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MANDATED NETWORK NEUTRALITY AND THE FIRST AMENDMENT: *Lessons from* Turner *and a New Approach*

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ABSTRACT

The debate over network neutrality—one of the most hotly debated public policy issues in the United States in recent years—has been focused primarily on economic and technological aspects of Internet governance. This article treats network neutrality primarily as a free-speech issue and comprehensively examines the First Amendment implications should neutrality rules be enacted. The article explains why the current legal environment does not support a network-neutrality law and questions, using an analogy to the Supreme Court's rulings in the *Turner* cases, the constitutionality of potential neutrality rules under existing First Amendment jurisprudence. It traces the jurisprudential difficulty in upholding neutrality rules to the traditional bilateral concept of the First Amendment, which sees any First Amendment conflict as a two-variable equation (a speaker and the Government), making it ill-suited to deal with the multiple-speaker environment of the Internet. The article identifies the various mechanisms by which the Court has traditionally reduced the multilateral matrix of conflicting First Amendment rights into the familiar bilateral pattern, the result being the deprivation of rights of some speakers. Network neutrality protects content providers' and especially users' individual free-speech rights, which stem from the First Amendment. The article calls for the adoption of both network-neutrality rules and a new, multilateral concept of the First Amendment, in which the rights of all relevant variables in the constitutional matrix are assessed on equal terms.

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I. INTRODUCTION

¶ 1 The Internet is in the midst of an era of transition[1]—an era in which narrowband access, mainly through dial-up modems,[2] gives way to broadband access "as the dominant mode for mass-market connectivity to the Internet."[3] The remarkable success of the Internet can be attributed to a few simple network principles, the most important

[1] François Bar et al., *Defending the Internet Revolution in the Broadband Era: When Doing Nothing Is Doing Harm* 6 (Berkeley Roundtable on the Int'l Econ., E-Conomy Working Paper No. 12, 1999), *available at* http://e-conomy.berkeley.edu/publications/wp/ewp12.pdf

[2] *Id.*

[3] William H. Lehr et al., *Scenarios for the Network Neutrality Arms Race*, Paper Presented at the 34th Research Conference on Communication, Information and Internet Policy 2 (TPRC 2006), *available at* http://web.si.umich.edu/tprc/papers/2006/561/TPRC2006_Lehr%20Sirbu%20Peha%20Gillett%20Net%20Neutrality%20Arms%20Race.pdf. The FCC has defined "broadband" as Internet access at speeds of at least 200 kilobits/second (kbps). *See In re* Inquiry Concerning Deployment of Advanced Telecomm. Capability to All Americans in a Reasonable and Timely Fashion, Report, 14 F.C.C.R. 2398 (1999). Narrowband service is limited to speeds of approximately 28.8 or 56 kbps. *See* Jason Oxman, *The FCC and the Unregulation of the Internet* (F.C.C. Office of Plans & Policy, OPP Working Paper No. 31, 1999), *available at* http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

being "end-to-end" design and open, equal access.[4] This unusual structure among networks, which gives users control over their online activities, has proved to support an "explosion of innovation"[5] at the edges of the network as well as to be socially indispensable.[6] But as we move to a broadband network, which is provided almost exclusively by cable operators through cable-modem systems or by telephone companies trough digital subscriber lines (DSL), these principles are no longer guaranteed.[7] A combination of technological,[8] economic,[9] and legal[10] factors gives broadband service providers (BSPs) unprecedented ability to control the access to and activity on the Internet; as a result, the transition to broadband connectivity threatens to change the nature of the Internet from a democratic and decentralized alternative to traditional mass media.[11] The question then becomes who will control the Internet in the future: the edges (users, application and content providers, etc.) or the gatekeepers (BSPs).[12] Hence, the vigorous debate over "network neutrality."

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[4] *See* Hearing on "Network Neutrality" Before the S. Comm. on Commerce, Science and Transportation, 109th Cong. (2006) (statement of Vinton G. Cerf, Vice President and Chief Internet Evangelist, Google Inc.), *available at* http://commerce.senate.gov/pdf/cerf-020706.pdf [hereinafter Cerf Statement]; Edward W. Felten, *Nuts and Bolts of Network Neutrality* 1-2 (2006), http://itpolicy.princeton.edu/pub/neutrality.pdf; Bar et al., s*upra* note 1, at 6-10. *See generally* Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001).

[5] Cerf Statement, *supra* note 4, at 1. *See generally* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003).

[6] Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J., 103, 112-19 (2006).

[7] In an interview with Business Week Online given the week in which SBC Telecommunications' purchase of AT&T was approved, then-SBC CEO Edward Whitacre straightforwardly stated the following regarding SBC's future business plans: "How do you think they're going to get to customers? Through a broadband pipe. Cable companies have them. We have them. Now what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes? The Internet can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! or Vonage or anybody to expect to use these pipes [for] free is nuts!" *Online Extra: At SBC, It's All About "Scale and Scope,"* BUS. WK. ONLINE, Nov. 7, 2005, http://www.businessweek.com/@@n34h*IUQu7KtOwgA/magazine/content/05_45/b3958092.htm; *see also Rewired and Ready for Combat*, BUS. WK. ONLINE, Nov. 7, 2005, http://www.businessweek.com/magazine/content/05_45/b3958089.htm.

[8] The Internet constitutes a neutral platform because it is designed as a "dumb" network—that is, it delivers packets of data equally in a "best effort" regardless of their content. *See* Sascha D. Meinrath & Victor W. Pickard, *The New Network Neutrality: Criteria for Internet Freedom* 3 (2006), http://www.saschameinrath.com/files/The%20New%20Network%20Neutrality%20(FINAL).pdf. Broadband technology, on the other hand, enables the middle of the network to be more "intelligent"—that is, it makes inspecting packets as to their nature and content more feasible. S*ee* Johannes M. Bauer, *Dynamic Effects of Network Neutrality*, Paper Presented at the 35th Research Conference on Communication, Information and Internet Policy 11 (TPRC 2006), *available at* http://web.si.umich.edu/tprc/papers/2006/633/Bauer-Net-Neutrality-TPRC-2006-fin.pdf.

[9] *See infra* at 15.

[10] *See infra*, Part I.

[11] *Cf.* Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561 (2000).

[12] Felten, s*upra* note 4, at 2.

¶ 2 Network neutrality may be defined as "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,"[13] or, more simply, the principle that broadband networks should not discriminate between favored and disfavored Internet content, services, and applications.[14] While such discriminatory practices are not the mainstream at this stage, there are several well-documented instances of actual discrimination by BSPs against specific Internet applications[15] and content,[16] making the potential threats a cause for major concern. Still, the idea of network neutrality does not go uncontested. As with any complex issue, it gives rise to various sets of claims and counterclaims and involves many players—content providers, device manufacturers,[17] BSPs, public interest groups,[18] academics,[19] policymaking officials, Congress, and so on—with different approaches.[20] The problem, however, more than the lack of consensus on the desirability of network neutrality, is the fact that the issue is debated "almost exclusively in terms of the economic benefits of innovation."[21] Important as innovation and its economic benefits may be, making them the focus of the debate reflects a very limited understanding of the significance of network neutrality. The result is a partial,

[13] Meinrath & Pickard, *supra* note 8, at 2.

[14] For example, broadband networks may deny a person access to one email service (e.g., Yahoo!) and not to another (e.g., Google), prevent her from using Voice over Internet Protocol (VoIP) services, cause her to surf one news website (e.g., nytimes.com) more quickly than another (e.g., washingtonpost.com), decide whether she can be exposed to controversial Internet content, and so on.

[15] One example in this regard is BSPs' blocking of VoIP traffic. *See* Herman, *supra* note 6, at 119–21; *see also* Wu, *supra* note 5, at 156-57. In a recent article, Professor Wu points to the fact that wireless carriers frequently and openly use discriminatory terms of service and blocking of applications in their mobile broadband services. *See* Tim Wu, *Wireless Net Neutrality: Cellular* Carterfone *and Consumer Choice in Mobile Broadband* 12-14 (New America Foundation Wireless Future Program, Working Paper No. 17, 2007), *available at* http://www.newamerica.net/files/WorkingPaper17_WirelessNetNeutrality_Wu.pdf.

[16] Herman, s*upra* note 6, at 122-23. A well-known example in this regard is Canada's second largest telecommunications company, Telus, blocking access to Voices for Change, a website supporting the Telecommunications Workers Union. *See* Michael Geist, *Telecommunications Policy Review Submission* 5 (2005), *available at* http://www.telecomreview.ca/epic/internet/intprp-gecrt.nsf/vwapj/Geist_Michael.pdf/$FILE/Geist_Michael.pdf.

[17] *See*, *e.g.*, Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1850 n.6 (2006).

[18] *Id*. at 1850 n.8.

[19] Professors Lawrence Lessig and Tim Wu write extensively in support of network neutrality. *See*, *e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS 26-48 (2002); Wu, *supra* note 5; Ex parte letter from Tim Wu, Associate Professor, University of Virginia School of Law, and Lawrence Lessig, Professor of Law, Stanford Law School, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 22, 2003), *available at* http://www.timwu.org/wu_lessig_fcc.pdf. Professor Christopher Yoo, on the other hand, is quite a vigorous opponent of network neutrality. *See*, *e.g.*, Yoo, *supra* note 17; Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. TELECOMM. & HIGH TECH. L. 23 (2004).

[20] For a list of editorials favoring and opposing network neutrality, see Yoo, *supra* note 17, at 1858 n.55.

[21] *Id*. at 1851 n.13. Opinions on this issue vary, as one's position regarding the influence of network neutrality on technological innovation and market development depends to a high extent on her position on whether greater benefits will continue to arise from innovation at the edges of the network (development of new applications and devices on the Internet platform) or from the deployment and development of its physical layer (the broadband infrastructure).

crippled debate that neglects what may be the most important aspect of any network-neutrality policy: its First Amendment implications. Surprisingly, this issue has been largely overlooked.

¶3 The body of scholarly writings on the issue of new information technologies' First Amendment implications is quite considerable.[22] This is especially true since the Supreme Court's decisions in the *Turner* cases,[23] which has been described as "by far the most important judicial discussion of new media technologies."[24] However, no substantial attempt to examine network neutrality as a free-speech issue has been made to date. Some very limited references, in scope as well as in substance, were made as to the question of whether BSPs exercise editorial discretion; Wu, Lessig, and Herman have argued that BSPs exercise no such discretion,[25] while Yoo has contended that editorial discretion plays an important role with BSPs.[26] In addition, it has been said, without much elaboration, that a network-neutrality policy would raise questions highly analogous to the ones addressed by the Court in *Turner*.[27] However, the proposition that the result of both cases would be similar has been challenged by at least one commentator, again without providing substantial reasoning.[28] Apart from what is

[22] *See, e.g.*, Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); Jim Chen, *The Authority to Regulate Broadband Internet Access Over Cable*, 16 BERKELEY TECH. L.J. 677 (2001); Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37 (1999); Harold Feld, *Whose Line Is It Anyway? The First Amendment and Cable Open Access*, 8 COMMLAW CONSPECTUS 23 (2000); William E. Lee, *Cable Modem Service and the First Amendment: Adventures in a "Doctrinal Wasteland,"* 16 HARV. J.L. & TECH. 125 (2002); Burt Neuborne, *Speech, Technology, and the Emergence of a Tricameral Media: You Can't Tell the Players Without a Scorecard*, 17 HASTINGS COMM. & ENT. L.J. 17 (1994); Frederick Schauer, *Cable Operators as Editors: Prerogative, Responsibility, and Liability*, 17 HASTINGS COMM. & ENT. L.J. 161 (1994); Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885 (2003); Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L.J. 137 (1994); Nancy J. Whitmore, *The Evolution of the Intermediate Scrutiny Standard and the Rise of the Bottleneck "Rule" in the Turner Decisions*, 8 COMM. L. & POL'Y 25 (2003).

[23] Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) [hereinafter *Turner I*]; Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) [hereinafter *Turner II* and hereinafter together *Turner*].

[24] Cass R. Sunstein, *The First Amendment in Cyberspace*,104 YALE L.J. 1757, 1765 (1994-1995).

[25] Wu & Lessig, *supra* note 19, at 9-10; Herman, *supra* note 6, at 112-14.

[26] Yoo, s*upra* note 17, at 1905-07.

[27] Wu & Lessig, *supra* note 19, at 10-11; Herman, s*upra* note 6, at 120. This claim draws an analogy between neutrality rules and the must-carry rules imposed on cable operators in *Turner* as well as between the governmental interests that justified the must-carry rules in *Turner* and the ones that could justify neutrality rules. For a critical discussion of the extension of must carry to digital TV, *see* Thomas W. Hazlett, *Digitizing "Must-Carry" Under* Turner Broadcasting v. FCC (1997), 8 SUP. CT. ECON. REV. 141 (2000).

[28] Randolph J. May, *Net Neutrality and Free Speech*, BROADCASTING & CABLE, Sep. 18, 2006, http://www.broadcastingcable.com/article/CA6372794.html?display=Opinion; Randolph J. May, *Net Neutrality Would Violate the First Amendment Rights of ISPs*, Aug. 16, 2006, http://www.law.com/jsp/article.jsp?id=1155559192876. May contends, unlike Wu, Lessig, and Herman, that the governmental interests that supported the validation of the must-carry rules in *Turner* would not suffice to override BSPs' First Amendment rights in the context of neutrality rules. In a short article published during the editing process of this article, May reiterated his position, somewhat less briefly. *See*

mentioned above, the debate over network neutrality and free speech has mainly taken place in the realm of blogs, public interest groups' websites, and the like.[29]

¶ 4 The first purpose of this article is, therefore, to start filling the lacuna in the network-neutrality discourse, by offering a comprehensive discussion of network neutrality as a free-speech issue and identifying the difficulties facing network-neutrality legislation under existing First Amendment jurisprudence. But this article goes beyond a descriptive legal analysis of the First Amendment implications of network neutrality; it articulates a normative critique of the traditional, bilateral concept of the First Amendment, on which both proponents and opponents of network neutrality have relied, and which, I argue, is ill-suited to deal with the multiple-speaker environment of the Internet. Thus, this article calls for the adoption of a new, multilateral understanding of the First Amendment, under which to guide the examination of the constitutionality of neutrality rules.

¶ 5 Part II of the article describes the current legal landscape pertaining to network neutrality, focusing on the Supreme Court's ruling in *Brand X*[30] and explains why the law as it stands does not support network neutrality. Part III discusses the Supreme Court's general First Amendment approach toward the Internet (or rather its confusion about this new medium) through an analysis of two central cases: *Reno v. ACLU*[31] and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[32] Part IV analyzes the constitutionality of neutrality rules under existing First Amendment jurisprudence, by way of analogy to *Turner*. This part lays out the Court's approach in *Turner* and elaborates on the relevance of the case to network neutrality. It refutes the position that BSPs do not exercise editorial discretion and contends that BSPs would have, at the very least, a reasonable First Amendment claim against neutrality rules. It then goes on to classify neutrality rules as content neutral but holds that in the absence of substantial evidence to support the potential governmental interests in legislating neutrality rules, it is questionable whether such rules would survive intermediate scrutiny of the sort applied by the Court in *Turner*.

¶ 6 Part V traces network-neutrality rules' possible failure to survive intermediate scrutiny under the Supreme Court's traditional bilateral (government-speaker) understanding of First Amendment conflicts. It starts with a description of the Romantic, bilateral view of the First Amendment, whereby the constitutional equation is understood to include one individual free-speech right on one side and one or more abstract free-

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Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3(1) I/S J.L, & POL'Y FOR THE INFO. SOC'Y 198 (2007).

[29] *See, e.g.*, Caroline Fredrickson, *Net Neutrality or Net Censorship*, C|NET, July 26, 2006, http://news.com.com/Net+neutrality+or+Net+censorship/2010-1028_3-6097579.html; Dick Armey, *Perspective: Net Ignorance of the Christian Coalition*, C|NET, July 17, 2006, http://news.com.com/Net+ignorance+of+the+Christian+Coalition/2010-1028_3-6094235.html; *Net Neutrality vs. Free Speech*, Mar. 16, 2006, http://www.onlyrepublican.com/orinsf/2006/03/taking_sides_on.html; ACLU, *Net Neutrality: Myths and Facts*, http://www.aclu.org/freespeech/internet/26825res20060922.html.

[30] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005).

[31] 521 U.S. 844 (1997).

[32] 518 U.S. 727 (1996).

speech interests or "values" on the other side. Part V then goes on to explain the limitations of the bilateral concept in a multiple-speaker environment such as the Internet, and finally, it demonstrates how the bilateral concept is embedded even in traditional speech-enhancement theories. Part VI articulates the need for a multilateral understanding of the First Amendment in the context of the Internet. This part elaborates on the Internet as a multiple-speaker environment, describes the implications of the multilateral concept for First Amendment jurisprudence (i.e., the understanding of free speech conflicts as a constitutional matrix in which First Amendment rights of presumptively equal normative value exist on *all* sides of the matrix), and suggests a principle, or guideline, for the determination between conflicting free-speech rights of presumed equal value: each right's contribution, if realized, to the advancement of free-speech values. Thus, the endpoint is that the real justification for network neutrality is not (or at least not only) some abstract "governmental interest" but rather the Internet users' and application or content providers' own individual rights, as they stem directly from the First Amendment. Part VII concludes the article.

II. THE POST–*BRAND X* LEGAL LANDSCAPE

A. *Brand X* and Its Aftermath

¶ 7 The design of the Internet and the concept of network neutrality are closely linked with principles of "common carriage."[33] For many years, this conceptual link had been reflected in American regulatory policy, as dial-up services, and later DSL services, provided over telephone lines, were considered "telecommunication services" and therefore subject to mandatory nondiscrimination, [34] interconnectedness, [35] and universality[36] requirements under Title II of the Communications Act. These principles, coupled with the FCC's policy of unbundling network elements, [37] enabled the development of a competitive market of last-mile Internet Service Providers (ISPs) over telephone lines, which had at least the potential to counterbalance the highly concentrated

[33] Meinrath & Pickard, s*upra* note 8, at 5. The term "common carrier" is defined in the Communications Act of 1934 as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act." *See* The Communications Act of 1934, 47 U.S.C. § 153(10) (2000). Given the circularity of the definition, FCC pronouncements and court decisions have tried to clarify the term. *See, e.g.*, F.C.C. v. Midwest Video Corp., 440 U.S. 689, 701 (1979); Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C., 173 U.S. App. D.C. 413, 424 (1976) (Common carrier does not "make individualized decisions in particular cases, whether and on what terms to deal."); *Report and Order, Industrial Radiolocation Service, Docket No. 16106*, 5 F.C.C. 2d 197, 202 (1966) (Common carrier in the communications context is one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."); *Report and Order*, *Multipoint Distribution Service, Docket No. 19493*, 45 F.C.C.2D 616, 618 (1974).

[34] 47 U.S.C. § 202 (2007).

[35] *See* 47 U.S.C. § 251(a).

[36] *See* 47 U.S.C. § 254.

[37] Bar et al., s*upra* note 1, at 8.

broadband market.[38] As cable-modem systems developed, the FCC was required to decide whether the regulatory model that applied to DSL would be extended to broadband Internet service provided over cable as well.[39] The path chosen by the FCC not only rejected the application of common-carriage principles to cable-modem systems but also would eventually lead to a retreat from those principles with regard to DSL. In March 2002, the FCC issued a *Declaratory Ruling*, which concluded that broadband Internet service provided by cable companies was an "information service" but not a "telecommunications service" under the Communications Act and therefore was not subject to mandatory Title II common-carrier regulation.[40] The *Declaratory Ruling* relied heavily on the FCC's own *Universal Service Report* that classified "non-facilities-based" ISPs solely as information service providers.[41] Oddly, the FCC did not find the fact that cable companies own the cable lines they use to provide Internet access to be a reason to treat them differently than non-facilities-based ISPs.[42]

¶ 8 Numerous parties, one of them Brand X Internet Services, petitioned for review of the *Declaratory Ruling*. By judicial lottery, the Court of Appeals for the Ninth Circuit was selected as the venue for the challenge. The Court of Appeals granted the petitions in part and vacated the *Declaratory Ruling*, holding that the FCC could not permissibly construe the Communications Act to exempt cable companies providing cable-modem services from mandatory Title II regulation.[43] The Supreme Court reversed the Court of Appeals' decision, applying the deferential framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*[44] and holding that the FCC's classification of cable-modem service as "information service" was a lawful construction of the Communications Act under *Chevron* and the Administrative Procedure Act (APA).[45] Shortly after the *Brand X*

[38] Prior to *Brand X*, more than 6,000 ISPs offered dial-up services, and more than 95 percent of Americans lived within the local calling area of four or more ISPs, with average costs of less than $20 per month for unlimited Internet access. Oxman, *supra* note 3, at 17.

[39] Historically, cable operators have not been regulated as "common carriers." *See, e.g.*, FCC v. Midwest Video Corp., 440 U.S. 689, 705 (1979). However, the Court acknowledged that a cable system may operate as a common carrier with respect to a portion of its service only and that one can be a common carrier with regard to some activities but not others. *Id.* at 701 n.9; *see also* Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C., 533 F.2d 601, 608 (DC Cir. 1976).

[40] *In re* Inquiry concerning High-Speed Access to the Internet over Cable and Other Facilities, Declaratory Ruling, 17 F.C.C.R. 4798, 4820-23 (2002).

[41] *In re* Federal State Joint Board on Universal Service, 13 F.C.C.R. 11501, 11533 (1998).

[42] *Declaratory Ruling*, *supra* note 40, at 4823.

[43] Brand X Internet Services v. F.C.C., 345 F. 3d 1120, 1131 (9th Cir. 2003). The court based its holding on the *stare decisis* effect of its decision in AT&T Corp. v. Portland, 216 F. 3d 871, 880 (9th Cir. 2000), which held that cable-modem service is a "telecommunications service."

[44] 467 U.S. 837, 842-43 (1984). *Chevron* requires a federal court to defer to an agency's construction, even if it differs from what the court believes to be the best interpretation, if the particular statute is within the agency's jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency's construction is reasonable. *Id*. at 843-44.

[45] The essence of the FCC's reasoning for classifying cable-modem service as an "information service" was that "[t]he service that Internet access providers offer to the public is Internet access . . . not a transparent ability (from the end-user's perspective) to transmit information." Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services, 125 S. Ct. 2688, 2710 (2005). The *Declaratory Ruling*, cited by the Court, also concluded that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market." *See Declaratory Ruling*, *supra* note 40, at 4802; *Brand X*, 125 S. Ct. at 2711. Ironically, the end user's point of view is used by the FCC to justify a

decision was rendered, the FCC adopted a *Wireline Facilities Order*, which ruled that DSL was also an "information service," thereby exempting the telephone companies' broadband services as well from Title II regulation.[46] The direct effect was that broadband providers were not obligated to provide their ISP competitors with access to their lines.[47] Thus, in a "seemingly minor turn-of-phrase,"[48] validated by a most legalistic judicial decision, policymakers permitted access foreclosure, moving away from the common-carriage model of regulation and turning their backs on 30 years of consistent policy direction.[49] *Brand X* practically closed the door on the Title II common-carriage "channel" as a means to apply neutrality rules to broadband providers (unless a new and opposite rulemaking procedure is initiated, which is highly unlikely). It is true that the Court noted, in dicta, that the FCC "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction"[50] and that such duties may include requiring cable companies "to allow independent ISPs access to their [the BSPs'] facilities."[51] Unfortunately, however, Title I ancillary jurisdiction is a poor alternative to Title II mandatory regulation. Moreover, as will be further discussed in the next section, it is highly questionable whether the FCC actually has jurisdiction to use its Title I powers to impose Title II-like requirements.

B. The FCC's Broadband Policy Statement

¶9 On the same day in which the FCC adopted the *Wireline Facilities Order*, it also issued the *Broadband Policy Statement*,[52] which has been described by Yoo as a "version of Network Neutrality."[53] This is a very flattering description for a three-page document that, at best, raises more doubts and concerns than it provides reassurance.[54] In the *Policy Statement*, the FCC "offers guidance and insight into its approach to the Internet and broadband."[55] This approach, so the FCC contends, is consistent with Congress' national Internet and broadband policy.[56] The FCC is of the opinion that it has jurisdiction to

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policy that might prove substantially detrimental to end users' interests. Similarly, the innovation argument, which is one of the strongest arguments in favor of network neutrality, was used by the FCC to achieve exactly the opposite goal.

[46] *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order, 20 F.C.C.R. 14853, 14909 (2005).

[47] Ted Glazner, *Unpacking the Brand X Decision*, TMCnet, June 27, 2005, http://www.tmcnet.com/usubmit/2005/jun/1158573.htm.

[48] Meinrath & Pickard, s*upra* note 8, at 7.

[49] *Id.*; Bar et al., *supra* note 1, at 3.

[50] *Brand X*, 125 S. Ct. at 2708.

[51] *Id*. at 2711.

[52] *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement, 20 F.C.C.R. 14986, 14987 (2005).

[53] Yoo, s*upra* note 17, at 1850.

[54] In comparison, the *Declaratory Ruling* holds about 80 pages and the *Wireline Facilities Order* holds more than 140 pages. Of the *Declaratory Ruling*'s pages, only one paragraph and three footnotes are dedicated to the First Amendment. The *Wireline Facilities Order* does not include even that minimal reference to issues of free speech.

[55] *Policy Statement*, *supra* note 52, at 14987.

[56] The policy objectives of the Communications Act of 1996 are "to preserve the vibrant and competitive free market that presently exists for the Internet" and "to promote the continued development of the Internet." 47 U.S.C. § 230 (1998). Further, the act seeks "to encourage the deployment on a

ensure that BSPs are operated in a neutral manner, by virtue of its Title I ancillary jurisdiction to regulate interstate and foreign communications.[57] In order to "encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet,"[58] the *Policy Statement* adopts the following principles: consumers are entitled to access the lawful Internet content of their choice; consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; consumers are entitled to connect their choice of legal devices that do not harm the network; and consumers are entitled to competition among network providers, application and service providers, and content providers.[59]

¶ 10 Yet it is highly questionable whether these broadly worded statements are more than mere rhetoric. First, the *Policy Statement* does not impose any duties and obligations on BSPs, which would correspond with the "entitlements" it grants to consumers. Second, the *Policy Statement* mentions no implementation measures, enforceable protections, or behavior standards required from BSPs; in fact, it seems to have been adopted with no notion of enforcement attached to it at all.[60] Third, the *Policy Statement* was not adopted subject to the thorough notice-and-comment process of the APA,[61] a fact that makes its validity highly suspect.

¶ 11 Even more important, however, is the fact that the legal foundations on which the FCC bases its jurisdiction to impose neutrality obligations on BSPs are shaky. As noted above, the FCC believes such obligations can be imposed by virtue of its Title I ancillary jurisdiction, but this position is unpersuasive. It is true that the FCC has broad powers to accomplish its statutory goals.[62] Nonetheless, these powers are not without limit, and an ancillary jurisdiction is, after all, just that—ancillary. It should be understood to authorize only interpretive and procedural rules.[63] What is the significance of the classification of BSPs as "information service providers," rather than "telecommunication service providers," if the same neutrality obligations that would have been imposed on them under Title II were now to be imposed under Title I?[64] The FCC heavily relies in this respect on the language of the *Brand X* majority opinion that seems to imply that the FCC can impose Title II-like obligations under Title I.[65] However, this jurisdictional question was not directly before the Court and the comment made by the Court in that respect was, therefore, mere dicta. Aware of the anomaly in the FCC's position, Justice Scalia noted

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reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 706(a) (1998)

[57] *Policy Statement*, *supra* note 52, at 14987.

[58] *Id*. at 14988.

[59] *Id.*

[60] Herman, s*upra* note 6, at 142 (citing neutrality proponents in the House, H.R. Rep. No. 109-470, pt.1, at 53 *et seq.* (2006)).

[61] *Id.*

[62] *See*, *e.g.*, United States v. Southwestern Cable, 392 U.S. 157, 168 (1968).

[63] *See* Thomas W. Merill & Kathrin Tongue Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 517-19 (2002); James B. Speta, *FCC Authority to Regulate the Internet: Creating It & Limiting It*, 35 LOY. U. CHI. L.J. 15, 23 (2003).

[64] *Cf.* Susan P. Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 FORDHAM L. REV. 695, 729 (2005-2006).

[65] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services, 125 S. Ct. 2688, 2708 (2005).

the following in his *Brand X* dissenting opinion:

> This is a wonderful illustration of how an experienced agency can . . . turn statutory constraints into bureaucratic discretions. The main source of the Commission's regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance . . . It contemplates, however, altering that (unnecessary) outcome, not by changing the law (*i.e.*, its construction of the Title II definitions), but by reserving the right to change the facts. *Under its undefined and sparingly used "ancillary" powers, the Commission might conclude that it can order cable companies to "unbundled" the telecommunications component of cable-modem service. And presto, Title II will then apply to them, because they will finally be offering telecommunications service*![66]

¶ 12 Justice Scalia also specifically questioned the legality of using Title I powers to impose Title II-like requirements on cable companies:

> Under the Commission's assumption that cable-modem-service providers are not providing "telecommunications service," there is reason to doubt whether it can use its Title I powers to impose common-carrier-like requirements, since 47 U.S.C. § 153(44) specifically provides that a "telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services", and "this chapter" included Titles I and II.[67]

¶ 13 Justice Scalia's remarks do not stand alone; they are supported by the Supreme Court's highly relevant decision in *FCC v. Midwest Video Corp.*[68] *Midwest Video*, unlike *Brand X*, dealt directly with the issue of the scope and limits of the FCC's ancillary jurisdiction. The *Midwest Video* Court was required to determine the validity of "must-carry" rules, which the FCC, relying on its ancillary jurisdiction, imposed on cable operators. The Court was of the view that the access rules amounted to an attempt to impose common-carrier obligations on cable operators[69] and that, by promulgating those rules, the FCC exceeded the limits of its ancillary jurisdiction.[70] At the time *Midwest Video* was decided, cable technology was very much in the position of the Internet today—a relatively new and unregulated medium.[71] In addition, the must-carry rules promulgated by the FCC in *Midwest Video* resemble in many ways the kind of rules that may be promulgated according to the principles embodied in the *Policy Statement* (e.g., both would impose common-carrier-like rules on the regulated entities). It follows, then,

[66] *Id.* at 2718 (Scalia, J., dissenting) (emphasis added).
[67] *Id*. at n.7 (Scalia, J., dissenting) (emphasis in the original).
[68] F.C.C. v. Midwest Video Corp., 440 U.S. 689, 708-09 (1979).
[69] *Id.* at 701.
[70] *Id*. at 708.
[71] *Midwest Video* was decided before any regulation of cable medium had been written into national legislation and, of course, much before the legislation of the must-carry rules discussed in *Turner*. The FCC's jurisdiction to regulate cable was at that time derived from § 2(a) of the Communications Act of 1934 which subjected to regulation "all interstate and foreign communication by wire or radio." *See* 47 U.S.C. § 152(a) (2000).

that the fate of both rules might also be similar. Thus, the FCC's reliance on its Title I ancillary jurisdiction for the purpose of imposing neutrality rules on BSPs might very well prove to be a reliance on a broken reed.[72]

C. Proposed Network-Neutrality Legislation

¶ 14 On June 8, 2006, the House passed the Communications Opportunity, Promotion, and Enhancement Act of 2006 (COPE).[73] COPE is a comprehensive telecommunications reform act, which is mainly designed to create a new, national franchising option for BSPs. It also contains very modest network-neutrality requirements by reference to the *Policy Statement.* Title II, § 201 of COPE, authorizes the FCC to enforce its *Policy Statement* and the principles incorporated therein;[74] limits the maximum forfeiture penalty applicable to a violation of the *Policy Statement*;[75] and bestows on the FCC the exclusive authority to adjudicate any complaint with regard to alleged violations of the *Policy Statement* and the principles incorporated therein.[76] At the same time, however, COPE explicitly prohibits the FCC from adopting or implementing rules or regulations to enforce the *Policy Statement* and the principles incorporated in it, although it does authorize adoption of procedures for the adjudication of complaints.[77] The latter provision renders all the previous ones practically meaningless. The kind of ad hoc implementation of a highly ambiguous *Policy Statement*, which the act mandates, "is an obvious attempt to create the illusion of addressing concerns of discrimination while weakening the hand of the very agency that would be entrusted with enforcement."[78] A more substantial network-neutrality bill sponsored by Representative Ed Markey was defeated by the House prior to the passing of COPE.[79] Senators Olympia Snowe and Byron Dorgan have sponsored another network-neutrality bill, the Internet Freedom Preservation Act,[80] which was defeated last term in committee.[81] The bill has been

[72] Nevertheless, in April 2007, the FCC released a Notice of Inquiry, in which it reiterated its position that the FCC had the authority to adopt and enforce the *Policy Statement*, under Title I of the Communications Act. *See In the Matter of Broadband Industry Practices*, WC Docket No. 07-52 (the "NOI"), 7896 (2007). The NOI states that it seeks to enhance the FCC's "understanding of the nature of the market for broadband and related services, whether network platform providers and others favor or disfavor particular content," and "how consumers are affected by these policies." *Id.* at 7894. To determine whether any regulatory intervention is necessary, the NOI asks "for specific examples of beneficial or harmful behavior" (*id.*), a requirement that, as will be later explained, is highly problematic in the context of network neutrality. It is worth noting that by the end of the comment period on the NOI, the docket ran to nearly 27,000 comments! *See* Nate Anderson, *FCC Asks for Comments on Network Neutrality, Gets 27,000 of Them*, ARS TECHNICA, July 17, 2007, http://arstechnica.com/news.ars/post/20070717-fcc-asks-for-comments-on-network-neutrality-gets-27000-of-them.html.

[73] H.R. 5252, 109th Cong. (2006).

[74] H.R. 5252 § 201(a).

[75] H.R. 5252 § 201(b).

[76] H.R. 5252 § 201(b)(3).

[77] H.R. 5252 § 201(b)(4).

[78] Herman, *supra* note 6, at 138.

[79] H.R. Res. 5273, 109th Cong. (2006) (failed by recorded vote).

[80] S.2917, 109th Cong. (2006).

[81] *See* http://www.govtrack.us/congress/bill.xpd?tab=main&bill=s109-2917; Tom Abate, *Network Neutrality Amendment Dies: Telecommunications Bill Goes to Senate Without Provision Sought by Web*

reintroduced by Senators Dorgan and Snow in January 2007, following that year's midterm elections[82] and has been endorsed by several other Senate members, including Senators Clinton, Obama, and Kerry, but has not yet reached a floor vote. The Internet Freedom Preservation Act would require BSPs to treat all data equally, while allowing reasonable exemptions for the purpose of preventing harmful activity, complying with legal duties, and neutrally managing bandwidth.[83] With the shift in the balance of power in Congress, and the 2008 presidential elections approaching, it remains to be seen whether this, or any other, bill mandating network neutrality will find its way into national legislation. What is clear, however, is that without such legislation, the existing legal situation is insufficient to ensure network neutrality.[84]

III. THE SUPREME COURT AND THE INTERNET: A STANDARD OF CONFUSION

¶ 15 The Supreme Court's first direct encounter with the Internet was in the landmark case of *Reno v. ACLU*, in which the Court invalidated the Communications Decency Act of 1996 (CDA) on First Amendment grounds. For our purposes, two important aspects of *Reno* should be pointed out. The first is the Court's findings of fact concerning the Internet. The Court described the Internet as a "unique and wholly new medium of worldwide communication,"[85] while stressing two main innovations that distinguish the Internet from other media: interactivity and unlimited low-cost capacity for

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Firms, S. F. CHRON., June 29, 2006, at C1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/06/29/NET.TMP.

[82] *See* Ted Hearn, *Dorgan, Snowe Introduce Net-Neutrality Bill*, MULTICHANNEL NEWS, Jan. 9, 2007, *available at* http://www.multichannel.com/article/CA6405766.html; David Hatch, *Sens. Dorgan, Snowe Revive "Network Neutrality" Push*, NAT'L J., Jan. 10, 2007. In February 2008, Rep. Markey introduced his own new network neutrality bill, H.R. 5353, 110th Cong. (2008), the short title of which is almost identical: the "Internet Freedom Preservation Act of 2008." The bill has been referred to the House Committee on Energy and Commerce.

[83] S.2917 § 2.

[84] On December 28, 2006, as a condition for the approval of its $85 billion merger with Bellsouth, AT&T submitted a "letter of commitment" with the FCC in which it promised to adhere to the *Policy Statement* and observe network-neutrality principles for 24 months. Letter from Robert W. Quinn Jr., Senior Vice President, AT&T Services Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 28, 2006), *available at* http://www.fcc.gov/ATT_FINALMergerCommitments12-28.pdf. Opinion is split on what the merger conditions mean. Some hail the conditions as an important victory. *See, e.g.*, Ben Scott, *A Victory We Can Hang Our Hats On*, Dec. 29, 2006, http://www.savetheinternet.com/blog/2006/12/29/a-victory-we-can-hang-our-hats-on/; Tim Wu, *AT&T: The Mechanics of the Deal: Why AT&T's Net Neutrality Concession Is a Milestone in the History of the Internet*, http://www.savetheinternet.com/=wu. Others believe they are filled with loopholes that render them meaningless. *See, e.g.*, Jeff Pulver, *Beware the Fine Print Buried in the AT&T-BellSouth Merger "Concessions"?*, http://pulverblog.pulver.com/archives/006164.html; Susan Crawford, *The Day the Internet Became Cable Television: Dec. 29, 2006*, http://scrawford.blogware.com/blog/_archives/2006/12/29/2604993.html. While the truth probably lies somewhere in the middle, it is clear that the merger conditions do not solve the problem. *See, e.g.*, Harold Feld, *AT&T Net Neutrality Condition: Win, Lose or Draw*, http://www.savetheinternet.com/blog/2006/12/29/att-net-neutrality-condition-win-lose-or-draw/. A comprehensive, stable, and principled settlement of the issue of network neutrality is dependent on an act of legislation.

[85] Reno v. ACLU, 521 U.S. 844, 850 (1997).

communication.[86] The Court noted that "[i]ndividuals can obtain access to the Internet from many different sources"[87] and that "[a]nyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods."[88] "Taken together," the Court said, "these tools constitute a unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." [89] The Internet, and particularly the World Wide Web, was compared by the Court to a "vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services."[90] The Court then determined that from the publishers' point of view, the Internet

> constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. *Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals*. . . . "No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web."[91]

¶ 16 Many of the findings in *Reno* remain relevant today; the Internet is still a unique medium among mass-media outlets; it is the most decentralized and democratic medium, in practice and especially in potential; and its content is "as diverse as human thought."[92] Yet the Court's incidental reference to the issue of access to the Internet reflects a limited, or at least an outdated, understanding of the medium's multilayered nature. The Internet is made up of at least three layers: the physical (wires, cable, etc.), the logical (software and applications), and the content layers. [93] While the Court's idealized description of the Internet may be generally true as to the logical and content layers, it is hardly accurate with regard to the physical layer, the broadband infrastructure, particularly in the post–*Brand X* regulatory environment. Cable and DSL providers currently control almost 98 percent of the residential and small-business broadband market.[94] 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,

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[86] *See id.* at 870.

[87] *Id.* at 850.

[88] *Id.* at 851.

[89] *Id*.

[90] *Id.* at 853.

[91] *Id.* (emphasis added). The Court also noted in note 9 that "Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal 'home pages,' the equivalent of individualized newsletters about the person or organization, which are available to everyone on the Web."

[92] *Id.* at 870.

[93] See Benkler, *supra* note 11, at 562, for a detailed description of the layered model of telecommunication networks. *See* Joshua L. Mindel & Douglas C. Sicker, *Leveraging the EU Regulatory Framework to Improve a Layered Policy Model for US Telecommunications Markets*, 30 TELECOMM. POL'Y 136 (2006).

[94] S. Derek Turner, *Broadband Reality Check: The FCC Ignores America's Digital Divide* 3 (2005), *available at* http://www.freepress.net/docs/broadband_report.pdf.

with one choice for each type of service.[95] Under any economic standard "nearly every regional broadband market is very highly concentrated."[96] The problem this situation generates is really very simple to grasp: in 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; and scarcity of physical layers means more control, and ability to realize that control, for fewer gatekeepers. In an article published in the *Yale Law Journal* more than a decade ago, Professor Cass Sunstein argued that "*Turner* is quite different from imaginable future cases involving new information technologies, including the Internet, which includes no bottleneck problem."[97] Sunstein's observation, we can now say, proved to be wrong, as the bottleneck problem of cable systems, discussed in *Turner*, resurfaces in the context of broadband networks as well.[98]

¶ 17 The second aspect of *Reno* that deserves highlighting concerns the Court's failure, or unwillingness, to make clear the standard of First Amendment review for the Internet.[99] The Court distinguished the Internet from broadcasting as lacking the latter's pervasiveness and scarcity while noting some similarities between the Internet and telephone communication.[100] It concluded, however, that previous cases "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[101] The Court did not, however, go on to establish guiding principles for the application of the First Amendment to the Internet, preferring a case-by-case, wait-and-see approach.[102] A similar approach was adopted by a plurality of the Court in *Denver Area*, which represents a shift of the Court from a categorical approach to a contextual method of review that focuses on a "complex balance of interests."[103] Writing for the plurality, Justice Breyer warned against "imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."[104] He further asserted that in light of changes taking place in the law, the technology, and the industrial structure related to telecommunications, it would be "unwise and unnecessary definitively to pick one analogy or one specific set of words now."[105] In a most unusual statement, Justice Souter added, in his concurring opinion, that the Court "should be shy about saying the final word today about what will be accepted as reasonable tomorrow. In my own ignorance I have to accept the real possibility that 'if we had to decide today . . . just what the First Amendment should mean in cyberspace . . .

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[95] *Id.* at 15.

[96] Herman, s*upra* note 6, at 126.

[97] Sunstein, s*upra* note 24, at 1765.

[98] *See generally* Herman, *supra* note 6.

[99] *See generally* Bradley J. Stein, *Why Wait? A Discussion of Analogy and Judicial Standards for the Internet in Light of the Supreme Court's Reno v. ACLU Opinion*, 42 ST. LOUIS L.J. 1471 (1998).

[100] Reno v. ACLU, 521 U.S. 844, 869-70 (1997).

[101] *Id.* at 870. The Court found that the ambiguity of the CDA rendered it problematic for purposes of the First Amendment, without relying on a specific standard of review in order to reach that conclusion.

[102] Stein, s*upra* note 99, at 1488.

[103] Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 747 (1996). *Denver Area* dealt with the regulation of "patently offensive" sex-related material on cable television, but its reasoning extends to new media technologies as a whole, including the Internet.

[104] *Id.* at 741.

[105] *Id.* at 742.

we would get it fundamentally wrong.'"[106] As a result of this restrained approach, the Court rejected not only the adoption of a specific standard of review but also the use of any analogy to other media[107] or to a "category of cases."[108] Instead, it sought an analogy to "the cases themselves"[109]—that is, to a specific case with a similar set of facts that raises similar questions.[110]

¶ 18 The Court's case-by-case, balancing approach to new media technologies in First Amendment contexts is sometimes portrayed as a reasoned, conscious response to a complex and constantly changing situation.[111] At least one First Amendment scholar has even embraced the case-by-case balancing approach, what he denominates "eclecticism," as the most desirable approach overall to the First Amendment.[112] But a close reading of *Reno* and *Denver Area* reveals, more than anything, a Court confused by both the technology itself and the First Amendment challenges that it generates. Hence, the Court resorts to a fluid, nonbinding type of analysis. In any event, whatever the origins of the Court's approach, it points toward the use of specific analogies. The place to look for such an analogy in the context of network neutrality is undoubtedly *Turner*.

IV. THE *TURNER* ANALOGY

¶ 19 Motivated, among other concerns, by the fear that cable television's success could endanger the ability of over-the-air broadcasters to compete for a viewing audience, Congress passed the Cable Television Consumer Protection and Competition Act of 1992.[113] Sections 4 and 5 of the Act required cable-television systems to devote a specified portion of their channels to the transmission of local commercial and public broadcast stations (must-carry provisions). Soon after the must-carry provisions became law, their constitutionality was challenged by numerous cable programmers and operators. The district court granted the United States summary judgment, ruling that the provisions were consistent with the First Amendment.[114] *Turner I* (with Justice Kennedy writing for a five-person majority) upheld the District Court's conclusion that the must-carry provisions were content-neutral restrictions that impose an incidental burden on speech and that, therefore, intermediate scrutiny was the appropriate standard by which to

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[106] *Id*. at 777 (Souter, J., concurring) (citing Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L. J. 1743, 1745 (1995)).

[107] *Id.* at 741-42.

[108] *Id*. at 747 (referring to Justice Kennedy's use of an analogy to "the public forum cases").

[109] *Id*.

[110] In *Denver Area*, the Court found that *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), provided the closest analogy and lent considerable support to the Court's conclusion.

[111] *See generally* Lessig, *supra* note 106; Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996).

[112] STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 108-9, 125 (1990).

[113] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[114] Turner Broadcasting System, Inc. v. FCC, 819 F. Supp. 32 (D.D.C., 1993). Prior to the enactment of the must-carry provisions by Congress, similar provisions promulgated by the FCC were found to be unconstitutional by the U.S. Court of Appeals for the District of Columbia Circuit. *See* Quincy Cable TV, Inc. v. FCC. 768 F.2d 1434 (D.C. Cir. 1985). *See also* Robert B. Hobbs Jr., *Cable TV's "Must Carry" Rules: The Most Restrictive Alternative—Quincy Cable TV, Inc. v. FCC*, 8 CAMPBELL L. REV. 339 (1986).

evaluate their constitutionality.[115] However, the Court vacated the District Court's judgment and remanded the case for further evidentiary hearings, following which it upheld the must-carry rules in *Turner II*.

¶ 20 Many important similarities between the First Amendment concerns raised by network neutrality and *Turner* make the latter the most relevant case to an examination of the constitutionality of network-neutrality rules. If neutrality rules are perceived as limiting BSPs from exercising control over their privately owned networks, the rules could in fact be seen as a version of must carry (albeit with a much lesser problem of channel scarcity); the governmental interests that could justify network-neutrality rules are almost identical to the interests recognized by the Court in *Turner* as substantial governmental interests; both cases involve a bottleneck problem; and both present a complex set of conflicting First Amendment rights and interests. However, before we delve into the analysis of neutrality rules within the framework sketched by *Turner*, we need to dispose of a preliminary contention: the contention that BSPs, unlike cable television operators, do not exercise editorial discretion and that, therefore, imposing neutrality rules on them would not raise any First Amendment question to begin with. Following the refutation of this argument, we shall return to the *Turner* analogy, arguing that neutrality rules would be classified as content neutral and therefore subject to intermediate scrutiny but that they might not survive that level of scrutiny.

A. BSPs and Editorial Discretion

¶ 21 While the expressive activities of cable operators do not warrant full First Amendment protection of the sort provided to newspapers,[116] it is by now well established that cable-television operators engage in speech and exercise at least a certain degree of editorial discretion (e.g., in the selection of their programming) and that they are entitled to the protection of the speech and press provisions of the First Amendment.[117] Thus, in *Turner I*, the Court found that the must-carry provisions regulated cable operators' speech by reducing the number of channels over which cable operators exercised "unfettered control."[118] However, in an attempt to distinguish between cable operators and BSPs, Wu and Lessig have argued that when applied to broadband networks, "it is difficult to find a similar exercise of editorial discretion."[119] In their view, it is the user of the Internet who decides on the content of transmission, while the influence of the BSP is limited to restricting usage or blocking content. Wu and Lessig acknowledge that the act of banning certain types of usage could be regarded as expressive conduct; yet they argue that "in the absence of an identifiable message or editorial policy informed by usage restrictions, it is hard to see how imposing network restrictions would be seen as protected speech under the First Amendment."[120] On a

[115] *Turner I*, 512 U.S. at 661-62.

[116] *See, e.g.*, Feld, *supra* note 22, at 30; Schauer, *supra* note 22, at 174-76 (referring to Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)).

[117] *See, e.g.*, Los Angeles v. Preferred Commc'ns, 476 U.S. 488, 494 (1986); *Denver Area*, 518 U.S. at 761; *Turner I*, 512 U.S. at 636; *Turner II*, 520 U.S. at 180; Leathers v. Medlock, 499 U.S. 439, 444 (1991).

[118] *Turner I*, 512 U.S. at 637.

[119] Wu & Lessig, *supra* note 19, at 9.

[120] *Id.* at 10.

similar note, Herman stresses the "utter lack of either a general expectation or industry-wide practice of editorial discretion" on the part of BSPs.[121] He further contends in this regard that § 230(c)(1) of the CDA[122] specifically states that ISPs (a category including BSPs, of course) are not editors.[123] In sum, both Wu and Lessig and Herman would like us to believe that BSPs are not "speakers" at all and that, therefore, their activities do not invoke any First Amendment rights to begin with.

¶ 22 Unfortunately, these arguments are flawed and inherently contradictory. Network-neutrality rules would put BSPs in a position of being mere conduits for the speech of others; this is a similar position to that which BSPs would have been in under Title II of the Communications Act had not *Brand X* been decided as it was.[124] However, as long as BSPs are not subjected to neutrality rules, arguing that they are not speakers for the purposes of the First Amendment is wishful thinking. The truth of the matter is that BSPs, like cable operators, can be reasonably characterized (by American jurisprudence standards) both as conduits and as editors,[125] even if the nature of their activities is not identical to that of cable-television operators. Indeed, on the Internet, unlike any other medium, users generally have more control over their own content than the users of cable. However, this does not necessarily or logically lead to the conclusion that BSPs are stripped from any editorial discretion of their own.

¶ 23 As Yoo notes, "the exercise of editorial discretion is playing an increasingly important role on the Internet." [126] This is especially true given the anticipated development of IP Television, which will bring the facts underlying network neutrality ever closer to the facts of *Turner*. Thus, BSPs certainly have the potential—and not only the potential—to exercise editorial discretion.[127] It would be difficult to explain why, for example, a BSP banning access to a website offering Nazi memorabilia would not be regarded as exercising editorial discretion or why such a ban would not be regarded as the conveyance of a message.[128] Moreover, proponents of network neutrality point, inter alia, to existing cases of BSPs' discrimination against controversial content or content unfavorable to them, as proof of the concreteness of their assertions and the necessity of neutrality rules.[129] This seems like an attempt to hold the stick at both ends: if network neutrality is desirable because of, among other reasons, BSPs' discrimination against

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[121] Herman, s*upra* note 6, at 113.

[122] 47 U.S.C. § 230(c)(1) (2000).

[123] Herman, s*upra* note 6, at 113.

[124] The classification of broadband services as an "information service" as opposed to a "telecommunication service" inherently entails an acknowledgment that BSPs might have an influence on the information transmitted over their networks. "Telecommunication service" involves "[no] change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (2000). "Information service," by contrast, involves the capability for getting, processing, and manipulating information. 47 U.S.C. § 153(20).

[125] *See* Schauer, *supra* note 22, at 175.

[126] Yoo, s*upra* note 17, at 1905. *See also* J. Mackie-Mason et al., *Service Architecture and Content Provision: The Network Provider as Editor*, 20 TELECOMM. POL'Y 203 (1996).

[127] In fact, wireless broadband service providers, for example, have been very clear about having an editorial agenda. *See generally* Wu, *Wireless Net Neutrality*, *supra* note 15.

[128] *Cf.* Yahoo, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006).

[129] *See, e.g.*, Herman, *supra* note 6, at 122-23.

certain content, how can it be said, at the same time, that they do not exercise any editorial discretion? Herman's reliance on the CDA as support for the claim that BSPs lack editorial discretion is especially peculiar. First, § 230(c)(1) of the CDA, to which Herman refers, should be read in the context of its location and purpose—that is, in the context of § 230 as a whole, which deals with "protection for private blocking and screening of offensive material." Second, Herman's contention is not supported by the language of § 230(c)(1), which determines that "[n]o provider *or user* of an interactive computer service *shall be treated as* the publisher or speaker of any information provided by another content provider" (emphasis added). Nothing in this language amounts to a positive conclusion that providers are not publishers or speakers under any circumstances and for all purposes; in fact, this is a classical example of the use of legal fiction, whereby the law provides a legal presumption for limited purposes. A similar presumption applies to users, and yet Herman would probably agree that this does not mean that users do not exercise control over their own content on the Internet. Third, and this is the main point, § 230(c)(2), which exempts providers from civil liability on account of "any action voluntarily taken in good faith to restrict access to or availability of" offensive or otherwise objectionable material, makes it clear that the legislature did not view providers as lacking editorial discretion, but rather the opposite. As explained by the Court of Appeals for the Fourth Circuit in *Zeran v. America Online, Inc.*,[130] § 230 was enacted not to strip ISPs of editorial discretion but precisely for the opposite reason—to give ISPs an incentive to exercise their editorial functions:

> Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. . . . In line with this purpose, § 230 *forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.*[131]

¶ 24 It follows from all the above that BSPs' potential First Amendment claim against neutrality rules cannot simply be dismissed by network-neutrality proponents saying that BSPs do not exercise editorial discretion and therefore should not be regarded as speakers in the first place. If anything, network-neutrality proponents should be first to acknowledge that BSPs, and their activities as such, might enjoy at least some degree of First Amendment protection. As Professor Ellen Goodman observed, "[t]he classification of network operators as editors seems to be a one way ratchet, moving towards a more generous understanding of the editorial function and expanded First Amendment protections."[132] In fact, "[e]very sort of network proprietor to try this line of argument has succeeded";[133] this includes at least one cable broadband provider, to which a lower Florida federal court granted even greater First Amendment protection than the level of

[130] 129 F.3d 327 (4th Cir. 1997).

[131] *Id.* at 331 (emphasis added).

[132] Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War With Itself*, 35 HOFSTRA L. REV. 1211, 1222 (2007).

[133] *Id.* at 1221.

protection granted to cable operators in *Turner*.[134] If this scenario is realized, and BSPs will not be deprived of speaker status, then a constitutional challenge of neutrality rules from the part of BSPs would have to be examined upon its merits—that is, within the framework sketched by the Court in *Turner*.

B. Network-Neutrality Rules Would Be Subject to Intermediate Scrutiny

¶ 25 The *Turner* Court was sharply divided on the question of whether the must-carry rules were content neutral and therefore subject to intermediate scrutiny or were content based and therefore subject to strict scrutiny.[135] The majority found the must-carry provisions to be content neutral based on its conclusion that the extent of interference of the provisions with the cable operators' editorial discretion did not depend on the content of the cable operators' programming.[136] Similarly, the majority held that both the burden imposed by the provisions on cable programmers and the privileges conferred by them on over-the-air broadcasters were unrelated to content.[137] Furthermore, it noted that Congress's overriding objective in enacting must carry was not to favor programming of a particular subject matter, viewpoint, or format but rather to prevent cable operators from exploiting their economic power to the detriment of broadcasters and to preserve access to free television programming for the (then) 40 percent of Americans without cable.[138] Justice O'Connor, writing for the dissent, took the position that the must-carry rules' preference for broadcasters over cable programmers was based on content.[139] "[T]he interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy," she wrote, was "directly tied to the content of what the speakers will likely say."[140] Thus, she concluded that the must-carry rules were impermissible because they favored the speech of broadcasters over that of cable programmers because of the content of that speech.[141] She also argued that the must-carry rules did not even survive intermediate scrutiny because they restricted more speech than necessary to further the Government's alleged content-neutral interests.[142]

¶ 26 Network-neutrality rules do not seem to suffer from the problem that was the source of disagreement in *Turner*. As Wu and Lessig correctly observe, "a general ban against discriminating among network uses is content-neutral; if anything, more so than the 'must-carry' rule in *Turner* that required carrying specific television channels."[143] In fact, it seems that even Justice O'Connor would have upheld such a common-carrier-like rule, as she notes that "it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an

[134] Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685 (S.D. Fla. 2000).
[135] *Turner I*, 512 U.S. at 622.
[136] *Id.* at 643-44.
[137] *Id.* at 645.
[138] *Id*. at 646, 649.
[139] *Id*. at 676.
[140] *Id.* at 678.
[141] *Id.* at 681-82.
[142] *Id.* at 682.
[143] Wu & Lessig, *supra* note 19, at 10.

approach would not suffer from the defect of preferring one speaker to another."[144] Under *Turner*, classifying network-neutrality rules as content neutral and therefore subject to intermediate scrutiny is not a hard case.

¶ 27 The remaining question is whether there are any other considerations that would warrant a different standard of review for network-neutrality rules. In *Turner I*, the Court rejected the Government's contention that the regulation of cable television should be analyzed under the less rigorous standard of scrutiny applied to broadcast, saying that the rationales for such review—spectrum scarcity and signal interference—did not apply in the context of cable.[145] While the Court agreed that the cable-television market suffered from "certain structural impediments," it stressed that the mere assertion of dysfunction or failure in the cable market was insufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media.[146] Furthermore, the Court reasoned that laws that single out the press, or certain elements of it (thereby acknowledging that cable operators were part of the "press"), for special treatment are always subject to at least some degree of heightened First Amendment scrutiny.[147] At the same time, however, the Court rejected the cable operators' contention, relying on *Miami Herald Publishing Co. v. Tornillo*,[148] that the must-carry provisions warranted strict scrutiny. Unlike the access rules struck down in *Tornillo*, the Court said, the must-carry provisions were content neutral and would not force cable operators to alter their own messages in order to respond to the broadcast programming they are required to carry.[149] The Court also emphasized an important technological difference between newspapers and cable operators—the bottleneck, or gatekeeper, control that a cable operator has over the television programming that is channeled into its subscriber's home:[150]

> [S]imply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.[151]

Thus, while the bottleneck problem did not persuade the Court to apply a lower standard of review than intermediate scrutiny, it did serve as a factor in the Court's rejection of strict scrutiny as the appropriate standard.

¶ 28 The Court's line of reasoning in differentiating between cable and broadcast, on the one hand, and between cable and newspapers, on the other hand, seems applicable also to BSPs in the context of network neutrality. There is, however, at least one important difference between *Turner* and the network-neutrality situation in the present

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[144] *Turner I*, 512 U.S. at 684.
[145] *Id.* at 637-39.
[146] *Id.* at 640. The Court also noted that "the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence." *Id*.
[147] *Id.* at 640-41.
[148] 418 U.S. 241 (1974).
[149] *Turner I*, 512 U.S. at 655.
[150] *Id.* at 656.
[151] *Id*.

context. Since Internet technology, because of its packet-switching nature (at least as we know it today), does not suffer from the problem of channel scarcity, neutrality rules would not impair the BSPs' ability to carry any content they wished to carry or require a BSP to carry any user or content provider at the expense of another. The absence of channel scarcity on the Internet has led at least one commentator to argue that an "open-access regime" should require only rational basis, and not intermediate scrutiny, to support its constitutionality.[152] The main problem with this position is that the absence of scarcity has traditionally served as a reason for the Supreme Court to apply a higher level of scrutiny, not a lower one; as shown above, the *Turner I* Court used the same reasoning in differentiating between broadcast and cable.[153] Thus, it could be argued not only that rational basis is the improper standard to apply to network-neutrality rules but also that the required standard is strict scrutiny. This exact line of thought led the U.S. District Court for the Southern District of Florida in *Comcast Cablevision of Broward County, Inc. v. Broward County*[154] to strike down a county ordinance that required cable operators offering broadband Internet services to allow competitor ISPs equal access to their systems. The district court found that the Florida cable operators did not exercise a bottleneck monopoly over access to the Internet the way they do in the cable television market.[155] Thus, the district court applied *Tornillo*'s strict-scrutiny test (although it said that the ordinance would not survive even intermediate scrutiny) and found that the ordinance abridged freedom of speech and the press by depriving cable operators of editorial discretion, infringing on their "liberty of circulating" and singling them out from all other speakers.[156] *Comcast* has been criticized, inter alia, for its departure from *Turner*'s intermediate test,[157] and it is also doubtful whether its findings regarding the bottleneck problem in broadband services are still true today (and, in fact, whether they were ever true).[158] The decision also dealt with a local ordinance that, as a practical matter, affected one cable company. Nonetheless, and although it is only a district court decision, *Comcast* demonstrates that the absence-of-scarcity argument can, at the very least, work in both ways. It should be noted, however, that the absence-of-scarcity argument might be relevant to the application of the intermediate standard itself, as that standard would require, inter alia, an examination of neutrality rules' effect on the speech of BSPs.

C. Network-Neutrality Rules Might Not Survive Intermediate Scrutiny

1. *Turner*'s Application of the Intermediate-Scrutiny Standard

¶ 29 *Turner I* borrowed its analysis from an earlier case, *United States v. O'Brien.*[159] In that case, the Court held that a content-neutral regulation will be sustained if "it furthers

[152] Feld, *supra* note 22, at 32-34.
[153] *Turner I*, 512 U.S. at 640-41.
[154] 124 F. Supp. 2d 685 (S.D. Fla. 2000).
[155] *Id.* at 698.
[156] *Id*. at 692-93.
[157] *See* David Wolitz, *Open Access and the First Amendment: A Critique of Comcast Cablevision of Broward County, Inc. v. Broward County*, 4 YALE SYMP. L. & TECH 6 (2001).
[158] *See generally* Herman, *supra* note 6.
[159] 391 U.S. 367 (1968).

an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest."[160] Congress declared that the must-carry provisions served three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television (the localism interest); (2) promoting the widespread dissemination of information from a multiplicity of sources (the democratic interest); and (3) promoting fair competition in the market for television programming (the economic interest). The Court concluded that, "viewed in the abstract," each of these interests was sufficiently important to justify the regulation.[161] At this point, the justices in the majority divided, with Justice Stevens asserting that the district court's decision should be affirmed, and a plurality (Kennedy J., Rehnquist C.J., Blackmun J., and Souter J.) asserting that the case should be remanded for further proceedings (Justice Stevens finally concurred in the judgment in order for the Court to reach a determination of the case).

¶ 30 Justice Kennedy, writing for his three colleagues in the plurality, stated that even if the governmental interests are sufficiently important in the abstract that does not mean that the must-carry rules will in fact advance those interests:

> When a Government defends a regulation of speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." . . . *It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way*.[162]

Thus, the Court must ask (1) whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protection of must-carry and, assuming an affirmative answer, (2) that the remedy adopted does not burden substantially more speech than is necessary to further the Government's legitimate interests. Justice Kennedy concluded that "on the state of the record developed thus far," the Government did not satisfy either inquiry.[163]

¶ 31 Justice Kennedy agreed that courts must accord substantial deference to the predictive judgments of Congress. Policymaking, he noted, "often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which empirical support may be unavailable."[164] As an institution, he said, Congress is far better equipped than the judiciary to deal with the vast amounts of data bearing on an issue as complex as the cable and broadcast markets, and Congress is not obligated to make a record of the type that an administrative agency or court are required to make.[165] Nevertheless, he added that the Court's obligation is to assure that "in formulating its judgments, Congress has drawn reasonable inferences

[160] *Id.* at 377.
[161] *Turner I*, 512 U.S. at 662-63.
[162] *Id.* at 664 (emphasis added).
[163] *Id.* at 665.
[164] *Id.*
[165] *Id.* at 665-66.

based on substantial evidence";[166] in this case, he concluded, the propositions on which Congress rested the must-carry provisions were grounded on scant evidence.[167] In addition, the legislative record lacked findings concerning either the actual effects of must carry on the speech of cable operators and cable programmers or the availability and efficacy of less restrictive means to achieve the Government's asserted interests.[168] The Court reached these conclusions despite its finding that the must-carry rules were enacted "after conducting three years of hearings on the structure and operation of the cable television industry."[169]

¶ 32 In *Turner II*, after further evidentiary hearings before the district court, the Supreme Court finally concluded (again in a five-person majority opinion) that the new record supported Congress's predictive judgment that the must-carry rules furthered important governmental interests and that, therefore, the must-carry provisions were consistent with the First Amendment.[170] Justice Breyer disagreed with the majority about which governmental interests were sufficient, constitutionally, to uphold the must-carry rules.[171] He was of the opinion that the governmental interest in promoting fair competition was insufficient to justify the must-carry rules but that the interests in assuring local broadcasting and the dissemination of information from a multiplicity of sources were sufficient in that regard.[172] Justice Breyer's concurring opinion in *Turner II* deserves special attention because its perspective on the First Amendment, compared with that of the other justices, is more open and accommodating to the complex speech issues that arise in settings like the Internet. Justice Breyer describes the situation in *Turner* as one in which "important First Amendment interests" exist "on both sides of the equation" and one that requires the striking of a "reasonable balance between potentially speech-restricting and speech-enhancing consequences."[173] Justice Breyer's approach "is sensitive not only to the strength of the government's interest in reallocating speech opportunities, but also to the magnitude of the speech interests being reallocated."[174]

2. Why Intermediate Scrutiny Poses a Problem for Network Neutrality

¶ 33 When analyzing *Turner*, legal commentators tend to focus more on the first part of the *Turner I*'s majority opinion, in which the Court adopted the intermediate-scrutiny standard, than on its second part, in which the Court applied that standard and finally

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[166] *Id.* at 666.

[167] *Id*. at 666-67. Congress's two essential propositions were described by Justice Kennedy as follows: (1) that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether.

[168] *Id*. at 667-68.

[169] *Id.* at 632. *See also* Goodman, *supra* note 132, at 9 ("[Congress] held more than a dozen hearings, accumulated a legislative record of more than 30,000 pages, and made detailed findings based on a decade's experience with intermittent must-carry rules.").

[170] *Turner II*, 520 U.S. at 185.

[171] Justice Breyer replaced Justice Blackmun on the bench shortly after the rendering of *Turner I*.

[172] *Turner II*, 520 U.S at 225-26.

[173] *Id.* at 227.

[174] Goodman, *supra* note 132, at 1256.

remanded the case. This is most unfortunate—at least when what is required is an assessment of the constitutionality of network-neutrality rules. Wu and Lessig, for example, contend that a neutrality regime is a "textbook case of a content-neutral regulation of conduct, supported by substantial government interests."[175] Moreover, the interests that could justify network-neutrality rules are similar to the interests recognized by the Court in *Turner* as substantial governmental interests: (1) the dissemination of information from a multiplicity of sources and (2) the promotion of fair competition.[176] To these, we may add a governmental interest in promoting technological innovation.[177] However, Wu and Lessig fail to go beyond what the *Turner I* Court described as a view "in the abstract" of those governmental interests. *Turner I* made clear that it is not enough for the Government to enumerate important interests in order to withstand the test of intermediate scrutiny; the Government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[178] The Court required substantial evidence in order to uphold the must-carry rules; this was despite its acknowledgment that Congress's predictive judgments were entitled to substantial deference. *Turner I*, it must be remembered, vacated the judgment below on these grounds and remanded the case for further proceedings; only after further factual findings were made, by the lower court and not by Congress, was the *Turner II* Court willing to uphold the must-carry rules. The *Turner* Court's "substantial evidence" approach has been understood as an invigoration of the intermediate-scrutiny standard.[179] Moreover, the level of scrutiny applied in *Turner* is best described as "'intermediate plus'—a standard of review that decidedly privileges speech rights over values."[180]

¶ 34 Other courts followed in the footsteps of the Supreme Court's approach in *Turner*. In *Chesapeake & Potomac Tel. Co. v. United States*,[181] the Court of Appeals for the Fourth Circuit invalidated restrictions limiting telephone companies' ability to offer video programming,[182] saying that the Government did not present sufficient evidence to show that the particular measures enacted were required in order to further the Government's stated goals.[183] The Court of Appeals for the Ninth Circuit came to the same result on

[175] Wu & Lessig, *supra* note 19, at 10.

[176] *Id.*; H.R. 5273, 109th Cong. § 2(13) (2006). As stated above, Justice Breyer did not join the other majority Justices in concluding that the interest in fair competition was a substantial governmental interest.

[177] H.R. 5273, § 2(2), 2(11). S*ee generally* Wu, *supra* note 5; Herman, *supra* note 6. The localism interest, which the Court found substantial in *Turner*, however, seems less relevant in the context of network neutrality

[178] *Turner I*, 512 U.S. at 664.

[179] *See, e.g.*, Comment, *Constitutional Substantial Evidence Review? Lessons From the Supreme Court's Turner Broadcasting Decisions*, 97 COLUM. L. REV. 1162, 1165-70 (1997); Michael J. Burstein, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030, 1038-41 (2004).

[180] Goodman, *supra* note 132, at 1219.

[181] 42 F.3d 181 (4th Cir. 1994).

[182] *Chesapeake & Potomac Tel. Co.*, 42 F.3d at 203-04; *see also* 47 U.S.C. § 533(b).

[183] The Government stated two such goals in that case: (1) restricting telephone company exercise of cross-subsidization and pole-access discrimination and (2) preserving diversity of ownership of communications outlets and of the means of electronic access to homes and businesses. *Chesapeake & Potomac*, 42 F.3d at 190.

similar grounds in *US West, Inc. v. United States.*[184] In *Time Warner Entertainment Co. v. FCC*,[185] the Court of Appeals for the District of Columbia Circuit struck down FCC regulations that set horizontal and vertical limits on cable operators pursuant to § 533 of the Communications Act.[186] The interests asserted by the FCC in support of the limits were similar to those presented in *Turner*: the promotion of diversity in ideas and speech and the preservation of competition.[187] In striking down the horizontal limit, the appeals court rejected the FCC's assumption that there was a serious risk of collusion, concluding that "the FCC has not presented the 'substantial evidence' required by *Turner I* and *Turner II* that such collusion has in fact occurred or is likely to occur; so its assumptions are mere conjecture."[188]

¶ 35 The substantial-evidence requirement imposed by intermediate scrutiny, or "intermediate-plus scrutiny," as Goodman denominates it,[189] poses a real problem for network-neutrality rules, since the discussion surrounding this issue is mostly forward looking, and thus, "the core claims of proponents and opponents of net neutrality are difficult to test systematically against historical empirical evidence."[190] In his opinion in *Turner I*, Justice Stevens reasoned that the broadcast industry "need not be at its death throes before Congress may act to protect it";[191] yet the Court required a showing that absent the must-carry rules broadcasters were realistically likely to suffer palpable harm. In the case of network neutrality, however, while examples of discrimination performed by BSPs do exist,[192] these are mostly anecdotal; at this stage, a clear and compelling body of empirical evidence that BSPs are unfairly blocking access to websites or online services seems to be lacking.[193] Moreover, as Lessig himself points out, it is difficult to know now what will become of the Internet tomorrow;[194] Yoo has used this observation to contend that it is impossible for experts to predict which architectural approach to the Internet will eventually prevail and which will emerge as optimal. Therefore, "mandating one architecture over another has the unfortunate effect of foreclosing exploration of the potential benefits of alternative approaches."[195] Consequently, the network-neutrality

[184] 48 F.3d 1092 (9th Cir. 1995). *See also* S. New Eng. Tel. Co. v. United States, 886 F. Supp. 211 (D. Conn. 1995); Bellsouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994). The judgments of the Fourth and Ninth Circuits were vacated by the Supreme Court after the issue was rendered moot by a provision of the Telecommunications Act of 1996 that eliminated the restrictions. *See* United States v. Chesapeake & Potomac Tel. Co., 516 U.S. 415 (1996); United States v. US West, Inc., 516 U.S. 1155 (1996).

[185] 240 F.3d 1126 (D.C. Cir. 2001).

[186] 47 U.S.C. § 533(f)(a)(1)(A), (B), as amended by § 11(c) of the Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460.

[187] *Time Warner*, 240 F.3d. at 1130.

[188] *Id.*

[189] Goodman, *supra* note 132, at 1219.

[190] Johannes M. Bauer, *Dynamic Effects of Network Neutrality*, Paper Presented at the 35th Conference on Communication, Information and Internet Policy 2 (TPRC 2006), http://web.si.umich.edu/tprc/papers/2006/633/Bauer-Net-Neutrality-TPRC-2006-fin.pdf.

[191] *Turner I*, 512 U.S. at 672 (Stevens, J., concurring in part and concurring in the judgment).

[192] *See generally* Wu, *supra* note 5; Herman, *supra* note 6.

[193] Adam T. Thierer, *"Net Neutrality"—Digital Discrimination or Regulatory Gamesmanship in Cyberspace?* 507 POL'Y ANALYSIS 1 (2004), http://www.cato.org/pubs/pas/pa507.pdf.

[194] *See* Lessig, *supra* note 106; Lessig, *supra* note 19, at 46.

[195] Yoo, *supra* note 17, at 1851.

debate is "inherently conceptual."[196]

¶ 36 The difficulty in supplying substantial evidence in support of neutrality rules is manifested in the controversy existing among scholars regarding the anticipated effects of neutrality rules on competition and technological innovation. Without the showing of actual harm to fair competition, any debate on whether neutrality rules would further this interest would be highly speculative. The issue of innovation is even more problematic because the controversy around it pertains not only to the question of whether neutrality rules are really needed in order to promote technological innovation but also to the more basic question of where technological innovation is most desirable—at the physical layer or at the logical and content layers? Furthermore, if we take *Turner* at face value (and there is no reason why we should not), then the claim that nonregulation of BSPs would be detrimental to free speech would also be subject to the substantial-evidence requirement. It is unclear whether there is sufficient evidence at this time to show that the restrictions that would be imposed by neutrality rules on BSPs would be no greater than is essential to the furtherance of the interest in the widespread dissemination of information from a multiplicity of sources.

¶ 37 Finally, another obstacle for upholding network-neutrality rules under the intermediate standard is the FCC's own record, on the basis of which *Brand X* was decided. The FCC's rationale for classifying cable-modem services as "information service"—a classification upheld by the *Brand X* Court—was stated in its *Declaratory Ruling* and cited by the Court: "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[197] This approach not only looks unfavorably at any regulation of BSPs, but its basic assumptions about what constitutes and what best promotes "innovation" and "competition" are also very different from those of network-neutrality proponents.[198] While there is no doubt that Congress may eliminate an agency's policy by legislation, such a policy shift, especially when First Amendment concerns are involved, would require, in itself, a convincing explanation.[199]

V. THE BILATERAL CONCEPT OF THE FIRST AMENDMENT AND ITS LIMITS IN CYBERSPACE

A. The Romantic View of the First Amendment

¶ 38 In his seminal 1967 article, media-law scholar Jerome Barron attacked the "banality" of the marketplace metaphor underlying traditional First Amendment jurisprudence and called for the adoption of a new right, the right of access to the

[196] Bauer, s*upra* note 190, at 2.

[197] *Declaratory Ruling*, *supra* note 40, at 4802.

[198] For a similar position, see the Department of Justice's ("DOJ") comment on the NOI: Ex Parte Filing, United States Department of Justice, *In the Matter of Broadband Industry Practices*, WC Docket 07-52, September 6, 2007, *available at* http://www.usdoj.gov/atr/public/comments/225767.htm. It should be noted that the lack of substantial evidence of existing harmful behavior from the part of BSPs plays a central part in the DOJ's overall position against network-neutrality rules, as presented in its Comment. *Id*.

[199] *See, e.g.*, Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29 (1983).

press.[200] He denounced what he called the "romantic view of the First Amendment,"[201] which assumes that without government intervention, there is a free-market mechanism in ideas, and he emphasized the need for the First Amendment to address "nongovernmental obstructions to the spread of political truth." [202] But as First Amendment jurisprudence drifted away, albeit cautiously and inconsistently, from the naïve marketplace metaphor toward what Sunstein calls a "Madisonian" model,[203] more accommodating (even though still suspicious) of speech-enhancing government action, there is another, marketplace-metaphor-related aspect of First Amendment Romanticism that firmly stands ground; this is the bilateral concept of the First Amendment.

¶ 39 "In the beginning, there was the speaker."[204] The traditional encounter of the Supreme Court with issues of free speech opens with the paradigm of a "heroic speaker of conscience, pressed by her art or her politics or her science or her religion to speak the truth to a hostile world that prefers silence."[205] In that world, the Government is the omnipotent leviathan from which the speaker needs to be protected. It is a world drawn from the experience of the American Revolution and from libertarian notions of the minimalist state and a world in which the First Amendment is largely about prohibiting government censorship of the lone pamphleteer. The equivalent of the persecuted lone pamphleteer, the image of the dissenter stands at the center of Shiffrin's project of linking Romantic ideals and free speech.[206] Dissent, according to Shiffrin, is a vital principle of American democracy and what unites the First Amendment, democracy, and the Romantic Movement.[207] "If the first amendment is to have an organizing symbol, let it be an Emersonian symbol, let it be the image of the dissenter."[208] Thus, argues Shiffrin, the central meaning of the First Amendment is the protection of dissenting speech.[209]

¶ 40 These antiauthoritarian perceptions of the First Amendment are closely linked with the notion that government power is the main threat to free expression.[210] But they are also premised on the assumption that two parties, and only two parties, are relevant—the speaker-dissenter who wishes to speak and a government that wishes, for whatever reason, to silence her.[211] Let us take *Turner* as an example. It is, no doubt, a decision based, to a large extent, on an affirmative understanding of the First Amendment, one that accepts the idea that speech-enhancing government action can be compatible with the

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[200] Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

[201] *Id.* at 1642.

[202] *Id*. at 1643.

[203] Sunstein, *supra* note 24, at 1759-60.

[204] Neuborne, *supra* note 22, at 30.

[205] *Id.*

[206] SHIFFRIN, *supra* note 112; STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (2000).

[207] Shiffrin mainly relies on the ideas of nineteenth-century Romantic writers Ralph Waldo Emerson and Walt Whitman.

[208] SHIFFRIN, *supra* note 112, at 5.

[209] *Id.* at 161.

[210] *See, e.g.*, *Denver Area*, 518 U.S. at 737-38; *Turner I*, 512 U.S. at 685 (O'Connor, J., dissenting).

[211] *See* Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1116 (1991-1992).

First Amendment; still, the free-speech interests of the broadcasters, and the cable subscribers, as distinct from those of the Government, are almost nowhere to be seen there.[212] As part of the classification process of the must-carry rules as content neutral, Justice Kennedy notes that the "privileges" conferred by the must-carry provisions are unrelated to content and that the rules "benefit" all broadcasters who request carriage.[213] The Court does not treat the broadcasters as holding an independent free-speech interest, not to mention a free-speech right to speak, but rather treats them as entities that are "privileged" and "benefited" by the must-carry provisions, almost as if these provisions were mere windfall for them. As a result, the broadcasters do not play any part in the balancing process that the intermediate standard dictates, save for a "representation" by proxy in the governmental interests asserted to justify the must-carry provisions. Similarly, the individual cable subscribers are mentioned only in the context of the bottleneck problem for the purpose of differentiating *Turner* from *Tornillo*; at the actual stage of weighing the competing free-speech interests against each other, the equation drawn by the Court contains only two variables: the cable operators (and the cable programmers' merging interests) vis-à-vis the Government. We will expand on the dynamics and significance of this bilateral concept in the next section, but at this stage, it is important to note that the Court's resort to a bilateral construction of the First Amendment might result, as the analysis of network neutrality in light of *Turner* demonstrates, in the limitation of speech-enhancing regulation, no matter how praiseworthy. If we follow Barron's reasoning, then the bilateral concept has always been a falsity, including in *Tornillo*. But even if we do not embrace his view in full—and the Supreme Court obviously has not—the bilateral concept is still ill-equipped to deal with the multiple-speaker environment of the Internet.

B. The Bilateral Concept in a Multilateral Speech Environment

¶ 41 Multilateral speech environments are complex; they challenge traditional First Amendment jurisprudence; and they make it much more difficult to formulate clear standards to adjudicate conflicts. Existing First Amendment standards of review (e.g., intermediate scrutiny, strict scrutiny) assume a bilateral conflict, in which the importance of the State's public, economic, or social interests must be proven sufficiently significant to justify limiting the speaker's First Amendment rights. The initial presumption, however, of every analysis of this sort is the superiority of the individual right over the governmental interest. No such presumption can control a multiple-speaker environment, where the potential collision between free-speech interests is a collision between equal First Amendment rights of the same nature. As observed by the *Reno* Court, the Internet is the manifestation of a multilateral speech environment, whereby "publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals."[214] It is no surprise, then, that the *Reno* Court found the confines of its existing First Amendment case law to be an uneasy fit in deciding the level of First

[212] As noted above, Justice Breyer's concurring opinion in *Turner II* may represent a somewhat different approach.

[213] *Turner I*, 512 U.S. at 644.

[214] Reno v. ACLU, 521 U.S. 844, 853 (1997).

Amendment scrutiny to apply to the Internet.[215]

¶ 42 The Supreme Court has taken two basic, and different, routes by which to cope with the discrepancy between the bilateral legal conceptualities and the multilateral developing realities. One is to abandon existing categories and standards in favor of a fluid, case-by-case balance of interests. This was the course chosen by the Court in *Denver Area*, from which it is worth citing a portion of Justice Breyer's words to demonstrate how difficult it is for the Court to free itself from the bilateral concept embedded in its First Amendment jurisprudence:

> We recognize that the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so *ordinarily* even where those decisions take place within the framework of a regulatory regime such as broadcasting. Were that not so, courts might have to face the difficult, and potentially restrictive, practical task of deciding which, among any number of private parties involved in providing a program (for example, networks, station owners, program editors, and program producers), is the "speaker" whose rights may not be abridged, and who is the speech-restricting "censor." Furthermore, as this Court has held, the editorial function itself is an aspect of "speech," . . . and a court's decision that a private party, say, the station owner, is a "censor," could itself interfere with that private 'censor's' freedom to speak as an editor.[216]

Judging from his opinions in *Turner II* and *Denver Area*, if there is a Justice on the Supreme Court who has shown a capacity to really understand, and cope with, the complexities of multilateral speech environments, it is Justice Breyer. Yet he too seems to be captured by the same bilateral concept of speaker-government/censor.[217]

¶ 43 This leads us to the second route taken by the Court to resolve the bilateral-multilateral discrepancy: a reduction of the multilateral setting into a bilateral one. This, in turn, is done through two possible mechanisms: (1) a second-level reduction of First Amendment rights—usually the rights of those who "gain" from the government regulation—into a component of the governmental interests;[218] (2) treatment of private entities as quasi-public, based on their characteristics and/or the nature of their activities. The first mechanism, second-level reduction, was used by the Court in *Turner*. The main problem with this approach is that in its attempt to simplify the First Amendment dilemma standing before the Court, the Court transforms specific individual First Amendment rights into a component of abstract governmental interests, which are inherently inferior to the individual rights standing on the opposite side of the equation.

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[215] *Id*. at 870.

[216] *Denver Area*, 518 U.S. 727, 737-38 (1996) (emphasis in the original).

[217] Shiffrin's Romantic perspective of the First Amendment leads him to actually embrace an "eclectic," case-by-case balancing approach to the First Amendment, while rejecting any attempts to formulate one grand theory or system that will govern the regulation of speech. *See* SHIFFRIN, *supra* note 112. However, this approach is not shared by most First Amendment scholars.

[218] *See* Campbell, *supra* note 211.

These are not merely semantics; as we have shown, the distribution of First Amendment rights and interests between and among the different players in the matrix dictates, inter alia, who bears the burden of proof, and thereby the result itself. Moreover, the act of reducing one's right to the level of a mere component of an abstract "governmental interest" interferes with one's right to speak by depriving the right from its status as such and might, therefore, be regarded in itself as an abridgment of the First Amendment.

¶ 44 The second reduction mechanism centers on finding governmental characteristics in private entities or "state action" in their activities (e.g., monopoly status, the exercise of quasi-public functions, subjection to licensing requirements or government regulation).[219] The concept of common carriage is premised, to a large extent, on these notions. In the past, the Supreme Court showed some willingness to support an expansive view of state action,[220] but in recent decades, the Court has shown "an increasing reluctance to impose constitutional obligations on nongovernmental actors."[221] An interesting attempt to use the public-forum doctrine[222] for similar purposes was made by Justice Kennedy in his *Denver Area* dissenting opinion. Describing Justice Breyer's opinion as a "grave indictment of our First Amendment jurisprudence,"[223] Justice Kennedy applied the definition of a public forum to public-access channels carried by cable companies. Justice Kennedy's approach might have been a possible legal anchor for network neutrality under existing First Amendment doctrine; however, as with all other attempts to impose First Amendment obligations on private parties, the Supreme Court has been reluctant to extend the public-forum doctrine beyond its traditional boundaries.[224] But even if the Court had been more attentive to an expansive view of

[219] *See, e.g.*, *CBS v. DNC*, 412 U.S. 94 (1973) (Brennan, J., dissenting); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 374 (1974) (Marshall, J., dissenting).

[220] *See, e.g.*, *Marsh v. Alabama*, 326 U.S. 501, 506-09 (1946) (enjoining a company from proscribing expressive activity in a "company town").

[221] Gregory P. Magarian, *The First Amendment, the Private-Public Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 130 n.196 (2004-2005) (citing a number of cases that refused to extend First Amendment obligations to shopping malls (*Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 309 (1968); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972); *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976)) and cases that rejected contentions that newspapers and television networks should be subject to state regulation (*Tornillo*, 418 U.S. 241; *CBS v. DNC*, 412 U.S. 94).

[222] Courts have recognized three categories of public forums: traditional public forums, designated or limited public forums, and nonpublic forums. Traditional public forums consist of property that historically has been both open to the public and available to any for use as a forum for the exercise of First Amendment rights, such as streets and parks. *See, e.g.*, Perry Education Association v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983). A limited public forum is property that traditionally has not been open for speech but has been opened by government for speech, such as university meeting facilities. *See, e.g.*, Widmar v. Vincemt, 454 U.S. 263, 267-68 (1981). Government property that has neither historically been open to the public nor specifically been opened by the government for use as a forum is not a public forum. *See, e.g.*, Cornelius v. NAACP, 473 U.S. 788 (1985).

[223] *Denver Area*, 518 U.S. at 784.

[224] *See generally* International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (concluding that the New York Port Authority's restrictions on distribution of literature at airports is reasonable); Arkansas Educational Television Commission v. Forbes, 523 U.S. 666 (1998) (concluding that broadcaster's decision to exclude political candidate from televised debate was reasonable under First Amendment); United States v. American Library Assn., 539 U.S. 194 (2003) (concluding that requiring Internet filters as a condition for receiving federal subsidies did not violate the Constitution).

"state action" or less rigid with regard to the application of the public-forum doctrine, the basic flaw of all these approaches would still remain, at least in the context of the Internet: they all seek to retreat to the familiar bilateral government-speaker equation, while filling the government's "missing spot" with something that is called "government" for this purpose only. The result is a zero-sum game by which one's status as a speaker and free-speech right holder is dependent on the other's definition as a nonspeaker and non–right holder. This situation is totally incompatible with the realities of a multiple-speaker environment with the potential to generate multilateral speech conflicts.

¶ 45 For fairness, it should be noted that some cases (although few and isolated) seem to depart from the rigid bilateral concept. The most salient of these cases is probably *Red Lion Broadcasting Co. v. FCC*, [225] in which the fairness doctrine was held constitutional.[226] In upholding the fairness-doctrine regulations imposed on broadcasters, *Red Lion* relied not only on the government's interest in legislating the regulations but also on the viewers' and listeners' "collective right to have the medium function consistently with the ends and purposes of the First Amendment." [227] "[I]t is the right of the viewers and listeners," the Court said, "not the right of the broadcasters, which is paramount." [228] Yet *Red Lion* used very broad language to support a fairly narrow rule of right of reply, which was not picked up by the Court outside the context of broadcast media. More important, the decision "fetishized spectrum as the distinguishing feature of broadcasting" [229] and has since been explained by the Court almost exclusively in terms of spectrum scarcity.[230] Therefore, even if *Red Lion* initially represented a more complex and sensitive view of the First Amendment, the scarcity rationale eventually took over.

C. The Problem with Traditional Speech-Enhancement Theories

¶ 46 The understanding of the First Amendment in broad, positive terms for the sake of enhancing democratic deliberation has been traced by scholars to the work of James Madison[231] and even Thomas Jefferson.[232] In modern legal history, however, the origins of the notion that government may take action in order to enhance speech and realize First Amendment objectives (as opposed to the marketplace metaphor formulated by Justice Holmes in his famous *Abrams* dissent)[233] can be traced back to the work of Alexander Meikeljohn[234] and to Justice Black's frequently cited passage in *Associated*

[225] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[226] The fairness doctrine was eliminated in 1987. *In re* Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, Memorandum Opinion and Order, 2 F.C.C.R. 5043 (1987). *See generally* Amit M. Schejter, *The Fairness Doctrine Is Dead and Living in Israel*, 51 FED. COMM. L.J. 281 (1999).

[227] *Red Lion*, 395 U.S. at 390.

[228] *Id.*

[229] Goodman, *supra* note 132, at 1226.

[230] *See, e.g.*, *Turner I*, 512 U.S. at 637-38.

[231] *See generally* Sunstein, *supra* note 24, at 1759-60.

[232] *See generally* Ben Scott, *A Broad, Positive View of the First Amendment*, *in* THE CASE AGAINST MEDIA CONSOLIDATION 39 (Mark N. Cooper ed., 2007).

[233] *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

[234] ALEXANDER MEIKELEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

Press v. United States[235]:

> [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-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[236]

¶ 47 *Associated Press* was an isolated reference, mainly to be understood in terms of antitrust laws and economic regulation, but in later years, the words of Justice Black experienced a revival to affirm the legitimacy of structural regulation designed to improve the communications realm.[237] Since then, media and First Amendment scholars have been concerned with the problem of reconciling the fear of government intervention with the reality of a concentrated media industry that provides little diversity and less access to most of the society's constituents.[238] As stated by Benkler, "Jerome Barron's work on access rights was the high water mark of the direct translation of these insights into a claim for constitutionally based access rights to the means of public discourse."[239] Since then, Baker,[240] Fiss,[241] Sunstein,[242] Magarian,[243] and others have developed valuable justifications for the adoption of speech-enhancing policies.

¶ 48 The problem with many of these approaches is their total focus on the use of the First Amendment for the advancement of social and democratic values such as deliberative democracy or public discourse; they are not directly engaged with a substantial *rights* discourse. These speech-enhancement theories are largely concerned with the development and formulation of sufficiently important "governmental interests" to override opposing First Amendment rights rather than the rights themselves. While these projects are undoubtedly useful, even essential, they are also quite limited, as they uncritically accept, whether explicitly or implicitly, the bilateral concept of the First Amendment. Fiss focuses on the enhancement of "public debate";[244] Sunstein emphasizes

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[235] *See* Barron, *supra* note 200, at 1654.

[236] 326 U.S. 1, 20 (1945) (emphasis added).

[237] C. Edwin Baker, *Merging Phone and Cable*, 17 HASTINGS COMM. & ENT. L.J. 97, 108 (1994-1995).

[238] *See* Benkler, *supra* note 11, at 566.

[239] *Id.* (citing Barron, *supra* note 200); *see* JEROME BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA (1973).

[240] Baker, *supra* note 237; C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317 (1998); C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L J. 311 (1997).

[241] Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

[242] *See* Sunstein, *supra* note 22; Sunstein, *supra* note 24; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

[243] *See* Magarian, *supra* note 221; Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, WM & MARY L. REV. 1939 (2002-2003).

[244] Fiss, *supra* note 241, at 784-86.

the Madisonian ideals of democratic deliberation;[245] Magarian develops a "public rights" theory of free speech[246] and calls for a reformulation of the public-private distinction;[247] but all of them fail to treat individual free-speech rights of constituents (or of Internet users, for that matter) as such; these rights are incorporated in their theories into the general and abstract notions of the public interest and the public good. Baker, in turn, specifically admits that "doctrinally, finding state action is the key component to asserting a constitutional mandate for common carriage—or, at least, a mandate that carriers not deny access on the basis of speech content." [248] This focus on public interests (even when they are called public "rights") and "state action" for the purpose of justifying an affirmative reading of the First Amendment, brings us back, yet again, to the same bilateral concept of the First Amendment and to the same reduction mechanisms discussed above. Thus, any justification advanced by current speech-enhancement theories, no matter how sophisticated, will still arrive to the next round of constitutional conflict with a presumption of unconstitutionality. As our discussion of the *Turner* analogy shows, such a presumption might become law even for desirable policies such as network neutrality.

¶ 49 Another related deficiency of most speech-enhancement theories lies in the fact that they reach for the finish line without first approaching the starting line. In other, less metaphorical words, the principle of individualism, a basic principle of any liberal theory, and the notion that freedom of speech—whether it is understood as an end to itself or as means to an end—is first and foremost an individual right, seem to have been downplayed by many First Amendment theories in their pursuit of greater social goals. Barron's work stands somewhat as an exception to the views of other scholars in this regard, as it seems to be based on a mixture of public interest and individual justifications. He asserts, for example, that "[a] constitutional prohibition against governmental restrictions on expression is effective only if the Constitution ensures an adequate opportunity for discussion. Since this opportunity exists only in the mass media, t*he interests of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view.*"[249] This view is reflected also in Barron's definition of a "right of access," which is supposed to stem directly from the First Amendment. But, at the end of the day, even Barron yields to the bilateral understanding of the First Amendment, saying that "if a contextual approach is taken and a purposive view of the first amendment adopted, *at some point the newspaper must be viewed as impressed with a public service stamp and hence under an obligation to provide space on a nondiscriminatory basis* to representative groups in the community."[250]

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[245] Sunstein, *supra* note 24, at 1764-65.

[246] Magarian, *supra* note 221, at 110-14; Magarian, *supra* note 239, at 1972-91.

[247] Magarian, *supra* note 221, at 146-50 (arguing that the private-public distinction should be replaced with a new substantive distinction between nonnatural entities [the government, corporations] and natural persons).

[248] Baker, *supra* note 237, at n.107.

[249] Barron, *supra* note 200, at 1656 (emphasis added).

[250] *Id*. at 1666 (emphasis added).

VI. TOWARD A MULTILATERAL CONCEPT OF THE FIRST AMENDMENT ON THE INTERNET

A. The Internet: A Multiple-Speaker Environment

¶ 50 Never in the history of mass communication has there been a more pure example of a multiple-speaker environment than the Internet. Speakers on the Internet include content providers, application providers, and of course, individual users; they also include ISPs and BSPs, whether as publishers of their own content or as editors (or potential editors). Professor Yochai Benkler describes the Internet as an information environment that represents an alternative for traditional mass media.[251] In this information environment,

> the end points are users—an ambiguous category from the perspective of an established conception of an information environment composed of (a small number of professional) producers and (a large number of passive) consumers. Users sometimes receive information and sometimes rework it and send it to others. They can play the roles of producer and consumer. Their acts of reception are dialogic in the sense that they can easily be mapped as moves in a conversation rather than as endpoints for the delivery of a product.[252]

¶ 51 The debate over network neutrality is a remarkable example of the limits of the bilateral concept of the First Amendment in a multiple-speaker speech environment. Any judicial examination of neutrality rules through the lens of the speaker (BSPs)–government equation would be tainted by a limited, artificial, and distorted view of the realities and dynamics of speech on the Internet. The multiple-speaker environment of the Internet is a result of its historical development and, more important, of its unique structure and characteristics. A plausible critique of Barron, who spoke of access to traditional media and obviously had no concept of the Internet in mind, would be that access rights come directly at the expense of the media outlets to which they relate and that the implementation of such access rights is not feasible. This kind of critique does not apply, however, to the Internet. Speech for all (that have a computer with an Internet connection) on the Internet is feasible. In fact, it is, to a large extent, the reality, which leads to another important point: a departure from network neutrality would be a departure from the status quo. Indeed, preserving the status quo is not, in itself, a normative goal, but the status quo is a relevant factor when one comes to evaluate the level of pervasiveness of government regulation. Moreover, a conscious decision not to enact neutrality rules might be said to amount to actual regulation—regulation by omission.[253]

¶ 52 The Internet poses the challenge of how to reconcile the rights of all speakers where their rights conflict. Policymakers must avoid collapsing into the guideline-free

[251] Benkler, *supra* note 11, at 564.
[252] *Id.*
[253] *See generally* Bar et al., *supra* note 1.

approach employed by the *Denver Area* Court,[254] where a regulation is upheld because "all things considered, [it] seems fine."[255] They must simultaneously avoid reducing the multilateral conflict into a bilateral one. As Neuborne argues, "free speech theory must develop more sophisticated ways to describe the intersection of speech, law, and amplifying technology."[256]

B. The Multilateral Concept: Conflicting Rights of Equal Value

¶ 53 The multilateral concept of the First Amendment departs from the bilateral concept at least in one theoretically important respect: it identifies all rights involved in a First Amendment situation and brings those that typically have been hidden in the background to the front, placing them on equal grounds with the rights traditionally acknowledged under the bilateral, one-case-one-right concept. According to this approach, in the context of network neutrality, content providers' and users' interests would not be assessed merely within the general assessment of the governmental interest in the dissemination of information from a multiplicity of sources (or any other governmental interest) but would enjoy separate, individual, and independent status, which would stem directly from the First Amendment. As a result, First Amendment rights would stand at all sides of the constitutional matrix distinct from the governmental interests that are also a relevant variable, requiring the Court to strike a balance between conflicting rights of similar nature. Conceptually, the difference between the bilateral and the multilateral ideas is the difference between an "external" balancing process and an "internal" balancing process, respectively. An "external" balance is a balance between a constitutional right and social, economic, or other interests that are external to the right itself (e.g., promoting fair competition); its aim is to further the interest, assuming it is important enough, while limiting the right as little as possible.[257] An "internal" balance is a balance between constitutional rights and therefore internal to the rights discourse itself; its aim is to accommodate both rights or, if reaching that aim is not possible, to determine between the conflicting rights. Obviously, network neutrality would stand on much more solid ground under the multilateral concept and within the framework of an internal balancing test, as its enactment would be justified not primarily by the social interests advocated the Government but by the need to ensure the realization of speakers' (content and application providers and users) individual free-speech rights.

C. The Normative Guideline for Determining Between Conflicting Rights

¶ 54 The remaining question is what should be the guideline for determining between conflicting rights that, as a matter of presumption, enjoy equal status under the First Amendment. I suggest the primary guideline to be a normative, substantive determination

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[254] *Compare* Goodman, *supra* note 132, at 1256 ("The chief criticism of Justice Breyer's approach is that it is susceptible to an unconstrained, ad hoc balancing of multiple factors."); *see generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

[255] *Denver Area*, 518 U.S. at 781 (Kennedy, J., dissenting).

[256] Neuborne, *supra* note 22, at 19.

[257] Intermediate scrutiny and strict scrutiny are both "external" balances, which vary by degree but not by nature.

based on each right's relative contribution to the realization of free-speech rationales. This may sound similar to the traditional justification for government intervention for the enhancement of speech, but it is substantially different. First, the proposed normative guideline broadens the scope of free-speech rationales, which the Court is required to consider. For example, the personal-autonomy rationale is inherently irrelevant under the label of "governmental interest." Second, the underlying assumption of the proposed normative guideline is that free-speech rights exist on all sides of the constitutional matrix, and therefore, the initial constitutional presumption is a presumption of equality and not a presumption of a right superior to a governmental interest. This approach may influence, for example, the decision of who bears the burden of proof. Finally, the proposed normative guideline, as its name suggests, emphasizes the relative normative force of each of the conflicting rights, not the evidential factor that was so central to the outcome in *Turner*.

¶ 55 Emerson (incorporating other major sources in the development of free-speech theory) identifies four main rationales, or values, that stand in the basis of the right to freedom of expression: (1) personal autonomy (individual self-fulfillment); (2) attainment of truth; (3) securing participation by the members of the society in social, including political, decision making; and (4) maintaining the balance between stability and change in society.[258] A thorough examination of the conflicting rights involved in the context of network neutrality in light of each of these rationales falls beyond the scope of this article; however, on the face of it, it seems that the free-speech rights of content providers and users should prevail over those of BSPs in upholding network neutrality. Surely, this is the case with regard to the last three of the above mentioned rationales, which treat the individual right of free speech instrumentally. The question might be more complicated with regard to the personal-autonomy rationale, which is considered inherently valuable; if we take autonomy seriously, then silencing one person would be no more justified than silencing mankind.[259] But even if this noble principle were to be applied to commercial corporations, such as BSPs (which is doubtful), surely when faced with the decision, most would agree that the autonomy of the many to speak should prevail over the autonomy of the few to prevent others from speaking. We would probably come to the same result even if we examined the relevant rights in light of less traditional free-speech justifications, such as Shiffrin's promotion-of-dissenting-speech rationale.[260]

VII. CONCLUSION

¶ 56 Although it is primarily a free-speech issue, network neutrality has not been seriously portrayed or discussed as such to this date. If the source for this unfortunate negligence of the issue is a notion that network neutrality is not a hard First Amendment case, then network-neutrality proponents should reassess their positions. The existing legal environment is not supportive of the concept of network neutrality, and in order for such policy to take effect, legislation, not yet enacted, would be required. But even if

[258] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963).

[259] *See* JOHN STUART MILL, ON LIBERTY, Ch. II (1869).

[260] *See generally* SHIFFRIN, *supra* note 112; SHIFFRIN, *supra* note 206.

promulgated, network neutrality would not sail through the courtroom uncontested. An analysis of network neutrality in light of its most analogous Supreme Court case, *Turner*, reveals that under current First Amendment jurisprudence, the upholding of neutrality rules is not guaranteed. The source of this problem, we suggest, is the Court's bilateral conception of the First Amendment, which is ill-suited to deal with the multiple-speaker environment of the Internet. The main problem we identify in this respect is the Court's tendency to reduce multilateral First Amendment situations into a bilateral framework of analysis, thereby depriving the rights of some players in the constitutional matrix from their status as rights and giving them weight only as a component of "governmental interests." This situation calls for the adoption of a multilateral concept of the First Amendment, in which the rights of all relevant variables in the constitutional matrix are assessed on equal terms. The normative determination between these conflicting rights should be made in accordance with their relative contribution to the realization of free-speech rationales. Thus, this article asserts that the real justification for network neutrality is content providers', and especially users', own individual free-speech rights, stemming directly from the First Amendment. Future researchers may test the validity and feasibility of this argument, as well as supply a more thorough examination of the conflicting rights in light of the rationales underlying the First Amendment.