the

⁴ Elizabeth Dickinson, *The First WikiLeaks Revolution?*, FOREIGN POL’Y (Jan. 13, 2011, 6:17 PM), http://wikileaks.foreignpolicy.com/posts/2011/01/13/wikileaks_and_the_tunisia_protests.

⁵ *Internet Usage Statistics: The Internet Big Picture*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last visited July 25, 2011). For comparison, there were just over 360 million Internet users by December 31, 2000. *Id.*

The FCC reports that, in 2009, eighty percent of home broadband users accessed the Internet to retrieve local news, fifty-five percent accessed a social networking site, and forty-eight percent uploaded content. FED. COMM’NS COMM’N, BROADBAND PERFORMANCE PAPER: OBI TECHNICAL PAPER NO. 4, at 8 exh. 7 (2010), available at <http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-%28obi%29-technical-paper-broadband-performance.pdf>.

⁶ The BBC took a poll indicating that four in five people worldwide consider Internet access a “fundamental right.” BBC NEWS, *Internet Access Is ‘a Fundamental Right’* (Mar. 8, 2010, 8:52 GMT), <http://news.bbc.co.uk/2/hi/8548190.stm>. The desire to make the Internet a fundamental right for all appears even more prominent in countries with less experience with Internet and less Internet diffusion. WORLD ECON. FORUM, THE NEW INTERNET WORLD: A GLOBAL PERSPECTIVE ON FREEDOM OF EXPRESSION, PRIVACY, TRUST AND SECURITY ONLINE 9 (2011), available at http://www3.weforum.org/docs/WEF_GITR_TheNewInternetWorld_Report_2011.pdf.

⁷ Charles Bremner, *Top French Court Rips Heart Out of Sarkozy Internet Law*, TIMES (London) (June 11, 2009), http://technology.timesonline.co.uk/tol/news/tech_and_web/article6478542.ece.

⁸ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.), available at <http://www.conseil-constitutionnel.fr/decision//2009/decisions-par-date/2009/2009-580-dc/decision-n-2009-580-dc-du-10-juin-2009.42666.html> (click “Version en anglais” in right sidebar for an English version).

international community that cutting off Internet access to quell protest is a human rights violation.⁹

While some members of the U.S. Supreme Court may be unwilling to recognize the weight international trends—even mandates—should have on U.S. lawmaking,¹⁰ U.S. citizens must begin to consider when a central function to daily living becomes something fundamental or guaranteed. Indeed, Americans consider the Internet as (if not more) important to their lives as the rest of the world. In 2009, the Federal Communications Commission (FCC) reported that the average American household user consumed over nine gigabytes of data per month.¹¹ The number of Americans demanding high-speed Internet access appears to be accelerating very rapidly as well.¹² In the wake of U.S. economic turmoil, Congress mandated the implementation of an initiative to make broadband services more accessible to Americans.¹³ Perhaps an indicator of increased broadband use, Facebook (an American-born company) has seen its membership base grow exponentially.¹⁴

Beyond use as a forum for expression and a database for information, the Internet has become home to increasingly varied application across the spectrum of telecommunication. The Internet protocol (IP) suite is now used for phone services

⁹ David Kravets, *U.N. Report Declares Internet Access a Human Right*, WIRED (June 3, 2011, 2:47 PM), <http://www.wired.com/threatlevel/2011/06/internet-a-human-right/>.

¹⁰ See *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (“Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct.”); *Roper v. Simmons*, 543 U.S. 551, 622-28 (2005) (Scalia, J., dissenting) (criticizing the majority’s use of international law and trend to reach its decision).

¹¹ FED. COMM’NS COMM’N, *supra* note 5, at 4.

¹² Edward B. Mulligan, Note, *Derailed by the D.C. Circuit: Getting Network Management Regulation Back on Track*, 62 FED. COMM. L.J. 633, 637 (2010) (citing *Table 1121: Adult Computer and Adult Internet Users by Selected Characteristics: 2000 to 2009*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2010/tables/10s1121.pdf>).

¹³ American Recovery and Reinvestment Act of 2009, div. B, tit. VI, § 6001(k)(2), Pub. L. No. 111-5, 123 Stat. 115 (“The national broadband plan required by this section shall seek to ensure that all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal.”). For more information on the National Broadband Plan, see *National Broadband Plan: Connecting America*, BROADBAND.GOV, <http://www.broadband.gov/plan/> (last visited Sept. 9, 2011).

¹⁴ In July 2011, Facebook clocked 750 million registered users, skyrocketing from 500 million users only a year prior. Leena Rao, *Zuck Confirms that Facebook Now Has 750 Million Active Users*, TECHCRUNCH (July 6, 2011, 1:32 PM), <http://techcrunch.com/2011/07/06/zuck-confirms-that-facebook-now-has-750-million-users/>.

through Voice-Over Internet Protocol (VoIP) technology,¹⁵ IP television is quickly gaining its footing in the viewership market,¹⁶ and the demand for mobile broadband has greatly increased with the advent of smartphones, netbooks, tablets, and other ubiquitous computing devices.¹⁷

One need not be terribly tech-savvy to conclude that much of humanity now relies upon Internet connectivity to retrieve and deliver content. The question emerges: ought the United States follow the worldwide trend to afford its citizens a right to access the lawful Internet content of their choice? Reserving for others the question of whether such a right should be fundamental under U.S. law, the most appropriate placeholder for a right to access Internet content, at least *prima facie*, is the First Amendment—the Internet is fundamentally a form of communication, after all.¹⁸ Theorists, scholars, and the citizenship-at-large must inquire, however, what the contours of such a recognized right would be, and—more importantly—how it can be preserved. The foundation of the latter inquiry goes beyond consumer-centered questions—how the government can deploy common carriage in the Internet age or how state actors can ensure that Internet service providers (ISPs) adhere to their terms of service. It lies in the more fundamental (and essential) question of how individuals can be assured access to the content of their choice when their ISPs and government have failed to account for that interest.

This fundamental question could not be riper for discussion. Current law and market realities do not easily accommodate a right or guarantee of access to Internet content.

¹⁵ See *Voice-Over-Internet Protocol*, FED. COMM'NS COMM'N, <http://www.fcc.gov/voip/> (last visited July 25, 2011).

¹⁶ Chris Davies, *Smart TV Could Overwhelm the Internet Warns Analyst*, SLASHGEAR (Dec. 30, 2010), <http://www.slashgear.com/smart-tv-coul-overwhelm-the-internet-warns-analyst-30122009/>.

¹⁷ FED. COMM'NS COMM'N, *supra* note 5, at 19. The FCC has recognized the increasing applications of the Internet, and has chosen to incorporate the above-mentioned applications in its rules on Internet openness. Preserving the Open Internet: Broadband Industry Practices, 25 FCC Rcd. 17,905, 17,932-33 (Dec. 21, 2010) (report and order) [hereinafter *Net Neutrality Order*].

¹⁸ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); see also *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (concluding that the limitations on Internet communication for decency under Congress's Communications Decency Act was a blanket prohibition that chills free speech). Courts and some scholars, unsurprisingly, have discussed this theory already. See generally Moran Yemini, *Mandated Network Neutrality and the First Amendment: Lessons from Turner and a New Approach*, 13 VA. J.L. & TECH. 1, 2 (2008); Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697 (2010); see also *infra* note 23.

Such questions, which strongly seem to implicate constitutional liberties, are directly affected by *network neutrality*, an issue that is transforming Internet accessibility's legal framework in the United States.¹⁹ Network (net) neutrality is a movement toward "the non-discriminatory interconnectedness among data communication networks that allows users to access the content, and run the services, applications, and devices of their choice."²⁰ The movement has emerged in the face of strong indications that the Internet is becoming (or has become) a privately regulated infrastructure where ISPs have the power to impede accessibility to the information exchanged over their networks.²¹ Bafflingly, the rise of private control over the Internet has been met with the fall of FCC oversight, even though the agency has for decades been tasked with maintaining nondiscriminatory access to telecommunications.²²

¹⁹ See, e.g., Robert C. Post, *A Progressive Perspective on Freedom of Speech*, in *THE CONSTITUTION IN 2020*, at 179, 185 (Jack N. Balkin & Reva B. Siegel eds., 2009) (Net neutrality "will hugely impact the precise ways in which the Internet will contribute to the formation of public opinion."); Noam Cohen, *Internet Proposal from Google and Verizon Raises Fears for Privacy*, N.Y. TIMES, Aug. 15, 2010, at B3, available at <http://www.nytimes.com/2010/08/16/business/media/16link.html>; *Raze the Mystery House: America Needs Clearer Laws to Regulate Internet Access*, ECONOMIST, Apr. 10, 2010, at 35, available at <http://www.economist.com/node/15867976>; Al Franken, *The Most Important Free Speech Issue of Our Time*, HUFFINGTON POST (Dec. 20, 2010, 8:43 AM), http://www.huffingtonpost.com/al-franken/the-most-important-free-s_b_798984.html.

²⁰ Yemini, *supra* note 18, at 2 (quoting Sasha D. Meinrath & Victor D. Pickard, *The New Network Neutrality: Criteria for Internet Freedom*, INT'L J. OF COMM'NS L. & POL'Y, Winter 2008, at 2, available at http://www.victorpickard.com/upload/The_New_Network_Neutrality.pdf). Lawrence Lessig captures the concept well in an interview with *Democracy Now!*:

Think about the electricity grid. Alright, when you plug a television into the electricity grid, it doesn't ask, "Is it a Sony television or a Panasonic television?" It doesn't ask, "Is it a toaster made in America or a toaster made in Japan?" It just runs. It just works. And that's because the electricity grid is a neutral network in this sense. You comply with the protocols—what the plug's got to look like and how much power you're taking—and it runs. That's the way the internet was. It used to be it didn't matter whether it was a browser made by Microsoft or a browser made by Netscape or a browser made by Mozilla. It just ran because the protocols said if you follow the rules, the system will run.

Interview by Amy Goodman, *Democracy Now!*, with Lawrence Lessig, Professor of Law, Stanford Law Sch. (Apr. 17, 2008), available at http://www.democracynow.org/2008/4/17/law_professor_lawrence_lessig_on_net [hereinafter *Lessig Interview*].

²¹ See *infra* Part I.

²² See *infra* Part I.A; see also Communications Act of 1934, 47 U.S.C. § 151 (2006) ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . . there is created a commission to be known as the 'Federal Communications Commission' . . .").

The impending degradations to Internet services imperil the freedom to access the most widely used forum for public expression in the world.²³

This note tackles the net neutrality problem from a practical perspective by suggesting and assessing a countermajoritarian regulatory regime that checks administrative and congressional action—a private cause of action based in constitutional rights. Rather than to solely outline the constitutional theory that supports net neutrality, the overarching purpose here is to answer whether, assuming the regulatory status quo, the federal court system is equipped to take on the role as arbiter of Internet-content-access disputes. In making that assessment, this note considers the multiple layers of constitutional protection that relate to the Internet-access issue—the freedom of expression and the right to access for end-users²⁴ as well as the freedoms of expression and property for ISPs.²⁵ The model of judicial enforcement assessed here can appropriately weigh individual and intermediary interests by adjudicating the reasonableness of network management on a contextual, case-by-case basis. This note concludes that there is ample existing doctrine to direct these case-by-case inquiries. But there are obvious hurdles to directly applying these constitutional standards to end-user litigation—namely, the state action doctrine and standing. Thus in conclusion, this note offers specific recommendations for legislation to facilitate the shift to judicial enforcement as a mode of Internet regulation that preserves the edges' rights to access.²⁶ Part I discusses the contours of the net neutrality debate and summarizes the nation's policy regarding Internet accessibility. Part II describes the shortcomings of other

²³ Communication theory coined by Marshall McLuhan states “the medium is the message.” Mark Federman, *What Is the Meaning of the Medium Is the Message?*, UNIV. OF TORONTO (July 23, 2004), http://individual.utoronto.ca/markfederman/article_mediumisthemessage.htm. That is, a medium's character is not the content it conveys, but the effect the medium itself has on society. *Id.* Here, content's accessibility by Internet users is not the legal issue implicated; the issue is the functionality of the medium in conveying its impact. As related by Jerome Barron, “The new modes of communication engage us by their form rather than by their content; what captivates us is the television screen itself.” Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1645 (1967); see also Yemini, *supra* note 18, at 15 (“[I]n order to ‘reach’ the logical and content layers, one has to ‘pass through’ the physical layer; whoever controls the physical layer, unless restricted by law, becomes a gatekeeper for all other layers”)

²⁴ See *infra* Part III.B.1.

²⁵ See *infra* Part III.B.2.

²⁶ See *infra* Part IV.

available enforcement mechanisms, including administrative rulemaking and legislative action. Part III outlines the legal standards potentially applicable to constitutional litigation over a theoretical right to access Internet content and highlights the benefits of judicial enforcement. Part III also recognizes the challenges end-user litigants face. Finally, Part IV proposes a private cause of action for end-user litigants.

I. THE FALL OF FEDERAL REGULATION, THE EMERGENCE OF NON-NEUTRALITY

As private control over the Internet's architecture has increased, the federal entities that would typically check that control have taken the back seat. In the current deregulated environment, the Internet continues to increase in day-to-day importance. This part outlines the legal and historical developments that have created this seemingly paradoxical situation—the shift to broadband infrastructure and the definitional hocus-pocus that has freed ISPs from common carriage regulation—then goes on to discuss the main points of the net neutrality debate. Finally, this part will detail the non-neutral practices that have emerged since the onset of the FCC's deregulatory approach to Internet access oversight.

A. *Creating a Non-neutral Network*

In the beginning the Internet was open.

From its inception, the Internet has used a packet-switching system,²⁷ which was initially nondiscriminatory. Packet-switching has proven an extremely efficient mode of transfer because it allows information, divided into small pieces called *packets*, to exchange over any conceivable path of routers between Internet-connected terminals.²⁸ In its early stages, the Internet consisted of a network of “narrowband,” packet-switched networks that were designed such that the

²⁷ DAWN C. NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE 19 (2009). During transfer, information sent from a computer terminal is separated into pieces that are then reassembled upon receipt. *Id.* The tags attached to packets dictate the packets' destination as well as their source, in addition to identifying information to reassemble the information at the destination. *Id.*

²⁸ The packet-switching system's efficiency is due to the nondiscriminatory allotment of pathways between routers (to “empower the individual,” interconnecting router points as a “network of equals”) in contrast to the centralized, “hierarchical” circuit-switching infrastructure used by the AT&T telephone network. TIM WU, THE MASTER SWITCH 173 (2011).

long-distance infrastructure carried high-bandwidth traffic to limited access points. The connection to the end or individual users, though, was carried by separate, “last-mile” providers,²⁹ which delivered content to central facilities through basic telephone call technology.³⁰ The old regime was inherently nondiscriminatory before the advent of broadband. First, on the physical level, telephone technology and wire use a simple routing process without any need for intermediary traffic modification. Second, on the logical level, Internet code uses the transmission control and Internet protocols (TCP/IP), which automatically allot service resources to an end-user on a “first-in first-out” or “best efforts” basis, rather than by the needs of an interested intermediary.³¹ These structural characteristics limited the entities’ ability to modify and block the traffic running over the last mile.

The incumbent narrowband regime, which (at least initially) carried Internet providers’ services,³² was also subject to requirements designed to open competition under the Telecommunications Act of 1996.³³ In 1984, the AT&T (Bell) telephone monopoly³⁴ was ordered to divest its regional operating companies that provided local service.³⁵ In turn, Congress passed the Telecommunications Act to combat the monopoly that “Baby Bells” enjoyed over the local exchanges and inject competition into those markets.³⁶ Summarized succinctly, the Act forced the incumbent local exchange carriers

²⁹ Last-mile providers were often the local telephone company. *Id.* But during the rise of the Internet, last-mile providers also successfully remained wholly independent from telephone carriers. *See, e.g., id.* at 262-63 (describing the AOL’s “walled garden” business model as wholly independent from the services provided by telephone-dial-up Internet). The separation between Internet transmission and services was implemented and maintained through the Nixon and Clinton administrations. *Id.* at 309.

³⁰ Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 23, 31 (2004).

³¹ Gary S. Becker et al., *Net Neutrality and Consumer Welfare*, 6 J. COMPETITION L. & ECON. 497, 500-01 (2010); Yoo, *supra* note 30, at 32-33.

³² H.R. REP. NO. 112-51, at 3 (2011).

³³ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.

³⁴ The government argued in its 1974 antitrust suit against AT&T that the company unreasonably restrained trade in the telephone equipment markets in violation of the Sherman Act, Section Two. *United States v. AT&T*, 552 F. Supp. 131, 139 n.18 (D.D.C. 1982). Judge Greene approved, but modified, the consent decree to divest the Bell Operating Companies from AT&T long distance, noting that AT&T, for years, used its market power over local telephone services to prevent the entry of new competitors in the local exchange and equipment markets. *Id.* at 223.

³⁵ WU, *supra* note 28, at 194.

³⁶ *Id.*

(ILECs) to interconnect with other companies that wanted to use the network, resell their services at reasonable rates, unbundle network elements, and engage in what has become a complex form of payment between carriers called *reciprocal compensation*.³⁷ All these requirements were passed upon findings that the local, last-mile providers sat on a natural monopoly, or bottleneck, of information that allowed them to discriminate against competitors trying to enter the market of data carriage.³⁸ The 1996 Act therefore attempted to limit the extent to which the last mile could be dominated by a single entity—that is, as long as the last mile was a telecommunications service subject to the Communication Act's Title II³⁹ regulation.

But today, the 1996 Act's common carrier obligations do not apply to home broadband Internet services. Whereas *telecommunications services* are normally subjected to common carrier requirements under Title II of the Communications Act,⁴⁰ because broadband service providers have been deemed *information services*, they are only subject to the lighter touch of Title I.⁴¹ This definitional dichotomy between computing and telecommunications services was created over the span of several hearings held to address the burgeoning computer market and its convergence with telecommunications.⁴² The delineation that emerged in those hearings was between telecommunications and information services and was maintained in the Telecommunications Act of 1996.⁴³

In 2002, the *information services* designation was extended from computing to broadband cable modems in the

³⁷ 47 U.S.C. § 251 (2006).

³⁸ See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (explaining the natural monopoly in local exchange services); see also Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of Trinko*, 107 COLUM. L. REV 1822, 1846-47 (2007).

³⁹ 47 U.S.C. §§ 251-261.

⁴⁰ 47 U.S.C. § 201(a).

⁴¹ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975-76 (2005).

⁴² *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 210-11 (3d Cir. 2007) (quoting *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267, ¶ 8 (1971)). The earliest dichotomy contemplated was one between *basic transmission* and *enhanced services*, where basic services were regulated, and enhanced services were not. *Id.* at 211 (citing Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384, ¶ 2 (1980)).

⁴³ *Brand X*, 545 U.S. at 975 (citing 47 U.S.C. § 153(20), (44) (defining *information service* and *telecommunications carrier*, respectively)).

FCC's *Cable Broadband Order*.⁴⁴ The U.S. Supreme Court affirmed the permissibility of that extension in *National Cable & Telecommunications Ass'n (NCTA) v. Brand X Internet Services*.⁴⁵ In *Brand X*, the Court indicated that the FCC's decision to regulate cable ISPs as information service providers was an acceptable construction of the Communications Act because cable companies offer an integrated "offering" of Internet services and their transmission, rather than a "stand-alone" transmission service.⁴⁶ The Court went on to find that the FCC's decision to reduce cable Internet access regulation was justifiable due to the "fast-moving [and] competitive market" of Internet services.⁴⁷ In other words, the FCC adopted the policy of deregulating the burgeoning Internet-services industry to avoid hindering its progress.⁴⁸ As articulated by the FCC, "[E]xisting regulations constrain technological advances and deter broadband infrastructure investment by creating disincentives to the deployment of facilities capable of providing innovative broadband Internet access services."⁴⁹ Soon after *Brand X* was handed down, the FCC issued its *Wireline Broadband Order*, which further extended the *information service* designation to telephone companies that provide DSL services.⁵⁰ In turn, no broadband providers are currently subject to common carrier regulation under Title II. But, oddly, the information bottleneck has further spilled into the realm of hardware as networks have shifted into the broadband regime.⁵¹ This trend is problematic in the rise of broadband, where

⁴⁴ *Id.* at 978-79 (discussing Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798 (2002)).

⁴⁵ *Id.* at 986.

⁴⁶ *Id.* at 988.

⁴⁷ *Id.* at 977.

⁴⁸ *Id.* at 1001 ("The Commission concluded that 'broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.'").

⁴⁹ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14,853, 14,865 (Sept. 23, 2005) (report and order), *petition denied*, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007) [hereinafter *Wireline Broadband Order*].

⁵⁰ *Id.* at 14,862.

⁵¹ Perhaps towards a consumer desire for easy and secure use, the bottleneck has further pervaded home and mobile information, where providers increasingly "appliancize" the devices we use to access Internet protocol. JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 3 (2008). That is, devices are purchased—often from the same company that offers access—to perform very specific functions with IP resources (consider your mobile phone or cable box). In turn, the ability of intermediaries to constrain end-user behavior is increased. *Id.* at 8-9. A new wave of proprietary networks in mobile broadband has created a separate chokepoint, where today's popular mobile devices are only capable of accessing what is available on

intelligent data management hardware is increasingly used between the last mile and the core,⁵² and market power in the last mile of broadband continues to expand.⁵³

Though the United States has enacted no laws since *Brand X* that guarantee equal or open access to Internet content,⁵⁴ the FCC has nonetheless clearly set a policy goal of digital connectivity.⁵⁵ In 2005, the FCC issued a policy statement in an attempt to effectuate the goal of section 230(b) of the Communications Act of 1934,⁵⁶ which states, “It is a policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”⁵⁷ The policy statement sought “to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet” by adopting four network management principles:

- Consumers are entitled to access the lawful Internet content of their choice . . .
- [T]o run applications and use services of their choice, subject to the needs of law enforcement . . .

the Apple App Store or Android Market. See *Net Neutrality Order*, *supra* note 17, at 17,925 (noting that a mobile wireless provider prevented users from using online payment options outside provider’s contracted service). In turn, the constraints upon mobile hardware are particularly susceptible to the hardware or network provider’s remote access to IP-enabled devices. See, e.g., Timothy Karr, *Is Apple Launching a Pre-Emptive Strike Against Free Speech?*, HUFFINGTON POST (June 22, 2011, 8:33 AM), http://www.huffingtonpost.com/timothy-karr/is-apple-launching-a-pree_b_881940.html (reporting an Apple patent on technology that can shut down the iPhone camera remotely).

⁵² See, e.g., *infra* Parts I.C.-D.; see also Yoo, *supra* note 30, at 32-34 (describing the emergence of data-sorting technology between end-users to properly provide cable/Internet services over cable modems, and telephone/Internet services over DSL).

⁵³ S. DEREK TURNER, BROADBAND REALITY CHECK: THE FCC IGNORES AMERICA’S DIGITAL DIVIDE 12 (2005), available at http://www.freepress.net/docs/broadband_report.pdf.

⁵⁴ The notable exception is the FCC’s recent *Net Neutrality Order*. See generally *Net Neutrality Order*, *supra* note 17.

⁵⁵ See generally *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 15 FCC Rcd. 14,986 (Aug. 5, 2005) (policy statement) [hereinafter *Broadband Policy Statement*]. The FCC’s policy of promoting competition over the objection of incumbent technologies goes much further back than the Internet. See *Use of the Carterfone Device in Message Toll Tel. Serv.*, 13 F.C.C.2d 420 (1968). Clearly, the FCC has taken a step back from this stance in the last ten years. *Net Neutrality Order*, *supra* note 17, at 18,045 (Statement of Commissioner Michael J. Copps Concurring, FCC 10-201, 2010 WL 5179798, at *7) (“[B]etween 2001 and 2009 . . . the FCC took American consumers on a dangerous deregulatory ride, moving the transmission component of broadband outside of the statutory framework that applies to telecommunications carriers.”).

⁵⁶ 47 U.S.C. § 230(b) (2006).

⁵⁷ *Id.* § 230(b)(2) (emphasis added).

- [T]o connect their choice of legal devices that do not harm the network . . .
- [And] to competition among network providers, application and service providers, and content providers.⁵⁸

While these principles clearly demonstrate a commitment to the underlying goals of net neutrality, in reality they still pose several problems. First, the *Broadband Policy Statement* lacks the force of law.⁵⁹ And second, even if the FCC's policy statement did have such authority, it lacks any cognizable measures to implement the policies set forth.⁶⁰ Therefore, as the law currently stands, there is little keeping ISPs from engaging in practices that discriminate against content to the detriment of end-users.

B. *The Debate*

The arguments for and against net neutrality can mostly be lumped into two fundamental, yet familiar, schools of thought.⁶¹ Proponents think that user competition benefits the path of innovation in Internet applications, and thus the government must preserve competition between empowered end-users in light of the growing market power network providers can leverage.⁶² Detractors believe that self-regulation, and even discrimination by private entities, will not adversely affect competition at the edges and—importantly—may more effectively preserve network economics.⁶³ Some critics also argue that the incentives to engage in business models that discriminate against content or other Internet applications are not as readily obvious as proponents suggest.⁶⁴ Indeed, AT&T

⁵⁸ *Broadband Policy Statement*, *supra* note 55, at 14,988.

⁵⁹ *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010) ("Policy statements are just that—statements of policy. They are not delegations of regulatory authority.")

⁶⁰ Yemini, *supra* note 18, at 5. Several developments in FCC action have cropped up since the implementation of the *Policy Statement* to fill this gap in regulatory authority. See *infra* notes 114-15, 131-34 and accompanying text. As discussed later, there is little to suggest that these rules will survive litigation. See *infra* notes 122-25 and accompanying text.

⁶¹ Unsurprisingly, the debate in Congress has remained consistent with party affiliations. Robert D. Atkinson & Philip J. Weiser, *A Third Way on Network Neutrality*, 13 *NEW ATLANTIS* 47, 49 (2006).

⁶² Daniel A. Lyons, *Virtual Takings: The Coming Fifth Amendment Challenge to Net Neutrality Regulation*, 86 *NOTRE DAME L. REV.* 65, 67 (2011); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 *J. ON TELECOMM. & HIGH TECH. L.* 141, 145 (2003).

⁶³ Yoo, *supra* note 30, at 56-59.

⁶⁴ In part, the power to switch to other ISPs that do not discriminate against the content at issue is a viable choice for edge users, and would weigh against an ISP's

has gone as far as claiming that the net neutrality issue is a “solution without a problem.”⁶⁵

Tim Wu, a proponent, characterizes neutrality’s central premise as “Darwinian”: only the “fittest” applications will survive the competition between developers.⁶⁶ The argument comports with Schumpeterian “creative destruction,” the frequently invoked theory in technology policy premised on the notion that competitive innovation tends to build on and destroy preceding norms chaotically, yet progressively.⁶⁷ Schumpeterian

decision to engage in that type of practice. Becker et al., *supra* note 31, at 502. For this reason, among others, some describe neutrality regulation as “a solution in search of a problem.” Lyons, *supra* note 62, at 67. The FCC notes, however, that the ability to switch providers may not truly remedy the problem, where users may have limited access to broadband providers, and the cost of switching may be prohibitive. *Net Neutrality Order*, *supra* note 17, at 17,921.

⁶⁵ Grant Gross, *AT&T Says It Didn’t Censor Pearl Jam*, PC WORLD (Aug. 9, 2007, 1:00 PM), http://www.pcworld.com/article/135767/atandt_says_it_didnt_censor_pearl_jam.html.

⁶⁶ Wu, *supra* note 62, at 145-46; *Ex Parte* Submission in CS Docket No. 02-52 from Tim Wu, Assoc. Professor, Univ. of Va. Sch. of Law, and Lawrence Lessig, Professor of Law, Stanford Law Sch., to Marlene H. Dortch, Sec’y, FCC 3 (Aug. 22, 2003), available at http://www.timwu.org/wu_lessig_fcc.pdf. Google is an appropriate example. Google began in 1997 as a search engine quickly regarded as having “an uncanny knack for returning extremely relevant results.” *Google History*, GOOGLE, <http://www.google.com/about/corporate/company/history.html> (last visited Sept. 9, 2011). Google now offers a wide array of Internet applications—including but not limited to search functions, word processing, e-mail, social networking, and mapping. See GOOGLE, <http://www.google.com> (last visited July 24, 2011). Google has, in turn, dramatically changed the way end-users access web content. For example, Google was in large part responsible for the paradigm shift to “cloud computing,” which, as Google’s current website structure demonstrates, allows users’ applications and data to be stored remotely, then accessed from any location in the world with no more than a username and password. See Steve Lohr, *Google and I.B.M. Join in ‘Cloud Computing’ Research*, N.Y. TIMES (Oct. 8, 2007), <http://www.nytimes.com/2007/10/08/technology/08cloud.html>. Lawrence Lessig agrees that the value of Google is due in part to the Internet’s neutrality:

Now, it’s because at no stage did they have to ask permission from the network owner that they’ve been able to do this. If, at the very beginning, Larry—Sergey Brin and Larry Page had to go to the existing network owners at the time, AT&T, for example, and say, “May we develop this new technology for your network?” it would have taken years for the company, AT&T, to even figure out whether this was going to be permitted, just like if they had gone to a cable company and said, “We want to open a new cable station on your network,” it would take forever to get that permission.

Lessig Interview, *supra* note 20; see also *Net Neutrality Order*, *supra* note 17, at 17,907 (“The Internet is a level playing field.”).

⁶⁷ Spulber & Yoo, *supra* note 38, at 1844 (citing JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 84 (1942)); Frank Rose, *The Father of Creative Destruction: Why Joseph Schumpeter Is Suddenly All the Rage in Washington*, WIRED (Mar. 2002), http://wired.com/wired/archive/10.03/schumpeter_pr.html.

economics appears to suggest that innovation and economic progress are protected through mandated neutrality.⁶⁸

According to neutrality activists, ISPs are incentivized to limit Internet access in order to prevent the utilization of competitive products or costly content, because they wield advantages in technology and law.⁶⁹ These incentives trouble neutrality proponents in how the consequential practices would flout the benefits of an “end-to-end”⁷⁰ design, undermining the “dumb” or nondiscriminatory Internet structure.⁷¹ Today, three industry practices stand at the forefront of neutrality literature: transparency, blocking, and tiering.⁷²

Professors Tim Wu and Lawrence Lessig note two important ways that mandated neutrality benefits the Internet as a medium. First, treating applications alike makes the market “predictable,” and therefore, incents the development of—and investment in—broadband applications.⁷³ Like electricity, the Internet is a “general purpose technology.”⁷⁴ Wu and Lessig note that in the current market for electricity, electronics manufacturers can design new products with peace of mind knowing that their products will work; “the uniformity of the electric grid is a safeguard against the risk of restrictions and uneven standards” that would give the electric company the power to discriminate against new products.⁷⁵ Similarly,

⁶⁸ Wu, *supra* note 62, at 145 n.10.

⁶⁹ Some congressional representatives have come to this conclusion: “Internet access service providers have an economic interest to discriminate in favor of their own services, content, and applications and against other providers.” Internet Freedom Preservation Act of 2009, H.R. 3458, 111th Cong. § 2(10) (2009). For example, several ISPs have engaged in full-scale blocking of VoIP technology, which allows users to make phone calls over the Internet. NUNZIATO, *supra* note 27, at 9-10.

⁷⁰ The “end-to-end” argument was drafted by Jerome Saltzer, David Reed, and David Clark, and “counsels against introducing intelligence into the core of the Internet.” Yoo, *supra* note 30, at 41. Under the theory, the better system is one that checks for errors only at the origin and destination of packet transmission—end-to-end. *Id.* See generally J.H. Saltzer et al., *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS ON COMPUTER SYS. 277 (1984), available at <http://web.mit.edu/Saltzer/www/publications/endtoend/endtoend.pdf>.

⁷¹ See Yemini, *supra* note 18, at 1 (explaining that through “technological, economic, and legal factors,” ISPs can now control the stream of data transmission and that data transmission was formerly controlled by the end-users themselves).

⁷² Atkinson & Weiser, *supra* note 61, at 49-50.

⁷³ Wu & Lessig, *supra* note 66, at 3. The FCC noted that “[n]ovel, improved, or lower-cost offerings introduced by content, application, service, and device providers spur end-user demand and encourage broadband providers to expand their networks and invest in new broadband technologies.” *Net Neutrality Order*, *supra* note 17, at 17,911.

⁷⁴ *Net Neutrality Order*, *supra* note 17, at 17,909.

⁷⁵ Wu & Lessig, *supra* note 66, at 3. Congress seems to agree with this analogy. See H.R. 3458, 111th Cong. § 2(2) (2009) (“The Internet is an essential

investment in new Internet applications and infrastructure developments will be stabler if the resource is open and ISPs cannot block “undesirable” applications.

Second, neutrality promotes the policy of innovation among applications.⁷⁶ There is some speculation, given the current climate of law and technology, that ISPs will shift toward a tiered business model—one that charges fees when there is too much congestion on the network or that charges content providers for edge-user access to their sites.⁷⁷ Such tiered access to content could prevent innovators from creating new uses for the Internet. For instance, if a search engine’s accessibility were treated more favorably than other sites on a network, developers would be incentivized to continue providing new Internet search features, without necessarily developing new media-streaming applications.⁷⁸ The range of possible Internet applications would therefore be limited, and the benefits to end-user access decreased.⁷⁹

In response, those opposed to net neutrality regulations argue that “prophylactic” regulations could limit an ISP’s incentive and resources to invest in new infrastructure.⁸⁰ Though the neutrality agenda would further a right to access Internet content, vying for complete neutrality ignores the fact that there are inherent trade-offs between mutually exclusive network design characteristics. That is, if internetworks prioritize connectivity, network providers may sacrifice the quality of service (QoS) applications necessary to access high-bandwidth content without latency.⁸¹ Some have therefore

infrastructure that is comparable to roads and electricity in its support for a diverse array of economic, social, and political activity.”)

⁷⁶ Wu & Lessig, *supra* note 66, at 5.

⁷⁷ Becker et al., *supra* note 31, at 501.

⁷⁸ The World Wide Web, for example, was created almost twenty years after the development of Internet protocols. *Net Neutrality Order*, *supra* note 17, at 17,910. If the Internet’s initial development was stifled by network providers’ intermediation, the existence of the World Wide Web may not have become a reality. Furthermore, “[r]estricting [the] edge providers’ ability to reach end users, and limiting end users’ ability to choose which edge providers to patronize, would reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure.” *Id.* at 17,911.

⁷⁹ Professors Wu and Lessig note a similar example in online gaming. In short, under the current system ISPs are inclined to prohibit or disincentivize the use of popular online gaming applications because of the large amount of bandwidth they occupy. “If carriers choose to block online games in particular, this gives a market advantage to competing applications that have not been blocked.” Wu & Lessig, *supra* note 66, at 15.

⁸⁰ Atkinson & Weiser, *supra* note 61, at 49. *But see* ZITTRAIN, *supra* note 51, at 105 (noting that maintaining the “generative Internet” has historically allowed for technology to overcome “blunderbuss technology regulation”).

⁸¹ Wu, *supra* note 62, at 148-49.

argued that forms of data discrimination are a viable remedy toward efficiency.⁸² There is certainly very little debate over whether network providers ought to engage in discriminatory practices when it comes to detecting harmful information packets, such as viruses.⁸³ The contentious question is what constitutes “reasonable network management” within the context of the current deregulated market, and how far an ISP may go in invading and prioritizing the content an end-user is uploading or downloading.⁸⁴

C. Comcast v. FCC

The landscape of Internet access law reached the apex of deregulation in 2010’s *Comcast v. FCC*⁸⁵ decision from the D.C. Circuit Court of Appeals. The facts of *Comcast* show—unequivocally—that when left to its own devices, the corporate intermediary has the ability and the incentive to impede end-user access. The holding, on the other hand, may be the final straw in stripping the FCC of its power to regulate network management and, in turn, content access.

In 2007, the Associated Press released a report confirming through “nationwide tests” that Comcast was engaging in data discrimination.⁸⁶ By impeding traffic, Comcast kept peer-to-peer applications from “swallowing” bandwidth and thereby limiting the Internet experience of other subscribers.⁸⁷ Comcast admitted to prioritizing service for this reason, but only after investigation.⁸⁸

⁸² See generally Yoo, *supra* note 18.

⁸³ See Wu, *supra* note 62, at 150-51; see also Internet Freedom Preservation Act, S. 215, 110th Cong. § 12 (2007) (Congress proposing to mandate neutrality except when “protecting the security of a user’s computer on the network”).

⁸⁴ The FCC’s new rules on network neutrality *purport* to carve out the parameters of what reasonable network management is. See *Net Neutrality Order*, *supra* note 17, at 17,951-56. Free Press, Public Knowledge, and many other advocacy groups took issue with the broad definitions provided in the rules, particularly “reasonable network management.” Letter from Sean McLaughlin, Exec. Dir., Access Humboldt, et al. to Julius Genachowski, Chairman, FCC, et al. 3 (Dec. 10, 2010), available at http://www.freepress.net/files/FCC_Letter_Real_Net_Neutrality.pdf.

⁸⁵ 600 F.3d 642 (D.C. Cir. 2010).

⁸⁶ Peter Svensson, *Comcast Blocks Some Internet Traffic*, WASH. POST (Oct. 19, 2007, 6:32 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html>.

⁸⁷ *Id.*; *Comcast*, 600 F.3d at 644. One peer-to-peer application affected was BitTorrent. *Id.* BitTorrent, as explained by the FCC, puts strain on the network because of its untraditional method of sharing information. See Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation, 23 FCC Rcd. 13,028, 13,029 (Aug. 1, 2008) (decision and order), *vacated*, *Comcast*, 600 F.3d 642 [hereinafter *Comcast Order*]. Rather than directly connecting a user’s computer directly to a shared

By order of the FCC, Comcast reported the following network management practices: Comcast's subscribers had been grouped together and routed to hubs through a Cable Modem Termination System (CMTS).⁸⁹ There had been approximately 3300 CMTS hubs functioning in the Comcast network, and they had served several million subscribers.⁹⁰ Subscribers' cable modems had shared upstream ports (content received from users' cable modems) and downstream ports (content sent to users' cable modems) on the hubs.⁹¹ In order to reduce congestion, Comcast installed hardware that analyzed the upstream traffic and managed information packets with characteristics that put undue strain on the network, in effect terminating the delivery of those packets.⁹² Comcast was careful to note that actual packet content was not inspected.⁹³ The FCC did not take sole issue with Comcast's network management itself, however—what was more disconcerting was the fact that traffic-blocking targeted specific online conduct and “a customer ha[d] no way of knowing when Comcast . . . [had] terminate[d] a connection.”⁹⁴

After investigation, the FCC decided that Comcast was not engaging in “reasonable network practices,” and thus concluded that Comcast had violated the agency's *Broadband Policy Statement*⁹⁵ by “imped[ing] Internet users' ability to use applications and access content of their choice.”⁹⁶ The FCC ordered Comcast to file a disclosure statement with the Commission detailing its invasive network management practices⁹⁷ and to suspend the unreasonable practices at issue.⁹⁸ The FCC claimed jurisdiction to rule on Comcast's conduct through multiple sections of the Communications Act by direct

server, BitTorrent uses a “decentralized distribution model” where pieces of a single file can be downloaded from other users simultaneously. *Id.* Therefore, extra strain is put on network bandwidth because the user engages in several Internet connections at once, as opposed to connecting to a “single, central pipeline.” *Id.* at 13,029-30.

⁸⁸ Comcast Corp. Description of Current Network Mgmt. Practices at 1, Formal Complaint of Free Press and Public Knowledge Against Comcast Corp., 23 FCC Rcd. 13,028 (No. 08-183) (2008) [hereinafter *Comcast Description*].

⁸⁹ *Id.* at 1.

⁹⁰ *Id.* at 2.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Only the “addressing, protocol, and other ‘header’ information that tells the network equipment what kind of packet it is” was inspected. *Id.* at 7.

⁹⁴ *Comcast Order*, *supra* note 87, at 13,051.

⁹⁵ *Supra* note 55.

⁹⁶ *Comcast Order*, *supra* note 87, at 13,058.

⁹⁷ *Id.* at 13,060.

⁹⁸ *Id.*

and ancillary authority.⁹⁹ Invoking *Brand X*,¹⁰⁰ the Commission based its authority to regulate “facilities-based ISPs under its Title I ancillary jurisdiction.”¹⁰¹

Comcast challenged the order in the D.C. Circuit, where the Court of Appeals held that the FCC failed to argue with specificity its statutory basis to regulate broadband data management practices.¹⁰² The FCC attempted to rely on its ancillary authority under Title I of the Act,¹⁰³ as suggested regarding DSL service in *Brand X*,¹⁰⁴ but the D.C. Circuit opined that the FCC would be stretching the Supreme Court’s precedent too far in arguing that this was a grant of “plenary authority over such providers”¹⁰⁵ The court also rejected any argument that the FCC could draw ancillary authority from policy statements such as Section 151 of the Communications Act, which states the purpose of the FCC: to regulate “interstate and foreign commerce in communication by wire so as to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.”¹⁰⁶ The court determined that legislative statements of policy—though conceivably declarations of the “legislative will”¹⁰⁷—“alone cannot provide the basis for the Commission’s exercise of ancillary authority”,¹⁰⁸ the FCC needed a congressionally delegated power to which the administrative agency’s action could be “tethered.”¹⁰⁹ The court went on methodically to decide that each section of the Act the FCC cited (including common

⁹⁹ The Commission relied on section 230(b) of the Communications Act as well as six other sections of the Act to justify exercising jurisdiction. *Id.* at 13,036.

¹⁰⁰ Nat’l Cable & Telecomms. Ass’n v. *Brand X* Internet Servs., 545 U.S. 967 (2005).

¹⁰¹ *Comcast Order*, *supra* note 87, at 13,035 (quoting *Brand X*, 545 U.S. at 996).

¹⁰² *Comcast v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010). Despite the D.C. Circuit’s conclusion, this was not the first time the FCC had exercised authority in preventing a carrier from blocking Internet applications and content. In 2005, the FCC adopted a consent decree requiring a fine of Madison River Communications, which was blocking ports used for VoIP traffic. *Madison River Commc’n, LLC & Affiliated Cos.*, 20 FCC Rcd. 4295, 4297 (Mar. 3, 2005) (consent decree).

¹⁰³ 47 U.S.C. § 154(i) (2006) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in execution of its functions.”).

¹⁰⁴ The Supreme Court, in dicta, stated that the Commission may “reconsider[] its treatment of DSL service . . . when it decides whether, pursuant to its ancillary Title I jurisdiction, to require cable companies to allow independent ISPs access to their facilities.” *Brand X*, 545 U.S. at 1002.

¹⁰⁵ *Comcast*, 600 F.3d at 650-51.

¹⁰⁶ *Id.* at 651-52 (quoting 47 U.S.C. § 151).

¹⁰⁷ *Id.* at 652.

¹⁰⁸ *Id.* at 654.

¹⁰⁹ *Id.*

carriage requirements¹¹⁰ and the mandate to implement broadband¹¹¹) delegates no specific authority over the practice at issue.¹¹² Thus, in one rap of the gavel, the D.C. Circuit created far-reaching consequences for the debate on net neutrality. More importantly, the decision has called into question the extent of a right to access Internet content—a guarantee that Internet users should expect to retain.

D. Post-Comcast Developments

To combat the trend of deregulation, the FCC has recently proposed and adopted rules for broadband management based on the *Broadband Policy Statement*,¹¹³ which explains the enforcement mechanisms that will attempt to aid in antidiscrimination measures.¹¹⁴ In the recent order, the FCC established three broad rules toward preserving an open Internet: transparency in broadband management, a prohibition against blocking “lawful content, applications, services, [and] non-harmful devices,” and a prohibition against “unreasonable discrimination.”¹¹⁵

While an important step in FCC regulation of Internet practices, the rules stand on unstable legal foundation after *Comcast*. The FCC faced challenges immediately after it released its *Net Neutrality Order*. Verizon has brought an appeal to challenge the FCC’s authority to enforce the rules.¹¹⁶ The House of Representatives has also challenged the rules, moving to overturn the *Net Neutrality Order* through its powers under the Congressional Review Act.¹¹⁷ Contending that “the retail availability of Internet access service [has] never [been] regulated,”¹¹⁸ and noting the “sweeping” and “stifling” effect the rules would have,¹¹⁹ the House Committee on Energy

¹¹⁰ See *supra* note 39 and accompanying text.

¹¹¹ 47 U.S.C.A. § 1302 (West 2001 & Supp. 2011).

¹¹² *Comcast*, 600 F.3d at 658-61 (discussing 47 U.S.C.A. §§ 201, 257, 301-99b, 543, 1302(a)).

¹¹³ See *supra* note 58 and accompanying text.

¹¹⁴ See generally *Net Neutrality Order*, *supra* note 17.

¹¹⁵ *Net Neutrality Order*, *supra* note 17, at 17,906.

¹¹⁶ Terrence O’Brien, *Verizon Appeals Net Neutrality Rules, Let the Legal Wrangling Begin*, ENGADGET (Sept. 30, 2011, 5:08 PM), <http://www.engadget.com/2011/09/30/verizon-appeals-net-neutrality-rules-let-the-legal-wrangling-be/>.

¹¹⁷ *Id.*

¹¹⁸ H.R. REP. NO. 112-51, at 4 (2011).

¹¹⁹ *Id.* at 6.

and Commerce voted to disapprove the Order.¹²⁰ The House voted in favor of the committee's resolution.¹²¹

Textually speaking, Congress's resolution appears to harp on a meritorious argument. *Comcast's* holding is much broader than a statement that the FCC lacks authority because there is no specific rule on network management: the court's language explicitly states that the FCC has not shown tethering for a statutory authority to regulate the activity of broadband network management.¹²² As noted by Commissioner McDowell, the lesson from *Comcast* was that Congress "has *not* established a new title of the Act to police Internet network management, not even implicitly."¹²³ Nonetheless, the FCC stated in its *Net Neutrality Order* that it has ancillary authority to pass the rules under several sections of the Act, including section 706.¹²⁴ But the D.C. Circuit ruled unequivocally that section 706¹²⁵ does "not delegate any regulatory authority" for broadband network management.¹²⁶ Therefore, without congressional action, the FCC cannot properly impose regulatory obligations with respect to network management on ISPs. This shift in regulatory authority suggests that it is due time to impart greater weight on the discussion at hand.

* * *

Today, the Internet is non-neutral, privately regulated, and free from oversight protecting individual freedom. For now, Internet users are stuck in the bottleneck. Some suggest that the incentive to block or tier Internet access is not economically viable for the Internet gatekeeper.¹²⁷ But if private ordering were a sustainable solution, the incidence of traffic-shaping,

¹²⁰ *Id.* at 13.

¹²¹ Tony Romm, *House Votes to Repeal Net Neutrality Order*, POLITICO (Apr. 8, 2011, 3:45 PM), <http://www.politico.com/news/stories/0411/52826.html>.

¹²² *Comcast v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) ("[T]he allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer . . . Commission authority." (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976))).

¹²³ *Net Neutrality Order*, *supra* note 17, at 18,053 (dissenting statement of Comm'r M. McDowell).

¹²⁴ The FCC cited Sections 201, 230, 254, 628, 706, and Title III of the Act. *Net Neutrality Order*, *supra* note 17, at 17,966-81.

¹²⁵ See 47 U.S.C.A. § 1302(a) (West 2001 & Supp. 2011) ("The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .").

¹²⁶ *Comcast*, 600 F.3d at 659.

¹²⁷ See *supra* note 64 and accompanying text.

blocking, and tiering should not have increased after *Comcast*. In fact, users continue to feel packet restrictions over home and wireless networks.¹²⁸ In 2010, Level 3—the primary backbone provider for Netflix—engaged in heated negotiations with Comcast because Comcast began tolling Level 3’s traffic transmitted over the network.¹²⁹ Even more recently, several ISPs have proposed and implemented tiered or capped access to the Internet in the mobile space.¹³⁰ While there are economic arguments to support the beneficial aspects of private broadband, the public must begin to speculate as to its options should private intermediaries constrain the bottleneck to a point of no return.

II. THE PITFALLS OF OTHER MODES OF PROTECTION

Post-*Comcast*, regulators must look forward to fashion a regime that will better account for a right to access Internet content. Although the FCC may be disempowered to adjudicate the issues presented by non-neutral telecommunications under its current Title II authority, other federal powers with the ability to enforce individual liberties still exist. Considered a priori, a new approach to FCC oversight, antitrust litigation, or congressional legislation could each provide a meaningful method to regulate ISPs and account for end-users’ theoretical right to access. This section concludes, however, that these modes of protection face problems similar to, and even broader than, the now defunct FCC framework.

A. Administrative Law

This section proposes methods by which federal administrative agencies may step into the fray of Internet access regulation. First, this section will outline and criticize

¹²⁸ See *Net Neutrality Order*, *supra* note 17, at 17,925-27.

¹²⁹ *Comcast v. Level 3: Online Netflix Traffic Causes Fee Fight*, USA TODAY (Nov. 30, 2010, 10:09 PM), http://www.usatoday.com/tech/news/2010-12-01-comcast01_ST_N.htm.

¹³⁰ AT&T has implemented a data-capping regime that charges a fee for every fifty GB of content over the 150 GB limit for mobile web users. Amy Lee, *AT&T to Impose Broadband Data Cap*, HUFFINGTON POST (Mar. 14, 2011, 11:21 AM), http://www.huffingtonpost.com/2011/03/14/att-data-cap_n_835318.html. Verizon also made the move to tiered data pricing in July 2011. Roger Cheng, *Verizon’s New Pricing Plan is a Godsend for Sprint*, CNET (July 6, 2011, 10:26 AM), http://news.cnet.com/8301-1035_3-20077218-94/verizons-new-pricing-plan-is-a-godsend-for-sprint/?tag=rtcol;pop. If the AT&T/T-Mobile merger takes effect, Sprint will be the only mobile wireless carrier with market power that does not restrict bandwidth usage. *Id.*

the FCC's Third Way—a proposal designed to reconceptualize the categorical approach to telecommunications policy. Second, this section will present similar and broader problems presented by antitrust litigation as a mode of protection.

1. The FCC's Third Way

Comcast and its background decisions have greatly weakened an enforceable regulatory scheme that protects Internet content access through the FCC's administrative power. In a frenzy to fill the regulatory gap created, Chairman Genachowski has proposed building a legal foundation for the regulation of Internet access by bifurcating the classification between Internet access and Internet content itself, allowing the FCC to regulate access to the Internet as a "telecommunications service" under Title II common carriage requirements¹³¹ and to regulate the information layer under Title I.¹³² This strategy is aptly nicknamed the "Third Way"—a third method of regulation beyond staying the course or reclassifying broadband Internet to Title II regulation altogether.¹³³ The FCC bases its legal foundation for this reclassification on the dissent in *Brand X*, where Justice Scalia argued that transmission of broadband and computing were two separate "offerings" within the meaning of the Communications Act.¹³⁴

But as long as rules are based solely on the power of the FCC to regulate toward an efficient communications network,¹³⁵ there is ample room for regulation to run astray from individual interests in accessing the Internet's content. For example, the historical trend is that the FCC pushes the boundaries of regulating indecent speech over broadcast.¹³⁶ Without tying FCC action to principles of individual freedom, Chairman Genachowski's proposal and the attempted passage of the *Net Neutrality Order* stop short of guaranteeing access to

¹³¹ See *supra* note 37 and accompanying text.

¹³² Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, NAT'L BROADBAND PLAN (May 6, 2010), <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html>.

¹³³ *Id.*

¹³⁴ *Id.*; Nat'l Cable & Telecomms. Ass'n v. *Brand X* Internet Servs., 545 U.S. 967, 1008 (2005) (Scalia, J., dissenting) ("[T]he telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer . . .").

¹³⁵ See 47 U.S.C. § 151 (2006). The purposes of the FCC dictated in the Act make no mention of preserving access for individual expression.

¹³⁶ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806-10 (2009).

Internet content.¹³⁷ That is, even if the FCC could regulate discriminatory practices limiting such access now, there is no guarantee that the FCC would do so in the future.

Despite the passage of the *Net Neutrality Order*, the FCC's regulatory capture and politicization present stark obstacles in appointing the FCC as the sole arbiter of end-users' individual rights going forward.¹³⁸ In May 2011, after approving Comcast's massive acquisition of NBC Universal (NBCU), Commissioner Baker took a position with Comcast as senior vice president of government affairs.¹³⁹ This development is problematic because the Comcast-NBCU merger goes against obvious policy considerations in promoting competition and common notions of First Amendment theory.¹⁴⁰ As noted by Judge Greene in precluding AT&T from entering the market of electronic publishing post-divestiture:

If, under these circumstances, AT&T were permitted to engage both in the transmission and the generation of information, there would be a substantial risk not only that it would stifle the efforts of other electronic publishers but that it would acquire a substantial monopoly over the generation of news in the more general sense. Such a development would strike at a principle which lies at the heart of the First Amendment: that the American people are entitled to a diversity of sources of information.¹⁴¹

2. Antitrust Enforcement

The possibility of antitrust enforcement presents pitfalls equally deleterious to the end-user's right to access. In February 2011, the Federal Trade Commission (FTC) hired as

¹³⁷ "There is a very strong presumption in most legal systems that other things being equal an interpretation which makes a law conform to a principle is to be preferred to one which does not." Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 839 (1972).

¹³⁸ Of interest, Rob Frieden explains that the FCC's attempts to gain greater flexibility in interpreting its statutory authority could be motivated by the following: "[T]he FCC engages in decision making with a preordained outcome designed to accrue political dividends and support economic doctrine regardless of the facts and regardless of whether the decision unfairly and unlawfully tilts the competitive playing field in favor of one group of stakeholders over others." Rob Frieden, *Neither Fish Nor Fowl: New Strategies for Selective Regulation of Information Services*, 6 J. TELECOMM. & HIGH TECH. L. 373, 415-16 (2008).

¹³⁹ Joelle Tessler, *Meredith Attwell Baker, FCC Commissioner, Joins NBCUniversal 4 Months After Approving Comcast Merger*, HUFFINGTON POST (May 11, 2011, 9:57 PM), http://www.huffingtonpost.com/2011/05/11/meredith-attwell-baker-comcast-nbcuniversal_n_860889.html.

¹⁴⁰ See *infra* Part III.B.1.b.

¹⁴¹ *United States v. AT&T*, 552 F. Supp. 131, 223-24 (D.D.C. 1982).

a senior advisor Tim Wu, a neutrality advocate and scholar in telecommunications policy.¹⁴² Beyond demonstrating the FTC's intention to regulate the telecommunications industry, Wu's appointment signals the FTC's desire to gain consultation in regulating telecommunications economics. The FTC, along with the FCC and Department of Justice (DOJ), is vested with the power to require certain provisions in agreements between merging telecommunications companies.¹⁴³ The FTC's goal, of course, is to prevent unfair competition and deceptive acts in the marketplace.¹⁴⁴

The FTC's role in regulating competition could potentially account for end-user interests through mandating competitive interconnection, and neutrality principles in the course of corporate mergers. But the degree to which interconnection requirements preclude other antitrust suits¹⁴⁵ may be unclear after the Supreme Court's decision in *Verizon Communications v. Law Offices of Curtis V. Trinko*.¹⁴⁶ Furthermore, though the FTC may be qualified to monitor and enforce complex antitrust violations that may emerge in non-neutral conduct,¹⁴⁷ the FTC—like the FCC—is no less susceptible to partisan and sometimes shortsighted goals. Just as the FCC has no obligation to preserve the free-expression interests of consumers, the FTC and DOJ may likewise maintain minimal oversight when the American economy benefits from a potential merger despite other harmful effects that merger may entail.¹⁴⁸

Furthermore, mandating neutrality provisions in merger agreements poses the possibility of piecemeal regulation.¹⁴⁹ That is, under the FTC's review, an ISP may voluntarily take on neutrality principles with respect to some

¹⁴² Spencer E. Ante & Thomas Catan, *Columbia Law's Tim Wu to Advise FTC*, WALL ST. J. (Feb. 8, 2011, 4:37 PM), <http://online.wsj.com/article/SB10001424052748703313304576132310943386724.html>.

¹⁴³ See 15 U.S.C. § 21 (2006) (vesting power of enforcement in FCC and FTC); 16 C.F.R. § 2.31-34 (2010) (outlining process for consent agreement among filing party).

¹⁴⁴ 15 U.S.C. § 45(a)(2).

¹⁴⁵ See Spulber & Yoo, *supra* note 38, at 1874.

¹⁴⁶ 540 U.S. 398 (2004).

¹⁴⁷ *Cf. id.* at 415 (expressing disfavor in granting a general court's authority to engage in regulatory practices more typical to an administrative agency).

¹⁴⁸ *But see generally* Press Release, Dep't of Justice, Justice Department Files Antitrust Lawsuit to Block AT&T's Acquisition of T-Mobile (Aug. 31, 2011), *available at* <http://www.justice.gov/opa/pr/2011/August/11-at-1118.html>.

¹⁴⁹ Consider, for instance, the problems that have emerged from siloed treatment of information services as opposed to telecommunication services, where both in fact provide identical offerings. See *supra* notes 38-53 and accompanying text.

forms of transmission, but not others. In the Comcast-NBCU merger, for instance, Comcast agreed to abide by the FCC's *Net Neutrality Order*, even if the order was overturned by a federal court.¹⁵⁰ The agreement did not, however, prohibit Comcast from blocking Google TV, an emerging television service that provides video programming over Internet protocol, but on a digital television set.¹⁵¹ A lack of uniformity with respect to neutrality principles undermines Internet connectivity where the bottleneck problem is particularly constraining—regions of the country that have no choice in deciding which broadband provider to use.¹⁵² In those regions, the market cannot remedy an ISP's lack of net neutrality through competing providers' ability to offer greater packaged access.

B. Congressional Action

Congressional legislation could potentially fill the gap in broadband regulation to preserve user freedom, but Congress must be careful to avoid crafting the systemic problems that created the non-neutral network in the first place. Congress has attempted on several occasions to fashion bills that, in one way or another, proscribe acts of data discrimination and business models that discriminate against end-users. In 2007, the U.S. Senate introduced the Internet Freedom Preservation Act to amend the Communications Act.¹⁵³ The bill proposed a new section, "Internet Neutrality," to be appended to Title I of the Communications Act.¹⁵⁴ The new section would address largely the same concerns presented in the FCC's *Broadband Policy Statement*, but it would more explicitly proscribe the acts of blocking, discriminating against, or degrading broadband service for accessing lawful content.¹⁵⁵ In addition, the bill requires ISPs to transmit content in a non-discriminatory manner that never "impose[s] a charge on the basis of the type of content."¹⁵⁶

¹⁵⁰ Sam Gustin, *A Media Colossus Is Born: Feds Approve Comcast-NBCU Merger*, WIRED (Jan. 18, 2011, 3:46 PM), <http://www.wired.com/epicenter/2011/01/comcast-nbcu/>.

¹⁵¹ *Id.*

¹⁵² See Yemini, *supra* note 18, at 14 ("More than one quarter of consumers have only one choice between cable and DSL, and even in markets with both services available, customers usually face a duopoly . . ."); see also *supra* note 64.

¹⁵³ S. 215, 110th Cong. (2007).

¹⁵⁴ *Id.* § 2.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

The House of Representatives presented a similar bill in 2009 that proposed to amend the Communications Act to include a section called "Internet Freedom."¹⁵⁷ In addition to protections similar to those listed in the FCC's *Broadband Policy Statement*, the bill proposed to prohibit both charging a fee to access lawful content and providing or selling devices that prioritize traffic for content or application providers; more broadly, the bill mandated "offer[ing] Internet access service to any person upon reasonable request therefor."¹⁵⁸ Significantly, the bill attempted to give the FCC power to make rules protecting against data discrimination and other anticompetitive practices.¹⁵⁹ Legislatively empowering the FCC to make such rules would greatly help to fill the jurisdictional gap between the FCC's *Broadband Policy Statement* and rules for network management.

But congressional legislation has two inherent limitations. First, with respect to rulemaking authority, mandating broad and unchecked regulatory power to the FCC has historically created the very threat that necessitates this writing.¹⁶⁰ Second, legislation may codify overly specific legal regimes that cannot properly adapt to the dynamic technology that emerges in telecommunications. The Telecommunications Act, for instance, was created with the intention of opening the market for competition in telephony, but Congress could not adequately consider the emergence of Internet over broadband at the time of the Act's passage. In turn, legislation left the medium untouched by the obsolete, siloed common-carriage requirements of federal law,¹⁶¹ and the populace continues to wait for a legislative solution.

* * *

Public sentiment and popular expectations do not control the federal regulatory powers-that-be; in fact, societal and governmental interests are sometimes in direct conflict. The FCC and its predecessor, the Federal Radio Commission (FRC), specifically, have been allowed leeway to infringe on normative expectations typically subject to constitutional protection.¹⁶² Therefore, if the only avenue to uphold citizens'

¹⁵⁷ H.R. 3458, 111th Cong. § 3 (2009).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See supra* Part II.A.1.

¹⁶¹ *See supra* notes 33-43 and accompanying text.

¹⁶² *See, e.g.,* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) ("[D]ifferences in the characteristics of new media justify differences in the First

interests rests in courts of appeals' review of these infringing decisions, the *Chevron* standard¹⁶³ categorically tips the scale towards affirming administrative regulatory decisions. Considering the rise of the non-neutral network, that framework is perilous to the establishment of a right to access Internet content. If, on the other hand, there is a competing forum for public outcry against regulatory action and communication-industry practices, ISPs and the government may be pressured to comport with individuals' interests. Supplementing the FCC's regulatory power with claims of individual right—in turn elevating the discourse on network management and pricing—thus avoids two pitfalls inherent in the other forms of regulation: first, users can be sure that they will have a claim available to them despite partisan effects on regulatory bodies; and, more importantly, the free flow of ideas can be secured in the Internet medium with a malleable standard despite the current lack of regulatory power under the Communications Act.

III. THE VENUE OF LAST RESORT: FEDERAL COURTS

In the absence of other oversight, federal courts can appropriately enforce a right to access Internet content; they have original jurisdiction over constitutional disputes¹⁶⁴ and the ability to establish uniform rules.¹⁶⁵ Though there are downsides to judicial oversight, the benefits are well-suited for the topic at hand. The underlying question, however, is what doctrinal “equipment” the courts can use to adjudicate these

Amendment standards applied to them.”); *KFKB Broad. Ass'n v. FRC*, 47 F.2d 670, 671 (D.C. Cir. 1931) (upholding FRC's decision to deny a radio license where doctor's program was “not in the public interest”); see also Henry H. Perritt, Jr., *Access to the National Information Infrastructure*, 30 WAKE FOREST L. REV. 51, 94 (1995) (“The First Amendment permits forcing some information conduits to accept content generated by others, but only when such forcing is necessary to permit the content to find its audience.”). *But see* *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1820-21 (2009) (Thomas, J., concurring) (noting the historically “dubious” and “incoherent” interpretation of the First Amendment with respect to broadcast); see also *Net Neutrality Order*, *supra* note 17, at 17,984 (FCC considering consumer First Amendment interests in issuing order); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 657 (D.C. Cir. 1989) (noting FCC's repeal of fairness doctrine for effect on First Amendment speech).

¹⁶³ “[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. . . . If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute.” *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 & n.11 (1984)).

¹⁶⁴ U.S. CONST. art. III, § 2.

¹⁶⁵ See *infra* notes 175-76 and accompanying text.

disputes. This part will detail the constitutional doctrine applicable to an end-user's challenge and address its current hurdles absent the existence of a private right of action—state action and standing. Incidentally, this part explores the contours of a theoretical right to access Internet content. To be clear, the goal of this section is not to argue that a non-neutral network violates the Constitution. Rather, in recognizing at the forefront that there is no express constitutional basis for litigation (though that point is arguable¹⁶⁶), the goal here is to highlight the normative constitutional values that could inform a judicial avenue of redress to protect the end-user's right to access Internet content. The considerations posed here will provide a basis for a legislatively created cause-of-action for end-users.

A. *The Benefits and Drawbacks of Judicial Enforcement*

Addressing Internet rights through the court system is appealing for two reasons. First, case-by-case adjudication will maintain the order of individual rights while considering the interests of ISPs. Contextual, fact-specific consideration will also account for new technologies that may modify individual and corporate interests without creating legacy limitations that entrench themselves in federal legislation or administrative rulemaking.¹⁶⁷ Second, a broad power to adjudicate disputes between end-users and ISPs will avoid the constitutional problems that arise from overly specific congressional mandates¹⁶⁸ and fill the regulatory gap left in administrative law.¹⁶⁹ Furthermore, while net neutrality is an issue of technological infrastructure, the debate's implications on personal liberty are so great that creating an additional, countermajoritarian remedial avenue based in constitutional doctrine may increase pressure on ISPs to properly consider individual freedom through their own self-regulation.¹⁷⁰

As noted by the FCC, case-by-case adjudication is preferred when considering data management regulation and

¹⁶⁶ See *infra* Part III.C.

¹⁶⁷ See *supra* notes 41-50 and accompanying text.

¹⁶⁸ See *infra* Part III.B.2 (discussing First and Fifth Amendment protections of ISPs).

¹⁶⁹ See *supra* Part II.A.

¹⁷⁰ It is worth noting that the FCC certainly has free expression in mind by imposing its net neutrality rules. See *Net Neutrality Order*, *supra* at 17, at 17,906. The concern posed here is whether that standard can be *maintained* by FCC oversight. The history of Internet regulation suggests that it cannot, and thus, regulators are left to consider whether self-regulation may provide the proper oversight. *But see supra* Part I.D.

common carrier-type problems.¹⁷¹ Indeed, the complexity of the medium begs that regulators weigh interests in every dispute arising over its access.¹⁷² The language of the Communications Act also suggests a fact-based inquiry when assessing the regulation of the telecommunications industry.¹⁷³ Some may argue that the FCC's Title I case-by-case adjudicative authority is better suited for the specialized knowledge of FCC commissioners. But in applying conservative and static constitutional jurisprudence,¹⁷⁴ courts are equipped to ascertain whether data management practices are overly broad or burdensome on an individual's right to access information through fact-based inquiries.¹⁷⁵ Further, establishing a separate avenue of adjudicative remedy in the courts will put action directly into the hands of citizens.

Federal adjudication through constitutional discourse provides two further benefits. First, judicial interpretation of the Constitution can maintain uniform, binding precedent through the Supremacy Clause.¹⁷⁶ Uniformity would therefore extend and preserve end-user rights to their maximum potential. Second, grounding ISP practices in limits delineated by the Constitution creates precedent that supersedes the actions of administrative agencies, and, further, signals congressional action.¹⁷⁷ Decisions

¹⁷¹ *Comcast Order*, *supra* note 87, at 13,046.

¹⁷² *See id.*

¹⁷³ *See* Communications Act, 47 U.S.C. § 201(a)-(b) (2006) (allowing for common carrier requirements when such action is "desirable in the public interest," and as long as they are "just and reasonable"); *see also* *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956) (weighing the public and private detriment caused by federal regulation of a telephone invention).

¹⁷⁴ For instance, the First Amendment precedent stating that strict scrutiny is triggered when the government restricts expression "because of its message, its ideas, its subject matter, or its content" traces its origins to the 1960s. *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 269, 270 (1964)). While the contours of this doctrine have changed over time, the origins remain in effect. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011).

¹⁷⁵ Stated simply, a court need not know much about engineering or network design to determine whether there are other means to achieve an ISP's "compelling purpose," or whether there is any reasonable purpose at all. *See infra* Part III.B.1.a. Those means can be proposed by the litigants themselves.

¹⁷⁶ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

¹⁷⁷ For instance, in 1995, the U.S. Supreme Court ruled, in *United States v. Lopez*, that Congress exceeded its Commerce Clause power in legislating a federal offense for "knowingly . . . possess[ing] a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 514 U.S. 549, 551, 561-63 (1995). The federal statute was later amended to include the "jurisdictional element" necessary

would therefore serve as a second line of defense should deregulation befall administrative action in the future.

Despite these systemic benefits, Lawrence Lessig argues that “[U.S. citizens] don’t want courts choosing among contested matters of values,”¹⁷⁸ values that are clearly implicated in the Internet-access issues presented here. Courts are ill-fitted to determine these values, argues Lessig, because translating Internet issues into matters of constitutional law will inevitably result in “political” decision making that “makes,” rather than “finds,” cyberspace’s expressive characteristics.¹⁷⁹ Put more concretely, when factual inquiries are left to judicial discretion, the possibility of directing cyberspace’s architectural realities increases. These decisions are perilous to Internet architecture, concludes Lessig, because they will dictate what cyberspace will become, perhaps in a manner contrary to end-user desires.¹⁸⁰ For reasons discussed briefly below, Congress can circumscribe the courts’ value-oriented judgments through legislative specificity.

B. The Rights at Stake: The Contours of Constitutional Litigation

With the benefits of judicial oversight in mind, this section proposes some of the normative legal values that are relevant to end-user litigation. As discussed below, there is an initial hurdle to constitutional discourse because ISPs do not (at least ostensibly) seem to fit within the traditional state action doctrine.¹⁸¹ This section therefore, in part, applies constitutional precedent to ISPs by analogy, as if they were state actors. The end goal here is to provide and assess the relevant legal theory that may underpin a court’s decision in a hypothetical end-user challenge.

to “ensure . . . that the firearm possession in question affects interstate commerce.” *United States v. Dorsey*, 418 F.3d 1038, 1045-46 (9th Cir. 2005).

¹⁷⁸ LAWRENCE LESSIG, *CODE VERSION 2.0*, at 8 (2006).

¹⁷⁹ *Id.* at 316-17. “We have tools from real space that will help resolve the interpretive questions by pointing us in one direction or another, at least some of the time. But in the end the tools will guide us even less than they do in real space and time.” *Id.* at 25.

¹⁸⁰ *Id.* at 317.

¹⁸¹ *See infra* Part III.C.1.

1. Edge Users' Rights

a. Traditional First Amendment Protection

There is no question that the Internet is a form of communication.¹⁸² The Supreme Court has confirmed that Internet content, if protected, can receive unqualified First Amendment scrutiny.¹⁸³ Furthermore, Congress has found, as one of the bases of proposed legislation, that free speech is protected by “preserving the open nature of Internet communications.”¹⁸⁴

Impeding content due to agreement or disagreement with its message is a viewpoint-based regulation deserving heightened scrutiny under traditional First Amendment jurisprudence.¹⁸⁵ Though the Internet has unique characteristics from other media, it does not have characteristics that set it so apart from the realm of speech that content- or viewpoint-based regulation would yield lesser scrutiny under First Amendment analysis.¹⁸⁶ This is the case despite the fact that Internet “speech” can be omnidirectional—that is, without a specified geographical or personal recipient—and does not seem to fit neatly into the traditional, bimodal framework of speaker and government conceived by the Constitution.¹⁸⁷ Therefore, as under traditional First Amendment protection, if restraining or degrading edge-user access to the core infrastructure were a form of content-specific regulation,¹⁸⁸ the First Amendment would provide protection under

¹⁸² *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (The Internet is “a unique and wholly new medium of worldwide human communication.”); *see also* 47 U.S.C. § 230 (2006) (“The Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”).

¹⁸³ *See Reno*, 521 U.S. at 870.

¹⁸⁴ Internet Freedom Preservation Act of 2009, H.R. 3458, 111th Cong. § 2(14) (2009).

¹⁸⁵ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

¹⁸⁶ *Reno*, 521 U.S. at 868-70 (noting that the Internet has not historically been regulated by the government and is not as invasive as radio or television, and still triggers unqualified First Amendment scrutiny).

¹⁸⁷ *See Ashcroft v. ACLU*, 535 U.S. 564, 576-77 (2002) (ruling that the question of “contemporary community standards” in the discussion of obscenity can still be applied in the context of Internet speech, even though there is no targeted geographic community in posting on a website). That is not to say, however, that the Internet is a clean fit in the First Amendment, two-speaker framework. *See Yemini, supra* note 18, at 41-49.

¹⁸⁸ *Turner*, 512 U.S. at 642.

heightened scrutiny.¹⁸⁹ The Supreme Court has also taken the position, however, that when speech and conduct are “joined in a single course of action,” there must be a balancing between First Amendment protections and broader societal interests.¹⁹⁰

On its face, issues of accessibility fit more neatly into the classical sense of content-neutral regulation. But in fact, accessibility can create both content-specific and content-neutral restrictions. In *Comcast*, the network management technology at issue did not affect categories of content, but rather modes of transfer.¹⁹¹ In fact, Comcast is very clear that the content of information it transmits is not inspected.¹⁹² Comcast’s definition of *content*, however, may be too narrow in this discussion. *Content*’s definition is rapidly changing in the world of electronic files and digital conveyance of information. The authorship of an electronic document is said by many to yield a privilege under the doctrine of attorney work product.¹⁹³ This would indicate that law regards protocol tags and metadata as document content, treating such tags the same way as a law firm’s internal memoranda.¹⁹⁴ Comcast’s definition also fails to recognize that impeding one type of file transfer could disproportionately affect a category of content associated with that transfer. For example, ISPs could easily identify—and in turn limit or de-prioritize—online gaming tags, which are distinguishable among others.¹⁹⁵ It would be difficult to argue that such a practice is “content-neutral”; the practice appears to directly target a category of speech.¹⁹⁶ Furthermore,

¹⁸⁹ *Id.*

¹⁹⁰ *City of Los Angeles v. Preferred Commc’ns, Inc.* 476 U.S. 488, 495 (1986) (citing *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968)).

¹⁹¹ See *supra* note 93 and accompanying text.

¹⁹² *Comcast Description*, *supra* note 88, at 7.

¹⁹³ The American Bar Association has ethical rules regarding the inadvertent disclosure of metadata, or the “data about data” (author, date of authorship, etc.) in an electronic document. See generally Joshua J. Poje, *Metadata Ethics Opinions Around the U.S.*, ABA, <http://www.abanet.org/tech/ltrc/fyidocs/metadataachart.html> (last updated July 20, 2011).

¹⁹⁴ Similar to metadata, the Second Circuit concluded in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), that computer code is in fact “speech” under the First Amendment. *Id.* at 445. In determining whether restriction of code was content-neutral, the court also noted whether the “regulated activity is sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment.” *Id.* at 450 (internal quotation marks omitted). Information packets clearly fall within these parameters.

¹⁹⁵ See Wu, *supra* note 62, at 168 (noting that ISPs could block online gaming through application information).

¹⁹⁶ See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”). In fact, ISPs

lazy packet inspection to reduce congestion may sweep up unintended content.¹⁹⁷ Courts should analyze any of these situations under a traditional, heightened scrutiny if the end-user does not explicitly agree to the specific practice.

b. Public Forums, the Right to Access Information, and the Free Flow of Ideas

In the modern age, where corporate media operate as gatekeepers to several of the most accessible means of relaying information, some have suggested a contextual approach to First Amendment protection, one—in contrast to the traditional view that the First Amendment is a restriction on what actors *cannot* proscribe—which asks informational gatekeepers to create opportunities for expression to be heard.¹⁹⁸ Indeed, “[a] realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications.”¹⁹⁹ This approach applies more neatly than the traditional approach discussed above.

The contextual, or affirmative, construction of the First Amendment was most famously declared by Justice Black:

[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede *the free flow of ideas* does not afford non-

including Comcast have not maintained complete integrity in shaping traffic without any consideration of content. In a clear example of content-based discrimination, Comcast was found censoring e-mails sent from antiwar groups on two separate occasions. NUNZIATO, *supra* note 27, at 5-7. In another instance, Comcast blocked access to *Gmail* and *Google* for their Boston subscribers, suggesting that subscribers switch over to Comcast e-mail. *Id.* at 11.

¹⁹⁷ Comcast’s data regulation technology, for example, creates session thresholds for P2P applications specifically, without considering whether an overall traffic threshold is met. *Comcast Description*, *supra* note 88, at 8-9. In effect, P2P protocols are identified and limited without consideration of the overall strain on the network, simply because these protocols are known to cause congestion.

¹⁹⁸ See Post, *supra* note 19, at 183 (“Even speech that seems on its surface irrelevant to politics . . . serves to focus and clarify public values and commitments. That is why constitutional protection should be extended to media of communication . . .”); Barron, *supra* note 23, at 1655-56 (“Today ideas reach the millions largely to the extent they are permitted entry into the great metropolitan dailies, news magazines, and broadcasting networks. . . . As a constitutional theory of the communication of ideas, laissez faire is manifestly [sic] irrelevant.”).

¹⁹⁹ Barron, *supra* note 23, at 1648 (1967). Barron’s work, though it precedes the issue addressed in this note, is eerily relevant.

governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.²⁰⁰

The role of government as a speech enhancer, contemplated by Justice Black, shifts the focus of the First Amendment from protecting the speaker to protecting the listener.²⁰¹ It is supported in part by the doctrines of public forum, common carriage, and fairness.²⁰² Henry Perritt has found additional support for a right to access cyberspace through common carrier requirements, the antitrust essential facilities doctrine, and contract law.²⁰³ Under this affirmative theory, preserving the free flow of ideas will differ when discussing radio as opposed to television, or newspaper as opposed to the Internet: each medium has a distinct abundance of resources and only a certain number of adequate alternative forms of expression that competently yield the same communicative effect.²⁰⁴ Therefore, the Internet's unique characteristics must be considered when determining the mode and extent of the government's intervention.

Although an intermediary's right to broadcast and editorialize the information it chooses conflicts with the right to access lawful content, such a right has been recognized and furthered by the FCC and the Supreme Court alike.²⁰⁵ In *Red*

²⁰⁰ *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (emphasis added); see also *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that charges may be obtained by lawful means . . . is a fundamental principle of our constitutional system.")

²⁰¹ "What is essential is not that everyone shall speak, but that everything worth saying shall be said." Post, *supra* note 19, at 181 (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1960)); see also *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) ("Free speech carries with it some freedom to listen.")

²⁰² NUNZIATO, *supra* note 27, at 41. The constitutionality of the fairness doctrine is addressed at length in *Red Lion v. FCC*, 395 U.S. 367, 386-401 (1969). Though common carriage is not explicitly mentioned in the Telecommunications Act common carrier designation, it has been argued that Internet services meet the legal standard for a common carriage industry. See generally James B. Speta, *A Common Carrier Approach to Internet Connection*, 54 *FED. COMM. L.J.* 225 (2002).

²⁰³ Perritt, *supra* note 162, at 61-62. For a brief discussion of the feasibility of federal protection under antitrust and common carriage doctrines, see *supra* Part II.A. The essential facilities doctrine, which explicitly emerged in the 1970s, allows courts to issue injunctive relief requiring monopolists to open "irreproducible bottleneck resources" to their rivals. Spulber & Yoo, *supra* note 38, at 1828-29.

²⁰⁴ Barron, *supra* note 23, at 1650-53; see also *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) ("The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers."). Supreme Court jurisprudence supports this conception of the First Amendment. See *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (discussing the roles history, scarcity, and invasiveness play in informing First Amendment protection).

²⁰⁵ See *infra* Part III.B.2.a.

Lion Broadcasting v. FCC,²⁰⁶ for example, a radio broadcaster challenged the constitutionality of the FCC's "fairness doctrine" and related regulations, which required "reply time" for those who were personally attacked over the airwaves.²⁰⁷ The doctrine was designed to further two main duties held by broadcast licensees: to "give adequate coverage to public issues" and to create fair coverage that "accurately reflects the opposing views."²⁰⁸ Faced with a First Amendment challenge, the Supreme Court reasoned that Congress, and in turn the FCC, has the authority to regulate broadcast licensees' conveyance of information due to the scarcity of the medium and "the legitimate claims of those unable without governmental assistance to gain access to [radio] frequencies for expression of their views."²⁰⁹

Though the fairness doctrine is no longer in effect, *Red Lion* implicitly upholds a normative right held by the public to access all viewpoints through commonly used media and government's authority to enact, in its power, what is necessary to effect that access given the nature of the medium.²¹⁰ Boiled down, the fairness doctrine's practical ramification is an extension of affirmative First Amendment obligations on private broadcasters. The Supreme Court would later find that the Internet lacks the scarcity concerns posed by the radio spectrum,²¹¹ but the effect on the right to access is nearly identical when Internet users are blocked from accessing online information. That is, limitation on the accessibility of an online discussion board or blog would be substantially similar to the limitations imposed by broadcasters that impede access to the free flow of ideas.

Legally speaking, however, the standard of review for an *impediment* to access is not entirely clear. And moreover, the Supreme Court has shown signs of scaling back its right-to-access interpretation of the First Amendment. In *American Library Ass'n v. United States*,²¹² the Supreme Court ruled that library-provided Internet was not a traditional public forum

²⁰⁶ 395 U.S. 367 (1969).

²⁰⁷ *Id.* at 373-75 (quoting 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (repealed 1987)).

²⁰⁸ *Id.* at 377.

²⁰⁹ *Id.* at 389, 400-01.

²¹⁰ *See id.* at 390 ("It is the purpose of the First Amendment to preserve an uninhabited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market." (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945))).

²¹¹ *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

²¹² 539 U.S. 194 (2003).

and therefore held that congressional legislation imposing limitations on library Internet access was constitutional under reduced scrutiny.²¹³ As the Court stated, a public library “provides Internet access, not to encourage a diversity of views from private speakers, . . . but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits.”²¹⁴ The Court’s interpretation of public forums appears, however, not to be a wholesale exclusion of the Internet, but rather a narrow interpretation of library-offered Internet.²¹⁵

Indeed, when it comes to accessing primary sources *online*, outside of a library, recent events illustrate how the Internet may provide exclusive means to access some forms of information, thereby deserving a greater degree of protection.²¹⁶ After the Iranian election of 2009 was met with popular unrest, *Twitter*, *YouTube*, and *Facebook* exploded with content exposing the violent turmoil, which was otherwise limited from exportation.²¹⁷ In fact, some observers reported that news stations needed the *Twitter* and *YouTube* content to cover Iran’s protests.²¹⁸ The Iran protests demonstrate that the Internet provides the potential for a direct conduit between public events and society—an important, unintermediated, and informative experience worthy of protection.²¹⁹

When adjudicating issues of free expression, courts sometimes weigh the information sought as well.²²⁰ It would flout the central policy of constitutional protection to contend

²¹³ NUNZIATO, *supra* note 27, at 81-82 (citing *Am. Library Ass’n*, 539 U.S. 194).

²¹⁴ *Am. Library Ass’n*, 539 U.S. at 206.

²¹⁵ See *id.* at 205 (“Internet access in public libraries is neither a ‘traditional’ nor a ‘designated’ public form.” (emphasis added)).

²¹⁶ Cf. *Saxbe v. Wash. Post*, 417 U.S. 843, 847-48 (1974) (reasoning that prison policy banning face-to-face meetings with inmates by unaffiliated individuals was not violation of First Amendment, in part, because journalists can attain information from prisons in other ways besides face-to-face interviews).

²¹⁷ Brad Stone & Noam Cohen, *Social Networks Spread Defiance Online*, N.Y. TIMES, June 16, 2009, at A11, available at http://www.nytimes.com/2009/06/16/world/middleeast/16media.html?_r=1.

²¹⁸ *Twitter I*, CNN 0, ECONOMIST, June 18, 2009, available at http://www.economist.com/node/13856224?story_id=13856224.

²¹⁹ In *Richmond Newspapers v. Virginia*, the Supreme Court held that the press’s access to a criminal trial is protected under the First Amendment. 448 U.S. 555, 580 (1980). Important to that holding was the Court’s reasoning regarding the role of the press, which “contribute[s] to public understanding of the rule of law” by “supplying the representations or reality of the real life drama once available only in the courtroom.” *Id.* at 572-73.

²²⁰ Compare *Saxbe*, 417 U.S. at 862 (Powell, J., dissenting) (noting the important press function in accessing information toward “preserving free public discussion of governmental affairs”), with *Richmond Newspapers*, 448 U.S. at 569 (concluding that the function of a public trial is indispensable in American law).

that Internet access should be guaranteed to access unlawful information.²²¹ Furthermore, unfettered access to unlawful or harmful content would create congestion over ISP networks that could substantially decrease accessibility to other, lawful content.²²² Even in the context of free expression, the First Amendment does not offer protection to obscenity, defamation, and incitement.²²³ In recent discussion, there has been some attack on the Internet site *WikiLeaks*²²⁴ for how it potentially compromises national security.²²⁵ But the general principle should hold for WikiLeaks and the like: the government has a “heavy burden” to justify prior restraint on the spread of information;²²⁶ dissemination of such information should only be restrained if it would “gravely prejudice the defense interests of the United States or result in irreparable injury to the United States.”²²⁷

That said, the notion that courts ought to make value judgments with respect to speech is inherently suspect. Indeed, recent First Amendment jurisprudence seems to reject this approach outright.²²⁸ But the separation of powers easily provides a counterbalance. In making a cause of action for end-users, Congress can use constitutional jurisprudence to circumscribe the “lawful content”²²⁹ to which a litigant can seek access.²³⁰ In turn, value judgments would not be left to judicial discretion, but rather to carefully detailed, bright-line rules.

²²¹ The First Amendment historically does not protect obscenity, *Miller v. California*, 413 U.S. 15 (1973), or “fighting words,” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), for example.

²²² See *infra* notes 257-58 and accompanying text.

²²³ *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

²²⁴ WIKILEAKS, <http://www.wikileaks.org> (last visited Sept. 11, 2011).

²²⁵ See Greg Miller, *CIA Launches Task Force to Assess Impact of U.S. Cables' Exposure by WikiLeaks*, WASH. POST (Dec. 22, 2010, 12:24 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/21/AR2010122104599.html?hpid=topnews&sid=ST2010122105304>.

²²⁶ *N.Y. Times v. United States*, 403 U.S. 713, 714 (1971).

²²⁷ *United States v. Wash. Post Co.*, 446 F.2d 1327, 1328 (D.C. Cir.), *aff'd*, 403 U.S. 713 (1971).

²²⁸ *Stevens*, 130 S. Ct. at 1585 (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”).

²²⁹ This language is pulled from the *Net Neutrality Order* as a primer for the base-level protections the cause-of-action could seek to protect. See *Net Neutrality Order*, *supra* note 17, at 17,906.

²³⁰ See *infra* notes 316-18 and accompanying text.

2. Rights of ISPs

a. *First Amendment Protection for Conduit Speech*

Just as the First Amendment affords protection to individual speakers, it also affords protection to commercial enterprises, or conduits, that carry individuals' speech.²³¹ In cable television, for instance, the Supreme Court has held that editorial discretion in selecting content under its services is within the scope of First Amendment protection.²³² Similarly, a public library's decision to exclude materials does not trigger heightened scrutiny.²³³ In *Turner Broadcasting System v. FCC*,²³⁴ a cable television case, the Supreme Court addressed the issue of whether a congressional act requiring cable operators to relay local broadcasts was an infringement on the freedom of speech or of the press.²³⁵ The Court applied intermediate scrutiny to the Act,²³⁶ stating first that laws singling out a medium are subject "to at least some degree of heightened First Amendment scrutiny,"²³⁷ then concluding that the Act was content neutral.²³⁸

The FCC and others have argued that intermediate scrutiny should likewise apply to a federal neutrality mandate.²³⁹ But cases dealing with media suggest that the First Amendment interests of media consumers outweigh the providers' interests at some point, proportional in part to how much of a speech "conduit" the provider is.²⁴⁰ Important to recall

²³¹ See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994) ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.")

²³² *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986) (concluding that expression by a cable operator includes "exercising editorial discretion over which stations or programs to include in its repertoire").

²³³ *United States v. Am. Library Ass'n*, 539 U.S. 194, 208 (1993).

²³⁴ 512 U.S. 622.

²³⁵ *Id.* at 626.

²³⁶ *Id.* at 661-62.

²³⁷ *Id.* at 640-41.

²³⁸ *Id.* at 622, 647. Some have argued that the standard of review was "intermediate plus," where it "decidedly privileges speech rights over values." Yemini, *supra* note 18, at 25 (quoting Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War With Itself*, 35 HOFSTRA L. REV. 1211, 1219 (2007)).

²³⁹ *Net Neutrality Order*, *supra* note 17, at 17,983; Yemini, *supra* note 18, at 20-22. Yemini argues that, similar to a cable operator, an ISP would just as easily engage in protected expression under *Turner* by blocking a website, for example. *Id.* at 18-20. In fact, Yemini suggests, to argue that ISPs do not engage in protected editorial discretion would be a contradictory position for net neutrality activists, where such discretion is essentially the conduct in question when engaging in data discrimination. *Id.* at 18-19.

²⁴⁰ NUNZIATO, *supra* note 27, at 138 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974)).

is that the First Amendment's protections vary with the carrying medium.²⁴¹ Unlike cable television, Internet content is primarily created by end-users. Even the largest corporate content providers are search engines and social networking sites, which derive most of their Internet traffic from end-user contributions. Furthermore, the type of "editorial discretion" argued by ISPs "bears little resemblance to an editor's choosing which programs [like in cable television] . . . to carry."²⁴² The FCC went further in its *Net Neutrality Order* to say that no court has ever "suggested that regulation of common carriage requirements triggers First Amendment scrutiny."²⁴³

Nevertheless, Wu and Lessig appear to be correct in that the governmental interests furthered by promoting neutrality are "important or substantial"²⁴⁴ enough to withstand intermediate scrutiny by the courts.²⁴⁵ As stated by the *Turner* Court, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."²⁴⁶ Indeed, when weighing conduits' First Amendment interests against society's in the free flow of ideas, the freedom of expression is at least as heavy as the freedom of editorial discretion under an affirmative conception of the First Amendment.²⁴⁷ But the cases also suggest that editorial discretion qualifies for greater protection as a service provider

²⁴¹ "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broad. Co.*, 395 U.S. at 386. Greater latitude is allowed in infringing on First Amendment rights in broadcast-radio regulation. *Id.* Very little latitude is granted in regulating print. *Tornillo*, 418 U.S. at 258.

²⁴² *Net Neutrality Order*, *supra* note 17, at 17,983; *see also Comcast Order*, *supra* note 87, at 13,033 ("Unlike newspapers or radio or broadcast television . . . the Internet gives Americans 'a great degree of control over the information that they receive.'").

²⁴³ *Net Neutrality Order*, *supra* note 17, at 17,983. *But see id.* at 18,073-74 n.114 (dissenting statement of Comm'r Robert M. McDowell).

²⁴⁴ *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *United States v. O'Brien*, 391 U.S. 367 (1968)).

²⁴⁵ Wu & Lessig, *supra* note 66, at 10. The interests put forward include "promoting the widespread dissemination of information" and "promoting fair competition in the market." *Id.* The FCC agrees with this reasoning in its *Net Neutrality Order*, but it provides somewhat different interests. *Net Neutrality Order*, *supra* note 17, at 17,984 (relating the important government interests that would pass intermediate scrutiny, such as "consumer choice, end-user control, free expression, and the freedom to innovate without permission").

²⁴⁶ *Turner*, 512 U.S. at 663.

²⁴⁷ *See Barron*, *supra* note 23, at 1654-55 (quoting *Associated Press v. United States*, 320 U.S. 1, 20 (1945)). *But see Yoo*, *supra* note 18, at 702 ("[I]n terms of deciding how that balance [between edge users and providers] should be struck, the cases indicate that free speech considerations favor preserving intermediaries' editorial discretion unless the relevant technologies fall within a narrow range of exceptions, all of which the Court has found to be inapplicable to the Internet.").

becomes less interested in the content of the expression being conveyed.²⁴⁸ From the vantage point of an Internet subscriber, Internet carriers should be disinterested in lawful content transmitted over their networks.

b. Fifth Amendment Takings

Another argument presented against the neutrality mandate is that governmental action would be a confiscatory taking under Fifth Amendment²⁴⁹ doctrine.²⁵⁰ The argument suggests that a limitation on network management practices would in turn limit the profitability of the broadband industry, or the choice to engage in new business models.²⁵¹ When assessing whether a taking occurs, courts look to interference with “investment-backed expectations,” the “economic impact of the regulation,” and “the character of the government action.”²⁵² The FCC found in its *Net Neutrality Order*, however, that the Fifth Amendment challenges are without merit. The FCC stated that “takings law makes clear that property owners cannot, as a general matter, expect that existing legal requirements regarding their property will remain entirely unchanged.”²⁵³

Case law seems to support the FCC’s finding as it relates to exercise of First Amendment rights. In assessing whether allowing demonstrators to handbill in a shopping

²⁴⁸ Henry Perritt observes:

The First Amendment permits forcing some information conduits to accept content generated by others, but only when such forcing is necessary to permit the content to find its audience. When the entity burdened by the duty has relatively little interest in expression, for example if it is simply a router, the First Amendment allows a broader range of legislative and regulatory discretion to impose a duty because the harm to First Amendment interests is minimal.

Perritt, *supra* note 162, at 94; *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”).

²⁴⁹ “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

²⁵⁰ *Net Neutrality Order*, *supra* note 17, at 17,985-86; *see also* Lyons, *supra* note 62, at 92-95; Rob Frieden, *Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 633, 667 (2008); Perritt, *supra* note 162, at 93.

²⁵¹ *See, e.g.*, Lyons, *supra* note 62, at 95. Lyons also argues that the Net Neutrality Rules could be a per se Fifth Amendment taking under the permanent physical occupation doctrine of *Loretto*. *Id.* at 92-94.

²⁵² *Net Neutrality Order*, *supra* note 17, at 17,985 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)) (internal quotation marks omitted).

²⁵³ *Id.*

center was a “taking,” the Supreme Court stated in *Pruneyard Shopping Center v. Robins* that the true test to determine whether the public has—through state-granted free speech protections—confiscated property rights of an owner is whether the restriction “forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²⁵⁴ Applying that test, the shopping center’s Fifth Amendment claim failed because the owner could not show unreasonable impairment on value or use of his property, especially where the demonstrators were orderly and remained in common areas.²⁵⁵

In the case of Internet accessibility, the benefit lost from ISPs’ data management practices would burden the entire industry. The government’s intervention would also not substantially limit the capability of the providers to compete. Moreover, the obligation to carry content without discrimination does not infringe on any physical space, so the challenge is inherently limited.²⁵⁶

That is not to say that a Fifth Amendment challenge is completely without merit. It is at least foreseeable that a court could find reasonable a business model where ISPs compete over providing greater access to Internet content.²⁵⁷ In fact, modern-day consumers analogously subscribe to cable packages that function similarly—providers compete to provide bundled packages of content that suit the needs of the consumer. Furthermore, an overbearing and blanket prohibition of data discrimination could actually serve the opposite effect it intends if ISPs do not deploy new Internet infrastructure: a pure nondiscrimination mandate could sacrifice the ability to access content effectively for outright connectivity.²⁵⁸ If ISPs cannot meet their burden of providing the requisite QoS to their subscribers, then sites that demand high bandwidth will

²⁵⁴ 447 U.S. 74, 83 (1980) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

²⁵⁵ *Id.* at 83-84.

²⁵⁶ Perritt, *supra* note 162, at 93-94 (citing *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (invalidating order by FCC to allot office space of local telephone carriers to competing carriers)). *But see* Lyons, *supra* note 62, at 93 (arguing that mandated neutrality would allow a continuous right by content providers to “physically invade broadband networks with their electronic signals and permanently occupy portions of network capacity”).

²⁵⁷ See Becker et al., *supra* note 31, at 502 (discussing the disincentive of network providers to engage in data discrimination).

²⁵⁸ In other words, at odds with one another are the rights to connectivity and a “public interest in quality infrastructure.” Perritt, *supra* note 162, at 58.

not be available to users on that network, implicating the very problem that net neutrality seeks to remedy and decreasing service efficiency for ISPs.²⁵⁹

C. *Hurdles to Litigation*

The previous section shows that there is some doctrinal basis under which a court could adjudicate the facts of an end-user litigation. Though informative to norms that should be considered in constructing a cause of action, the jurisprudence on its own is not self-executing in this context. Two doctrines are particularly noteworthy hurdles to litigation: state action and standing. Their respective merits and problems will be assessed here.

1. Arguing State Action

As Christopher Yoo has argued, “[I]nvoking [the] First Amendment as requiring governmental intervention to redress private power would stand the First Amendment on its head.”²⁶⁰ In other words, the First Amendment is a protection against intrusion by the government, not by private actors.²⁶¹ That is not to say, though, that constitutional restrictions cannot be imposed on private actors.²⁶² Under Fourteenth Amendment jurisprudence, for example, the Court has held that private actors may be bound by constitutional obligations when the state judiciary enforces racially discriminatory restrictive

²⁵⁹ Put differently, the issue of Internet access as a right is enforced by blanket prohibitions at the risk of creating a critical mass: complete deregulation gives ISPs the power to unduly discriminate against content, while over-regulation may make the content inaccessible to begin with. This effect would undermine the service the ISPs intend to provide. “We have a public network that is indeed a great creative commons for data applications, but it is less so for any application that requires a minimum quality of service. True application neutrality may, in fact, sometimes require a close vertical relationship between a broadband operator and Internet service provider.” Wu, *supra* note 62, at 148.

²⁶⁰ Yoo, *supra* note 18, at 700.

²⁶¹ *Id.*

²⁶² In *Burton v. Wilmington Parking Authority*, the Supreme Court held that a restaurant that leased space from a Wilmington, Delaware, parking facility was a state actor because in leasing space from the city authority, and being maintained by public funds, the restaurant was “an integral part of a public building devoted to a public parking service.” 365 U.S. 715, 724 (1961); see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (applying the Thirteenth Amendment to private actors); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (same). Warranting further discussion, courts have in the past considered First Amendment rights of defendants sued under right of publicity claims. See, e.g., *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 968 (10th Cir. 1996).

covenants.²⁶³ In the context of Internet litigation, however, there is some indication that judges are reluctant to extend the state action classification to ISPs outright.²⁶⁴

Nonetheless, there is an argument that ISPs may fall directly within the parameters of the state action doctrine, in turn allowing for direct constitutional enforcement. The Third and Fourth Circuits have stated that there are three distinct tests utilized by the Supreme Court to assess whether a private actor has crossed the line into state action. First, the court may consider whether the entity has “exercised powers that are traditionally the *exclusive* prerogative of the state” (or, in short, the “public function” test). Second, the court may ask whether “the private party has acted with the help of or in concert with state officials.” And in the final test, the court may determine whether “[t]he State has so far insinuated itself into a position of interdependence with . . . [the acting party] that it must be recognized as a joint participant in the challenged activity.”²⁶⁵

Public “insinuation” may be present in the Internet’s origins, where the initial connection of networks creating the Internet was instituted in large part by the federal government. In *Lebron v. National Railroad Passenger Corp.*,²⁶⁶ the Supreme Court ruled, for First Amendment purposes, that Amtrak was a government actor subject to the limitations dictated by the Constitution.²⁶⁷ In reaching its decision, the Court compared Amtrak—a statutorily created rail service held through private stock²⁶⁸—with other government corporations like the Communications Satellite Corporation (Comsat).²⁶⁹ Similar to Amtrak, Comsat was created by the federal government, yet it is “capitalized entirely with private funds.”²⁷⁰ The Internet was developed under circumstances similar to those of Amtrak and Comsat. Through the 1960s, one of the initial networks giving rise to the Internet, the Advanced

²⁶³ See *Shelley v. Kramer*, 334 U.S. 1, 18-21 (1948) (holding that judicial enforcement of racially discriminatory restrictions is state action that warrants Fourteenth Amendment challenge). Here, portions of the Communications Act, 47 U.S.C. §§ 151, 157, 201, 230(b), 256, 601, as interpreted by the D.C. Circuit in *Comcast*, 600 F.3d 642, imposes similar restraint on the freedom of expression for Internet users.

²⁶⁴ See, e.g., *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 444 (E.D. Pa. 1996) (finding that AOL is not a state actor).

²⁶⁵ *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141-43 (3d Cir. 1995) (citing *Haavistola v. Cmty. Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 215 (4th Cir. 1993)).

²⁶⁶ 513 U.S. 374 (1995).

²⁶⁷ *Id.* at 400.

²⁶⁸ *Id.* at 385.

²⁶⁹ *Id.* at 390-91.

²⁷⁰ *Id.* at 390.

Research Projects Agency Network (ARPANET), was funded and developed by the Department of Defense for research purposes.²⁷¹ The National Science Foundation (NSF), a federal agency created by Congress, extended the network connection to U.S. universities and beyond the realm of defense research.²⁷² One of the first national backbone infrastructures was, in turn, created by the NSF in 1992.²⁷³

The government is also largely responsible for implementing the uniform system of packet-traffic management currently controlled by the Internet Corporation for Assigned Names and Numbers (ICANN).²⁷⁴ The federal government established ICANN in 1998, privatizing the root server system that informs subordinate servers of IP addresses.²⁷⁵ Without that arrangement, the Internet would have potentially grown into a set of redundant and conflicting internetworks.²⁷⁶ This fact is particularly relevant when considering the constitutional treatment of packet and network traffic management; though Internet services are provided by private actors, this does not detract from the clearly public origins that suggest a “close nexus”²⁷⁷ between Internet services and federal action.

The public function test, considered in conjunction with the joint participation of government action in private enterprises, also provides meaningful guidance in determining the public nature of Internet control. *Marsh v. Alabama*²⁷⁸ expresses the principle that the more a private party opens his property to the function of the public, “the more do his rights become circumscribed by the statutory and constitutional rights who use it.”²⁷⁹ In simple terms, the public function test states that, at some point, private owners provide access to a property so fundamentally public in nature that the owners

²⁷¹ *A Brief History of NSF and the Internet*, NAT'L SCI. FOUND., http://www.nsf.gov/news/news_summ.jsp?cntn_id=103050 (last visited July 31, 2011).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ See STUART M. BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 914 (2d ed. 2006).

²⁷⁵ *Id.*

²⁷⁶ See Improvement of Technical Management of Names and Addresses, 63 Fed. Reg. 8826, 8827 (proposed Feb. 20, 1998) (proposing the coordination of the root server network to ensure the system “work[s] smoothly” and “preserve[s] the stability and interconnectivity of the Internet”).

²⁷⁷ See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (“[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”).

²⁷⁸ 326 U.S. 501 (1946).

²⁷⁹ *Id.* at 506.

begin to owe an obligation to protect “identical interests” to those held by citizens of a state or municipality.²⁸⁰

In *Altmann v. Television Signal Corp.*,²⁸¹ the United States District Court for the Northern District of California ruled that the defendant cable company was a “state actor” for the purposes of a constitutional challenge. The court used language to suggest that it assessed state action based on the government’s participation in empowering the company to censor indecent public-access programming.²⁸² Interestingly, the *Altmann* Court also noted the important function of public-access channels “to serve as public forums, accessible to all interests, including those that may otherwise lack the resources to communicate through electronic media.”²⁸³ The court, in turn, concluded that the effect of allowing cable operators to block indecent material on these stations would likely fail strict scrutiny.²⁸⁴ This decision seems to apply here on two different levels, suggesting, first, that the government has a duty to preserve public forums in broadcast media, or, alternatively, that the government has imposed enough obligation on the cable operator to subsume its private interests.²⁸⁵ *Marsh* and *Altmann* considered in tandem present the possibility that courts may be willing to extend the state action doctrine in issues of First Amendment freedom where, as in *Altmann*, largely public functions are subjected to the requirements of facilitating public forums and where, as in *Marsh*, the private intermediaries that own the medium of expression have opened the medium to public discourse. To be sure, the Court has never ruled that the Internet is a traditional public forum,²⁸⁶ but, in any event, the unintermediated debate the Internet holds strongly indicates that it ought to be. Indeed, except to the extent limited by non-neutrality, the Internet is a wide-open resource of access to information—suggesting its similarity to a sidewalk or square

²⁸⁰ *Id.* at 507. *But see* *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976) (narrowly construing *Marsh*).

²⁸¹ 849 F. Supp. 1335 (N.D. Cal. 1994).

²⁸² *Id.* at 1342-43.

²⁸³ *Id.* at 1340.

²⁸⁴ *Id.* at 1343.

²⁸⁵ *See id.* at 1342 (“Congress stripped cable operators of any editorial control over constitutionally protected speech.”).

²⁸⁶ The Court touched on the issue in *United States v. American Library Ass’n*, but the holding appears limited to the circumstances of library-provided Internet. *See supra* notes 214-15 and accompanying text.

deserving of public-function protection, even though controlled by private actors.²⁸⁷

That being said, and in all fairness, the appropriate application of state action to ISPs is one that may be novel to normal constitutional discourse. Lawrence Lessig writes:

Architectures constitute cyberspace; these architectures are varied; they variously embed political values; some of these values have constitutional import. Yet for the most part—and fortunately—these architectures are private. They are constructed by universities or corporations and implemented on wires no longer funded by the Defense Department. They are private and therefore traditionally outside the scope of constitutional review. The constitutional values of privacy, access, rights of anonymity, and equality need not trouble this new world, since this world is “private” and the Constitution is concerned only with “state action.”

Why this should be is not clear to me. If code functions as law, then we are creating the most significant new jurisdiction since the Louisiana Purchase. Yet we are building it just outside the Constitution’s review. Indeed, we are building it just so that the Constitution will not govern—as if we want to be free of the constraints of value embedded by that tradition.²⁸⁸

But if courts *were* to extend constitutional review to the issue at hand without legislation, Lessig is right to note that constitutional theory may not clearly provide the proper context.²⁸⁹ Other modes of speech are easily divided into two distinct and opposing forces: the government and the speaker.²⁹⁰ The Internet, by contrast, is inherently a multispeaker,²⁹¹ multi-interest, or multilateral environment, mediated by

²⁸⁷ The logical conclusion from this fact is that the Internet should be treated as a common carrier, which seems “presumptively” appropriate. *See Speta, supra* note 202, at 269.

²⁸⁸ LESSIG, *supra* note 178, at 317-18.

²⁸⁹ Lessig points out that the architecture contemplated by the framers of the Constitution, based in natural law and the laws of economics, is directly opposed to the man-made architecture of sovereignty in cyberspace based in code. *Id.* at 318.

²⁹⁰ 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, 162 (2007), available at <http://www.mttlr.org/volfourteen/schejter&yemini.pdf>; see also U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press” (emphasis added)).

²⁹¹ Take, for example, the immensely popular online encyclopedia, *Wikipedia*. WIKIPEDIA, <http://www.wikipedia.org> (last visited Dec. 28, 2010). Wikipedia does not get its source information from a single user, but rather from an immense supply of edge user contributions for any single entry. *Wikipedia: About*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Dec. 28, 2010). Unlike the press or a cable station, there does not need to be a single speaker transmitting information over the Internet.

nongovernmental actors.²⁹² In the multispeaker environment of the Internet, the free flow of ideas cannot be protected if liberty interests are evaluated in a two-speaker forum, because there are tiers of speakers and expressive interests present²⁹³: edge users submit and access content; corporate content and application providers engineer methods to access their content and that of edge users; and ISPs deliver the resources to make all the above interactions possible.²⁹⁴ The government, after the *Comcast* decision, is only a limited overseer in this situation.

Though perhaps an activist-oriented position, this multitiered system suggests that rather than using precedent based in a bilateral system, we should be evaluating competing communicative interests irrespective of the state-like characteristics of these intermediary entities.²⁹⁵ Addressing the state action doctrine under this method promotes beneficial cultural values, granting to legal discourse symbolic statements upon which to base decisions of right and wrong, and freeing the categorical approach of decisions from what, in turn, becomes an arbitrary public/private distinction.²⁹⁶

2. Standing to Sue and Problems of Pleading

An Internet subscriber may also face problems bringing their claims in federal court due to issues of standing and pleading. Unless the recipient of information knows by some other means that he or she is expecting data, there is insufficient information to proceed with an action on the basis that an ISP is limiting or degrading service.²⁹⁷ Without factual support, a litigant would have difficulty meeting the heightened pleading standards of the federal court system,

²⁹² See Yemini, *supra* note 18, at 51.

²⁹³ Schejter & Yemini, *supra* note 290, at 162.

²⁹⁴ “Mass-media speech implicates a broader range of free speech values that include interests of audiences and intermediaries, as well as speakers.” Yoo, *supra* note 18, at 701.

²⁹⁵ Yemini suggests a normative approach to assessing conflicting rights. Yemini, *supra* note 18, at 54.

²⁹⁶ Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation* 1295-96 (Univ. of Conn. Sch. of Law Articles and Working Papers, Paper No. 9, 2000), available at http://lsr.nellco.org/uconn_wps/9.

²⁹⁷ Consider *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), where Comcast’s subscribers would not necessarily be aware of Comcast’s practice without reports from “nationwide tests.” See Peter Svensson, *Comcast Blocks Some Internet Traffic*, WASH. POST (Oct. 19, 2007, 6:32 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html>.

which require a statement of the claim that is “plausible on its face.”²⁹⁸ Even if the case can survive pleading, a litigant must still show a “concrete and particularized injury” that is “not conjectural or hypothetical” in order to have standing to sue in federal court.²⁹⁹ This is a difficult burden in the context of Internet accessibility; any number of errors, circumstances, or other factors could contribute to the degradation or blockage of service. Then again, injury may be more easily shown in challenging an ISP’s *tiering* access, which today is the more widely utilized form of limitation.³⁰⁰

An end-user cannot, therefore, sue with an adequate basis if transparency is not preserved. Transparency, as noted by the FCC, “increases the likelihood . . . that the Internet community will identify problematic conduct and suggest fixes.”³⁰¹ As suggested below, the FCC must maintain its role in issuing orders of transparency if litigants will have an opportunity to properly plead their cases and discover the harm giving rise to them.

IV. PROPOSED ACTION

If courts were to adjudicate a right to access Internet content through litigation, issues of state action and standing would likely stop the actions in their tracks. Congress must legislate outright that unreasonably impeding access to lawful Internet content gives rise to a private right of action in federal courts.³⁰² Congress should be specific as to what constitutes a per se violation, using First Amendment jurisprudence and the FCC’s recent *Net Neutrality Order* as a guide in determining which practices should be banned outright.³⁰³ But the legislation should also give sufficient leeway to courts to adjudicate circumstances specific to the technology, conduct, and information at issue. Congress must also make explicit in this legislation that the courts have jurisdiction to issue a wide array

²⁹⁸ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

²⁹⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

³⁰⁰ See *supra* note 130 and accompanying text.

³⁰¹ *Net Neutrality Order*, *supra* note 17, at 17,936-37.

³⁰² The Senate’s 2007 bill comes close in permitting “any aggrieved person to file a complaint with the [FCC].” Internet Freedom Preservation Act, S. 215, 110th Cong. § 12(e)(1) (2007).

³⁰³ See *id.* at 17,941-51 (prohibiting blocking and unreasonable discrimination).

of equitable relief—an end-user litigant is unlikely to incur actual money damages. Equitable relief will serve well to take the place of the FCC’s power to issue orders. Beyond the federal court system, the FCC must maintain its role as a diligent overseer of transparency. Transparency will enable end-users to make informed, specific, and plausible claims against ISPs.

A. *The Specifics of Legislation*

Congress can certainly outlaw data management practices and pricing schemes that infringe on the interests of end-users through its power to regulate interstate commerce.³⁰⁴ Legislating on issues of constitutional right, even without an explicit provision in the Constitution allowing for this, is not a shaky proposition either.³⁰⁵ The legislation must guide a court hearing a network discrimination challenge, instructing the judge to weigh the individual’s right to access the information sought with the reasonableness of the data management practice or the tiering scheme.

In its *Comcast Order* the FCC sought to impose a new standard for adjudicating network management challenges: “[An ISP’s] practice should further a critically important interest and be narrowly or carefully tailored to serve that interest.”³⁰⁶ The FCC’s proposed standard, however, is too stringent to accommodate ISPs’ interest; any standard utilized should not sanction ISPs for failing to exercise the least restrictive means possible in every instance of managing their networks. In fact, the FCC would later scale back its “narrowly tailored” standard because it “overly constrain[ed] network

³⁰⁴ See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”). “Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce.” *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). Packets cross state lines instantaneously and continuously through the packet-switching system. See *supra* notes 27-28 and accompanying text.

³⁰⁵ In the past, Congress has used its powers to codify Fourth Amendment rights that courts declined to incorporate into common law. See Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 *FORDHAM L. REV.* 747, 754-60 (2005) (discussing passage of federal statutes concerning electronic surveillance, government access to records, and searches involving communicative material).

³⁰⁶ *Comcast Order*, *supra* note 87, at 13,055-56.

engineering decisions”³⁰⁷ and failed to consider that “reasonable network management practices may differ across platforms.”³⁰⁸

To preserve the property and speech interests of ISPs and yet still keep users from facing undue discrimination, legislation should adopt an intermediate standard of review.³⁰⁹ That is, network providers must show an important interest in utilizing challenged data management practices, and the practice should be substantially related to that interest.³¹⁰ Applying intermediate scrutiny comports with the conduit speech assessed in *Turner*³¹¹ and is consistent with the conclusions of the FCC in its recent *Net Neutrality Order*.³¹² What “reasonable” network management is—and conversely, what unreasonable discrimination is not—poses a question that cannot be addressed at length here. But even where a system of interest-balancing is appropriate, bright-line categories of conduct are inherently unlawful. The FCC, in its rules to preserve the open Internet, has laid out some methods that weigh towards unreasonable discrimination on the one hand³¹³ and reasonable network management on the other.³¹⁴ Congress should look to these definitions and set out conduct that is unlawful per se. Consistent with First Amendment principles,³¹⁵ Congress should at the very least contemplate prohibiting ISP conduct that impedes access to lawful and

³⁰⁷ *Net Neutrality Order*, *supra* note 17, at 17,953.

³⁰⁸ *Id.* Wu agrees that the appropriate goal is to “strike a balance” between the opposing individual and ISP interests so as to preserve efficiency. Wu, *supra* note 62, at 165.

³⁰⁹ Moran Yemini agrees that a normative (non-evidentiary) weighing of interests is the appropriate model of preserving individuals’ Internet free speech interests. Yemini, *supra* note 18, at 36-37. However, Yemini rejects the traditional approach advocated here—for governmental “enhancement” of free speech—where such a model unduly focuses on potentially irrelevant governmental interests, and because governmental enhancement of free speech interests presumes “a right superior to a governmental interest.” *Id.* at 37. What Yemini fails to consider are the Fifth Amendment ramifications of mandated neutrality, which put a conduit and an individual speaker on equal footing in the Internet forum, thereby warranting a presumption of right superior to governmental interest for edge users *and* ISPs.

³¹⁰ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661-62 (1994) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

³¹¹ In determining the standard of review, the *Turner* Court concluded Congress’s “must-carry” provisions for cable providers fell within the intermediate scrutiny of the Court, where the regulation is a “content-neutral restriction[] that impose[s] an incidental burden on speech.” *Id.* at 662.

³¹² See *supra* notes 307-08 and accompanying text.

³¹³ *Net Neutrality Order*, *supra* note 17, at 17,946-47 (discussing discrimination and its unreasonableness when it is anticompetitive, harmful to end-users, or impairs free expression).

³¹⁴ *Id.* at 17,954-56 (discussing reasonable network management practices like congestion-management and Internet security).

³¹⁵ See *supra* Part III.B.1.a.

nonharmful content and degrades provision of services that compete with services provided by the ISP.

Congress must also guide courts in considering the weight accorded to the information sought by plaintiffs. Needless to say, information that would not normally enjoy First Amendment protection should not fall within the statute. But the Internet is home to many frivolous—and perhaps harmful—enterprises that may be protected speech. While Internet resources are not as scarce as broadcast radio frequencies,³¹⁶ for example, they are still not unlimited. Unimpeded access to pornographic content (though protected under normal First Amendment jurisprudence, if not obscene)³¹⁷ may therefore be granted at the expense of access to other information that has a direct benefit to society.³¹⁸ The end-user is left back at square one if courts consistently uphold these access challenges—a degradation of service to access the Internet content of one’s choice. Congress should therefore provide that impeding access to certain categories of content—carefully circumscribed in the legislation for being indecent, threatening, or harmful—is actionable only if the defendant ISP’s access restrictions also sweep up other lawful content that Congress does not set out.

No congressional bill to date has accounted for end-user and ISP interests to the extent advocated in this note. Nor has a bill constructed a private right of action that stands in federal courts. Congress should create that right of action and mandate that the following examples of ISP conduct are significant or important network management and pricing interests³¹⁹:

- Preserving the privacy and security of end-user information and hardware;
- Providing unimpeded access to the content of an end-user’s choice, including but not limited to network management to maintain standard QoS for high-bandwidth web applications, so long as providing such access does not throttle or prioritize one form of lawful content over another;

³¹⁶ *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

³¹⁷ *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

³¹⁸ “With respect to the Internet, intermediaries help protect end-users from exposure to spam, pornography, and viruses . . . while helping them sift through the ever-growing avalanche of desired content that appears on the Internet every day.” Yoo, *supra* note 18, at 701.

³¹⁹ This list is, in part, derived from the 2007 Senate bill. See Internet Freedom Preservation Act, S. 215, 110th Cong. § 12(b) (2007).

- Allowing end-users to attach devices and use software that limit their own Internet accessibility to the extent end-users desire;
- Complying with other applicable federal or state law.

This list is not exhaustive. To preserve this bill's application to circumstances currently unforeseeable, the judiciary must be entitled to consider other important interests identified by ISP defendants. But under no circumstances should an ISP's interest in procuring a profit be sufficient, unless the network management or pricing scheme at issue only incidentally gains a profit in furthering one of the above-stated objectives. Finally, Congress should, at the very least, indicate that impeding access to any content that is not protected under the First Amendment does not give rise to an end-user challenge.

B. The FCC's Continued Role in Transparency

Congress should also grant the FCC the authority to serve as an arbiter of transparency in ISP data management. In the *Comcast* proceedings, the FCC issued orders asking for more detailed illustrations of network management practices.³²⁰ The FCC should continue to use this power to play network management inspector. The FCC has the technical knowledge and resources to monitor the transparency of ISPs' network management practices, and they are therefore better equipped to determine whether ISPs are being fully forthcoming in informing the public. Continued transparency in the market will keep information regarding ISPs in the open so litigants can file in court with a basis upon which to make allegations.

* * *

In conclusion, the reader should note that the model proposed here is not one that would replace the regulatory power of administrative law. It is rather designed as a countermajoritarian check on legislative and administrative solutions that have provided insufficient consideration of individual interests in Internet-content access. This new cause of action can serve to supplement any regulation with *individual* action—granting an avenue of remedy that is based in the conservative and (more) stable doctrines upheld by the Constitution. This additional mode

³²⁰ See *Comcast Order*, *supra* note 87, at 13,060.

of remedy will not only put greater pressure on ISPs to preserve individual rights, but it can also serve as a barometer of consumer welfare in the Internet market.

CONCLUSION

The trend of recognizing access to Internet content as a right is important if United States citizens want to hold the power to access information and use the Internet as a speaking platform. The fact that other nations have adopted such a right is informative of international sentiment, but does not necessarily reflect the reality of American law. Traditional constitutional protections of the First Amendment (though not readily applicable to the right-to-access issue) evoke a possibility that litigation based in constitutional norms may serve as a mode of individual remedy, and further, as a form of pressure to exert upon Internet service providers. There are indeed major hurdles to this form of regulation: the outdated and draconian state action doctrine; an individual litigant's difficulty in alleging or proving a plausible scheme to reduce accessibility; and the First and Fifth Amendment rights of ISPs in protecting their interests as conduits and enterprises of speech. The model proposed here allows for litigation on this topic and preserves transitory regulatory power held by federal courts until a new regime is fashioned. But that power rests on legislative action. In the meantime, U.S. citizens are left with little recourse or remedy to protect any theoretical right to access Internet content. Therefore, the potential for disempowerment of the populace remains.

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[†] J.D. Candidate, Brooklyn Law School, 2012; B.A., Boston University, 2007. I dedicate this to Ryan Weiss. May his memory be a blessing. I must thank my classmates and especially my colleagues on the *Law Review* for their remarkable effort, dedication, and patience. I would also like to thank Derek Bambauer and Jonathan Askin for their invaluable guidance. Finally, I could never have reached this point without the love and unwavering support of my family—my motivation, my hope, and my inspiration.