COMMENT

SPLIT NET NEUTRALITY: APPLYING TRADITIONAL FIRST AMENDMENT PROTECTIONS TO THE MODERN INTERWEB[*1]

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1. "'Interweb' is a colloquial term for the World Wide Web [and] Internet . . . which combines the two formal names for today's global network of computers and servers . . . ." *Interweb*, TECHOPEDIA, https://www.techopedia.com/definition/23549/interweb (last visited Mar. 15, 2016).

I. INTRODUCTION

The heated debate between proponents and adversaries of network neutrality is one of the predominant "First Amendment issue[s] of our time."[2] The foundation of network neutrality—commonly referred to as net neutrality[3]—rests upon the principle that communications providers should treat information transmitted to consumers in an equal and nondiscriminatory manner.[4] However, this doctrine implicates a possible First Amendment violation by forcing a speaker—in this case a communications provider—to convey a message in the form of transmitting information.[5] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech," and applies to spoken or written words as well as an individual's right to refrain from speaking.[6]

2. Dawn C. Nunziato, *The First Amendment Issue of Our Time*, 29 YALE L. & POL'Y REV. INTER ALIA 1, 3 (2010) (quoting Stephanie Condon, *Al Franken to Liberals: Don't Check out Now*, CBS NEWS (July 26, 2010, 10:45 AM), http://www.cbsnews.com/news/al-franken-to-liberals-dont-check-out-now/).

3. 2 PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW § 11.4.4 (rev. 2d ed. Supp. 2016).

4. Dina R. Richman, *The Shot Heard Round the World Wide Web: Comcast Violates Net Neutrality*, INTELL. PROP. & TECH. L.J., Mar. 2008, at 17 ("Exact definitions vary, but the basic principle of Net Neutrality is that all content transmitted over a cable or a phone company's network should be treated equally and without preference.").

5. *See id.* at 20 (emphasizing that "the essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas" (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 11 (1986))).

6. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002) (citing the general principle that "the First Amendment bars the government from dictating what we see or read or speak or hear"); *Pac. Gas & Elec. Co.*, 475 U.S. at 11 (clarifying that, simultaneous to an affirmative aspect of freedom of speech, there is "a concomitant freedom *not* to speak" (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985))).

Accordingly, the First Amendment seems to protect communications providers from being forced to comply with net neutrality. Even after approximately two decades of enforcing net neutrality principles, there remains a lack of notable case law or regulation pertaining to these free speech concerns surrounding the issue of communications providers, such as internet service providers (ISPs), and nondiscriminatory internet access.[7]

Although many people view net neutrality as an enhancement of free speech because it promotes the nondiscriminatory transmission of content, it is also a First Amendment violation in that it may compel internet providers to convey messages against their will.[8] In 2010 the Federal Communications Commission (FCC) passed the Preserving the Open Internet Order (2010 Order).[9] This 2010 Order prevented broadband ISPs from unreasonably discriminating against legal content, services, or applications provided by their competitors or otherwise.[10] Verizon, one of the largest broadband providers in America, appealed this 2010 Order and challenged that it violated ISPs' free speech rights.[11] Although the court vacated two parts of the FCC's 2010 Order upon appeal, its decision did not address the issue of whether it infringed upon First Amendment protections or whether the FCC could impose similar content-neutral regulation through other avenues.[12]

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7. Alexander Owens, Comment, *Protecting Free Speech in the Digital Age: Does the FCC's Net Neutrality Order Violate the First Amendment?*, 23 TEMP. POL. & C.R.L. REV. 209, 209, 215 (2013) (citing Marvin Ammori, *The Next Big Battle in Internet Policy*, SLATE (Oct. 2, 2012, 11:26 AM), www.slate.com/articles/technology/future_tense/2012/10/network_neutrality_the_fcc_and_the_internet_of_things_.html) (noting an astounding lack of jurisprudence on this topic "[d]espite approximately two decades of de facto net neutrality"); *see also* Richman, *supra* note 4, at 17 ("Because of its recent advent and unusual nature, the Internet is still largely unregulated.").

8. *See* Richman, *supra* note 4, at 20 ("[C]ompelling a speaker to convey a message is just as much a First Amendment violation as forbidding the speaker from conveying a message.").

9. Preserving the Open Internet Order Broadband Industry Practices, 25 FCC Rcd. 17905 (Dec. 23, 2010) (report & order) [hereinafter 2010 Open Internet Order], *vacated and remanded by* Verizon v. FCC, 740 F.3d 623, 628, 659 (D.C. Cir. 2014); Preserving the Open Internet, 47 C.F.R. § 8 (2011).

10. *See* 47 C.F.R. § 8.5 (2011).

11. *See* Owens, *supra* note 7, at 210–11 (citing Om Malik, *Who's the World's Biggest Broadband Company? Find Out*, GIGAOM (July 28, 2010, 6:30 AM), https://gigaom.com/2010/07/28/top-ten-broadband-providers/) ("Verizon, one of the largest broadband providers in America, filed an appeal challenging the Order on jurisdictional as well as constitutional grounds . . . ."); *see also* Joshua Brustein, *Net Neutrality Goes on Trial: A Guide to* Verizon v. FCC, BLOOMBERG (Sept. 9, 2013), http://www.bloomberg.com/bw/articles/2013-09-09/net-neutrality-goes-on-trial-a-guide-to-verizon-v-dot-fcc#p1.

12. *See* HUBER, KELLOGG & THORNE, *supra* note 3, § 11.4.4.

Whether or not free speech protection extends to broadband internet providers depends on whether or not modern network providers actively engage in editorial discretion when transmitting content.[13] However, current analyses frame these constitutional issues through the outdated lens of more traditional media technologies.[14] The current technological framework of internet service differs from these older media outlets in critical ways, and so "First Amendment analysis of access regulations must therefore be updated to reflect these technological differences."[15]

This Comment addresses the need for a split analysis when applying First Amendment protections in today's internet framework due to the differences between modern technology and the technology considered in prior case law. Part II provides an overview of the net neutrality debate, the latest changes in federal regulation, and looming First Amendment issues following the D.C. Circuit Court of Appeals' most recent decision. Then, Part III outlines the different levels of speech protection historically afforded to various media outlets and communications providers. Part IV analogizes the platform-specific approach of First Amendment protection to the modern internet framework, and reinforces the need for a split analysis when considering net neutrality regulation. Finally, Part V discusses overarching policy concerns behind the net neutrality debate and the potential for a split analysis to resolve these issues.

II. AN OVERVIEW OF THE NET NEUTRALITY DEBATE

As the internet evolves and becomes a more integral part of everyday life, the debate surrounding net neutrality becomes more and more contentious.[16] This section discusses the history behind the expanding net neutrality dispute, from the inception of dial-up connections to the most recent FCC regulations for modern ISPs. This section will also identify possible First Amendment issues that recent net neutrality debates triggered.

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13. *See* Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1284, 1289–90 (2010).

14. John Blevins, *The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 TENN. L. REV. 353, 365–70 (2012).

15. *Id.* at 353, 360.

16. *See Moyers on America: Net Neutrality*, PBS, http://www.pbs.org/moyers/moyersonamerica/net/neutrality.html (last visited Mar. 15, 2016) (emphasizing that the net neutrality debate is "hot" and has everyone concerned from "Google and Yahoo! to Verizon and AT&T").

A. The Evolution of Internet Access

In the early to mid-1990s, the internet's earliest stages, traditional dial-up customers connected to the internet by attaching a modem to a telephone jack and accessing the internet through any service provider in the marketplace.[17] Because of this framework, the FCC initially treated dial-up connections similarly to how it treated conventional telephone services: without any form of data transfer discrimination.[18] Consequently, net neutrality was unintentionally enforced on the preliminary providers of internet connections.[19]

By the early 2000s, as Americans increasingly gained access to internet connections faster than dial-up, the internet entered into an advanced economic, technical, and legal framework of high-speed broadband connections.[20] Two types of broadband connections predominantly replaced dial-up service: digital subscriber lines (DSL) and cable modem connections.[21] Initially the FCC required DSL providers to abide by the same telecommunication and common carrier regulations because they utilized telephone lines just like dial-up providers.[22] On the other hand, the FCC placed cable modem providers under the more relaxed structure of "information-service providers"[23] due to their use of coaxial cables[24] to send cable television and internet signals into consumers' homes.[25]

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17. Jay Stanley, ACLU, *Network Neutrality 101: Why the Government Must Act to Preserve the Free and Open Internet* 13 (2010), https://www.aclu.org/files/assets/netneutrality_report_20101021.pdf (explaining that dial-up connections allowed consumers access to the internet by connecting directly through the telephone network); Jordan Wellington, Note, *Free the Net*, 2 BROOK. J. CORP. FIN. & COM. L. 533, 539 (2008).

18. Stanley, *supra* note 17, at 13. The FCC's regulation of common carriers by promoting openness and nondiscrimination has been applied to telecommunications providers since the early 20th century. *Id.* The FCC regulates telecommunications carriers, which are treated as common carriers, by restricting them from charging discriminatory rates and allowing other providers to utilize their networks. Wellington, *supra* note 17, at 538; *see* Stanley, *supra* note 17, at 13.

19. *See* Stanley, *supra* note 17, at 13. "[T]he impression . . . that the Internet is the product of an unregulated, 'government-free zone'" is a common misconception. *Id.* at 14.

20. *Id.*

21. *Id.*

22. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 154–55 (2001).

23. Wellington, *supra* note 17, at 538 ("[I]nformation-service providers [are] not to be confused with Internet service providers or the abbreviation ISP."); *see* Stanley, *supra* note 17, at 14–15.

24. "Coaxial cables are a type of cable that is used by cable TV and that is common for data communications. . . . Data is transmitted through the center wire, while the outer braided layer serves as a line to ground." *What Is a Coaxial Cable?*,

Public interest advocates such as the American Civil Liberties Union (ACLU) attempted to challenge the FCC's exemption of cable broadband from common carriage requirements, but in 2005 the Supreme Court deferred to the FCC and allowed the classification to stand.[26] In *National Cable & Telecommunications Ass'n v. Brand X Internet Services* the Supreme Court upheld the FCC's classification of broadband companies as information service providers rather than telecommunication providers.[27]

Justice Thomas delivered the opinion of the Court, explaining the origins of the two statutory classifications.[28] The FCC originally set the classifications by differentiating between basic services and enhanced services, which related "to how the consumer perceive[d] the service being offered."[29] Following the 1996 amendment, the FCC additionally established definitions for telecommunications service and information service—telecommunications analogous to basic services and information service analogous to enhanced services.[30]

Under the context of the historical development of these definitions, the FCC chose to evaluate broadband providers by their ultimate utility to consumers rather than the methods used to achieve that utility.[31] Because broadband providers did

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www.phy.davidson.edu/stuhome/phstewart/IL/speed/cableinfo.html (last visited Mar. 15, 2016).

25. Stanley, *supra* note 17, at 14. The Communications Act of 1934, as amended by the Telecommunications Act of 1996, defines and differentiates between telecommunications carriers and information service providers. Wellington, *supra* note 17, at 539–40; *see* Telecommunications Act of 1996, Pub. L. No. 104-104, § 3(41), (49), 110 Stat. 56, 59–60 (codified as amended at 47 U.S.C. § 153(24), (51) (2012)). Information service providers are not subject to the same mandatory compliance as telecommunications carriers. *See* Wellington, *supra* note 17, at 539–40.

26. Stanley, *supra* note 17, at 15.

27. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 974, 1000 (2005).

28. *Id.* at 967, 976–77.

29. *Id.* at 976. Basic service was defined as "'a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.'" *Id.* (quoting Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 420 ¶ 96 (1980)). Enhanced service was defined as "computer processing applications . . . used to act on the content, code, protocol, and other aspects of the sub[s]criber's information." *Id.* at 976–77 (quoting *Amendment of Section 64.702*, 77 F.C.C.2d at 420 ¶ 97).

30. *Id.* at 977. Telecommunications carriers were defined as "provider[s] of telecommunications services." *Id.* (alteration in original) (quoting 47 U.S.C. § 153(51) (2012)). Information service was defined as "the offering of a capability for generating, acquiring . . . or making available information via telecommunications." *Id.* (quoting 47 U.S.C. § 153(24) (2012)).

31. *Id.* at 978–79 (explaining that the Commission's reasoning was based on the fact that consumers use cable modems to obtain internet access, rather than to transmit information transparently).

not "offe[r] telecommunications service to the end user, but rather . . . merely us[ed] telecommunications to provide end users with cable modem service," the Commission concluded in their declaratory ruling that cable broadband providers were an information service, not a telecommunications service.[32]

Subsequently, the Supreme Court approved of this construction and held that it was a reasonable policy choice by applying the *Chevron* two-step test.[33] Noting that these issues revolved around technical, complex, and dynamic issues, Justice Thomas stated: "Nothing in the Communications Act or the Administrative Procedure Act makes unlawful the Commission's use of its expert policy judgment to resolve these difficult questions."[34]

Under the technology existing at that time, the FCC's classification seemed reasonable. However, as the structure and technology used to access the internet continued to evolve, the FCC, as well as broadband service providers, began to struggle with this traditional utility-based model.

B. The Rise of Discriminatory ISP Behavior

After broadband providers were uniformly classified as "information service providers,"[35] many ISPs began to indicate an intent to prioritize content on the internet.[36] For example, the

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32. *Id.* at 977–79 (first alteration in original) (quoting Declaratory Ruling, 17 FCC Rcd. 4823–24 ¶ 41 (2002)). "The integrated character of this offering led the Commission to conclude that cable modem service [was] not a 'stand-alone,' transparent offering of telecommunications." *Id.* at 988 (citing Declaratory Ruling, 17 FCC Rcd. 4823–25 ¶¶ 41–43 (2002)).

33. *Id.* at 989, 997. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court outlined the now famous "*Chevron* two-step test," which requires a reviewing court to use a specific procedure when evaluating whether an agency's interpretation of a statute is valid. This test requires courts to enforce the express language of Congress, and in the absence of clear language, courts must defer to an agency's reasonable construction of an ambiguous statute. Chevron U.S.A, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

34. *Brand X*, 545 U.S. at 1003.

35. Following the Supreme Court's ruling in *Brand X*, "the FCC also classified DSL as an 'information service,' thus releasing it, too, from common carrier rules." Stanley, *supra* note 17, at 15 (quoting Marguerite Reardon, *FCC Changes DSL Classification*, CNET (Dec. 11, 2005, 3:02 PM), http://www.cnet.com/news/fcc-changes-dsl-classification/).

36. *See* Susan P. Crawford, *Network Rules*, LAW & CONTEMP. PROBS., Spring 2007, at 51, 59–60. Data prioritization began when "Cisco Systems, Inc. developed a system to control information through 'traffic-type identification . . . [and] *preferential queuing*.'" Wellington, *supra* note 17, at 539 (alteration in original) (quoting *White Paper: Controlling Your Network – A Must for Cable Operators*, CISCO SYSTEMS, INC., http://www.cptech.org/ecom/openaccess/cisco1.html (last visited Mar. 16, 2016)). Under "this technology, ISPs could [replace] 'first-come, first-serve' information transportation and create a system of 'policy-based routing,' also called a discriminatory network." *Id.* (quoting LESSIG, *supra* note 22, at 46, 155–56).

Chief Technology Officer for BellSouth "claimed that ISPs should [have the ability] to charge websites such as 'Yahoo, Inc. for the opportunity to have its search site load faster than that of Google, Inc.'"[37] This type of content provider discrimination was precisely what net neutrality advocates were concerned about.[38]

For example, the FCC specifically acknowledged that:

> [A] broadband Internet access service provider that is also a pay television provider could charge providers or end users more to transmit or receive video programming . . . in order to protect [their] own pay television service. Alternatively, such a broadband internet access service provider could seek to . . . degrad[e] the performance of video programming delivered over the Internet by third parties.[39]

This outlined the two basic types of inequitable practices that broadband companies could now implement through their capacity as information service providers: tiered pricing and discriminatory content regulation. Through tiered pricing, ISPs had the ability to separate service into multiple tiers of speed and to charge content providers a fee for access to faster tracks.[40] Alternatively, ISPs could discriminatorily regulate content by intentionally speeding up, slowing down, or blocking targeted material due to a host of reasons, such as: exclusive agreements with certain providers, potential competition from market players, or any other alternative motives.[41] Such practices are in direct opposition to the net neutrality principles of an open and unsupervised internet.[42]

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37. Wellington, *supra* note 17, at 540 (quoting Johnathan Krim, *Executive Wants to Charge for Web Speed*, WASH. POST, Dec. 1, 2005, at D5).

38. HUBER, KELLOGG & THORNE, *supra* note 3, § 11.4.4 (stating that the net neutrality debate essentially concerned whether or not an internet provider could favor certain content providers).

39. Rob Frieden, *Assessing the Merits of Network Neutrality Obligations at Low, Medium, and High Network Layers*, 115 PA. ST. L. REV. 49, 71–72 (2010) (quoting Preserving the Open Internet, 24 FCC Rcd. 13094 ¶ 72 (2009)).

40. *Id.*; *see also* Rob Frieden, *Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 633, 639–41 (2008).

41. Krim, *supra* note 37. For example, "[i]n 2004, Madison River Communications completely blocked Vonage's Internet telephone service because it competed with its own Voice Over IP (VoIP) service." Wellington, *supra* note 17, at 545; *see* Declan McCullagh, *Telco Agrees to Stop Blocking VoIP Calls*, CNET (Mar. 3, 2005, 3:26 PM), http://www.cnet.com/news/telco-agrees-to-stop-blocking-voip-calls/.

42. *See* AT&T Inc. & BellSouth Corp. Application for Transfer of Control, 22 FCC Rcd. 5662, 5831 (2007) ("The next Drudge Report, Wikipedia, Craigslist, Instapundit, or Daily Kos should not have to seek a massive corporation's blessing before it can begin reaching out to the American public . . . .").

Later that year, the FCC became concerned with this emergence of discriminatory behavior and recognized its duty in protecting network neutrality principles.[43] The Commission released a comprehensive Policy Statement outlining its position on regulation of the internet and its intent to "foster creation, adoption and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition."[44]

C. The FCC Attempts Enforcement of Net Neutrality

As the technological capacity for discriminatory behavior became more prevalent, the FCC began to take steps towards protecting net neutrality principles.[45] In 2005, the Commission released a Policy Statement establishing Four Internet Freedoms that entitled internet users to: (1) access any lawful content; (2) use any applications or services; (3) connect any devices that did not harm the network; and (4) benefit from competition among network providers.[46] However, a 2010 D.C. Circuit decision eliminated the FCC's authority to impose such principles.[47]

Under *Comcast Corp. v. FCC*, the D.C. Circuit Court of Appeals found that the Communications Act of 1934 did not provide the FCC with any express statutory or ancillary authority over an ISP's management practices.[48] The FCC rested its assertion of authority on the broad language in Section 4(i) of the Communications Act, which states: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[49] However, the FCC

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43. Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14988 (2005) ("The Commission has a duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age.").

44. *Id.*

45. *See* Stanley, *supra* note 17, at 16.

46. *Id.*

47. *Id.*

48. Comcast Corp. v. FCC, 600 F.3d 642, 644, 661 (D.C. Cir. 2010). The FCC was attempting to regulate Comcast's network management practices as a result of the discovery that Comcast was interfering with the use of peer-to-peer networking applications. *Id.* at 644–45. Comcast defended its interference as a necessary step to manage its limited network capacity because such programs consume significant amounts of bandwidth. *Id.*

49. *Id.* at 645 (quoting 47 U.S.C. § 154(i) (2012)). Although the FCC typically has express and expansive authority to regulate communications services under the Communications Act, the FCC did not claim any specific authority over Comcast's internet service here. *Id.* This was due to its previous classification of cable internet

may only exercise this ancillary authority if it demonstrates that the action is "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities."[50]

The FCC primarily relied on Congressional statements of policy to establish net neutrality as one of its statutorily mandated policies.[51] However, the D.C. Circuit Court ultimately found that statements of policy, by themselves, do not create statutorily mandated responsibilities.[52] As a result of this decision, the FCC no longer had any authority to enforce its Four Internet Freedoms or similar net neutrality principles, a shift that changed the internet's legal landscape overnight.[53]

The Commission's next attempt at discouraging discriminatory behavior consisted of only a barebones, minimal expression of net neutrality. This attempt, called the Preserving the Open Internet Order, required that landline broadband providers "not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management" and "not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service."[54] Before this Order even appeared in the Federal Register, Verizon filed an appeal on jurisdictional and constitutional grounds.[55]

In its renewed appeal following the Order's publication in the Federal Register, Verizon challenged the FCC's authority to create such regulation and alleged that the Order violated ISPs' free speech rights.[56] Once again, the D.C. Circuit Court of Appeals acknowledged the fact that, although the FCC had general authority to regulate the telecommunications and

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service as neither a telecommunications service under Title II of the Communications Act nor a cable service under Title VI. *Id.*

50. *Id.* at 644 (alteration in original) (quoting Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005)).

51. *Id.* at 644.

52. *Id.* The FCC also attempted to rely on various provisions of the Communications Act that create statutorily mandated responsibilities, which the Court rejected for a variety of substantive and procedural reasons. *Id.*

53. Stanley, *supra* note 17, at 16.

54. Preserving the Open Internet, 47 C.F.R. §§ 8.5, 8.7 (2011). These requirements require that broadband providers follow regulations similar to those governing common carriers. *See* Katy Bachman, *Will FCC Net Neutrality Rules Survive Court?: Challenges to FCC Rules Will Be Heard by Appeals Court in D.C. . . . and Verizon Is Licking Its Lips*, ADWEEK (Oct. 11, 2011, 6:53 AM), http://www.adweek.com/news/technology/will-fcc-net-neutrality-rules-survive-court-135665 ("For years, the FCC didn't regulate the Internet, and now they are almost imposing common carrier rules . . . ." (quoting Rob Jackson, a lawyer from Reed Smith)).

55. *See* Verizon v. FCC, Nos. 11-1014, 11-1016, 2011 WL 1235523, at *1 (D.C. Cir. Apr. 4, 2011) (dismissing Verizon's challenge to the order because it was filed before the order had not yet been published in the Federal Register); *see also* Owens, *supra* note 7, at 210–11, 221.

56. Verizon v. FCC, 740 F.3d 623, 634 (D.C. Cir. 2014).

broadband industry, it could not impose requirements that directly opposed its own statutory mandate.[57] Because the FCC previously identified broadband providers as entities outside the common carrier classification, the Communications Act expressly prohibited the FCC from regulating them as Title II common carriers.[58] Therefore, once the Court found that the Commission failed to demonstrate that its discrimination and blocking restriction orders were not *per se* common carrier regulations, it vacated those two portions of the Preserving the Open Internet Order.[59]

Despite the FCC's multiple attempts to regulate broadband service providers and codify net neutrality principles, it seemed clearly established that the FCC lacked the authority to do so.[60] Additionally, this growing controversy over the ability to regulate ISPs opened the door to several constitutional issues that remain unresolved today.[61]

D. The FCC Reclassifies Internet Service Providers

Almost immediately following the D.C. Circuit's *Verizon* decision, the FCC reworked its regulation of ISPs to brand them as common carriers that provide a telecommunications service.[62] In what has been considered "a lightning rod for controversy," the FCC finally voted to reclassify ISPs under Title II of the Communications Act.[63]

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57. *Id.* at 628.

58. *Id.*

59. *Id.* In addition to the antidiscrimination and antiblocking requirements, the FCC's Order contains a third transparency requirement: that broadband providers "publicly disclose accurate information regarding . . . network management practices, performance, and commercial terms." *Id.* at 633 (quoting 2010 Open Internet Order, *supra* note 9, at 17937 ¶ 54). This third requirement was not vacated by the D.C. Circuit Court and is not discussed in this Comment. *See id.* at 659 (stating that they reject Verizon's challenge to the Order's disclosure rules). *See generally* Open Internet Order, 80 Fed. Reg. 19,738, 19,740 (Apr. 13, 2015) ("The Commission's 2010 transparency rule, upheld by the *Verizon* court, remains in full effect . . . .").

60. *See Verizon*, 740 F.3d at 628; Comcast Corp. v. FCC, 600 F.3d 642, 644, 661 (D.C. Cir. 2010).

61. *See* discussion *infra* Part II.E.

62. Amir Nasr, *FCC Will Head to Court to Defend Net Neutrality . . . Again*, MORNING CONSULT (Aug. 13, 2015), http://morningconsult.com/2015/08/fcc-will-head-to-court-to-defend-net-neutrality-again. "In many ways, Verizon's victory laid the groundwork for the current net neutrality regulations. . . . 'The D.C. Circuit opened the door, they just walked through it.'" *Id.* (quoting Joshua Stager, policy counsel at New America Foundation's Open Technology Institute); *see also* Open Internet Order, 80 Fed. Reg. 19,737, 19,743 (Apr. 13, 2015) ("Taking the *Verizon* decision's implicit invitation, we revisit the Commission's classification of the retail broadband Internet access service as an information service . . . .").

63. Marguerite Reardon, *13 Things You Need to Know About the FCC's Net Neutrality Regulation*, CNET (Mar. 14 2015, 5:00 AM), http://www.cnet.com/news/13-things-you-need-to-know-about-the-fccs-net-neutrality-regulation/.

These rules, which were adopted on February 26, 2015 and put into effect on June 12, 2015, "are designed to protect free expression and innovation on the Internet and promote investment in the nation's broadband networks."[64] Specifically, this latest version of the FCC's Open Internet rules, called the Open Internet Order (2015 Order), prevents broadband ISPs from blocking, impairing, or establishing fast/slow lanes to legal online content.[65] The Bright Line Rules include:

> *No Blocking*: broadband providers may not block access to legal content, applications, services, or non-harmful devices.
>
> *No Throttling*: broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.
>
> *No Paid Prioritization*: broadband providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind—in other words, no "fast lanes." This rule also bans ISPs from prioritizing content and services of their affiliates.[66]

The FCC accomplished this reclassification by grounding the new rules in both section 706 of the Telecommunications Act and Title II of the Communications Act.[67] In this 2015 Order, the FCC reasoned that "[t]his is a Title II tailored for the 21st century, and [is] consistent with the . . . regulatory framework that has facilitated the tremendous investment and innovation on the Internet."[68] The FCC also recognized that "Title II has never been applied in such a focused way."[69] Several critics of these new rules do not view this as an adequate basis for reclassification and anticipate that the foundation will be challenged in court.[70]

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64. *Open Internet*, FCC, http://www.fcc.gov/openinternet (last visited Mar. 15, 2016).

65. *Id. See generally* Open Internet Order, 80 Fed. Reg. 19,737, 19,738–41 (Apr. 13, 2015).

66. *Open Internet*, *supra* note 64 (emphasis added).

67. Open Internet Order, 80 Fed. Reg. 19,737, 19,738 (Apr. 13, 2015).

68. *Id.*; *see also* Larry Downes, *Judgment Day for the FCC's Latest Net Neutrality Folly*, FORBES (Sept. 9, 2015, 6:00 AM), www.forbes.com/sites/larrydownes/2015/09/09/judgment-day-for-the-fccs-latest-net-neutrality-folly/print/ ("The FCC claims the reclassification is necessary not only to support its expanded neutrality rules but to stimulate more competition in broadband access.").

69. Open Internet Order, 80 Fed. Reg. 19,737, 19,742 (Apr. 13, 2015).

70. *See* Jeff Sommer, *What the Net Neutrality Rules Say*, N.Y. TIMES (Mar. 12, 2015), http://www.nytimes.com/interactive/2015/03/12/technology/net-neutrality-rules-explained.html?_r=0 (discussing the FCC's invocation of Title II's broad powers and stating "if these rules are challenged in the courts, these core concepts are likely to be questioned"); David Balto, Opinion, *Net Neutrality Win Could Be Short-Lived*, BOS. GLOBE

E. Looming First Amendment Issues

Whether or not the FCC's reclassification of broadband service providers withstands future challenges, several constitutional concerns remain unresolved. After the D.C. Circuit Court of Appeals' ruling in *Verizon v. FCC*, both opponents and advocates of net neutrality noted that the court declined to address the First Amendment challenge raised by Verizon.[71] Justice Tatel, writing for the court, revealed that when Verizon's counsel was pressed at oral argument to discuss a case relevant to its First Amendment claim, Verizon's counsel failed to do so.[72] Subsequently the Court concluded that because Verizon "'made no attempt to address the issue,' the argument [was] clearly forfeited."[73]

The court's opinion leaves Verizon's First Amendment claim open to debate.[74] As the dispute between internet broadband providers and open internet advocates escalates, unresolved issues may indicate a trend for future net neutrality challenges.[75] Certain proponents accurately predicted that the FCC would attempt to reclassify net neutrality, which would open the door to another First Amendment challenge.[76] Regardless of whether the FCC's enforcement of the 2015 Order is within its statutory authority, "it remains an open question whether regulation that limits the ability of [broadband service providers] to block or discriminate against Internet traffic violates the First Amendment."[77] This is an issue that involves essential constitutional rights and should be considered seriously and examined carefully.

(Sept. 3, 2015), http://www.bostonglobe.com/opinion/2015/09/03/net-neutrality-win-could-short-lived/aaFXIHVVsyNKZEWLUwBUAN/story.html ("The new regulations are far more sweeping, and thus far more vulnerable to challenge."); *see also* Reardon, *supra* note 63 ("FCC officials say they needed to give detailed explanations of how and why they wrote these rules, because they expect the rules will be challenged in court.").

71. HUBER, KELLOGG & THORNE, *supra* note 3, § 11.4.4.

72. Verizon v. FCC, 740 F.3d 623, 647 (D.C. Cir. 2014).

73. *Id.* at 647–48 (quoting Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983)).

74. *See id.* (explaining that the Court will not resolve the claim due to Verizon's failure to address the issue).

75. *See* HUBER, KELLOGG & THORNE, *supra* note 3, § 11.4.4 (predicting that the *Verizon* decision will provide more to debate and that the issue is far from being resolved).

76. *Id.* § 14.7.11.

77. Meredith Shell, Note, *Network Neutrality and Broadband Service Providers' First Amendment Right to Free Speech*, 66 FED. COMMS. L.J. 303, 306 (2014); *see also* Jon Brodkin, *ISPs Don't Have 1st Amendment Right to Edit Internet, FCC Tells Court*, ARS TECHNICA (Sept. 15, 2015), http://arstechnica.com/tech-policy/2015/09/isps-don't-have-1st-amdendment-right-to-edit-internet-fcc-tells-court (reporting current litigation exists against the FCC's 2015 Order brought by broadband companies claiming their constitutional rights have been violated).

III. FREE SPEECH RIGHTS FOR COMMUNICATIONS PROVIDERS

The evolving net neutrality debate has brought unresolved First Amendment concerns into the spotlight. This section highlights the relationship between the FCC's net neutrality principles, as outlined in its 2010 and 2015 Open Internet Orders,[78] and relevant free speech issues. Furthermore, this section discusses the conventional free speech protections that the First Amendment gives to media outlets spanning from traditional sources to modern digital platforms. A careful examination of these platform-specific protections is essential when considering how to address First Amendment issues in the current digital age.

A. The FCC's Orders and the First Amendment

The FCC's Orders raise two First Amendment concerns that bring their constitutionality into question. First is the question of whether the Orders involve the constitutional concept of speech at all. Second is the question of whether the Orders compel speech by forcing broadband providers to transmit information that they would prefer not to carry or at different speeds than they would prefer.

Because the FCC's Orders restrict broadband service providers from blocking legally transmittable content, they necessarily implicate First Amendment free speech concerns.[79] The First Amendment states that "[c]ongress shall make no law . . . abridging the freedom of speech."[80] However, this concept of speech is not limited to spoken or written words; it also "include[s] an individual's right not to speak and [an individual's] right to engage in symbolic speech."[81] In the landmark decision *West Virginia State Board of Education v. Barnette*, the Supreme Court established the application of First Amendment protection against government actions forcing citizens to speak and upheld protection against compelled speech.[82] As methods of mass communication and media continually emerge, the Supreme

78. This Comment's discussion of net neutrality principles encompasses rules from both the FCC's 2010 Open Internet Order, which was mostly overturned by the D.C. Circuit, and the FCC's attempt to revive these rules in its 2015 Open Internet Order, which has yet to be reviewed by a higher court.

79. *See* 47 C.F.R. §§ 8.5, 8.7 (2011).

80. U.S. CONST. amend. I.

81. Shell, *supra* note 77, at 310; *e.g.*, Stromberg v. California, 283 U.S. 359 (1931) (holding that First Amendment protections extend to symbolic speech such as the display of a red flag in opposition to organized government).

82. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

Court has begun to consider how these First Amendment applications relate to the protection of media outlets acting as third-party speakers.[83]

B. Media Outlets and Free Speech Protections

Historically, the Supreme Court has carried a long tradition of protecting the most conventional forms of free speech such as newspapers.[84] However, it has also established strong First Amendment protections against compelled speech,[85] such as protecting a newspaper editor's ability to select articles.[86] This protection of editorial discretion became evident in cases regarding communications sources outside of conventional media, for example the right of parade organizers to refuse specific groups from participating in their parade.[87] Free speech regulations and First Amendment protections are now significantly varied based on the category of communication involved.[88] As such, modern digital communications providers specifically challenge these category-specific regulations due to the confusion over "what technological category, if any, they most closely resemble."[89] These frustrations are continually exacerbated by the emergence of new, uncategorized digital mediums and hybrid technologies that blend historically distinct categories.[90] This modernization of communication mediums has caused the Supreme Court to transition into a platform-specific First Amendment approach.

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83. *See* Shell, *supra* note 77, at 310–11 (stating that the evolution of technology and communications has expanded the definition of speech); *see also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 636 (1994) (recognizing that cable companies are entitled to First Amendment protection when exercising editorial discretion in the transmission of third party content). Types of mass communication and media include newspaper, radio, cable television, and the internet. Blevins, *supra* note 14, at 379.

84. *E.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

85. *See* Richman, *supra* note 4, at 20 ("Compelling a speaker to convey a message is just as much a First Amendment violation as forbidding the speaker from conveying a message.").

86. In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court found that a statute requiring a newspaper to print replies from criticized politicians was a form of compelled speech that did not pass strict scrutiny. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 244, 258 (1974).

87. Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574–75, 581 (1995).

88. Blevins, *supra* note 14, at 370. Print publishers get the most protection, followed by broadcasters and then common carriers. *See* HUBER, KELLOGG & THORNE, *supra* note 3, § 14.6.1 (explaining the relevant hierarchy of communications providers, and the fact that "carriers . . . have not been thought of as deserving much First Amendment protection at all").

89. Blevins, *supra* note 14, at 370.

90. *Id.*

C. A Platform-Specific First Amendment Approach

The advent of communications technologies outside of print newspaper, such as radio and television, introduced new issues concerning free speech and the limits of editorial discretion. These technologies also inspired a trend of media-specific approaches for First Amendment applications.[91] In *Red Lion Broadcasting Co. v. FCC* the Supreme Court established a more lenient level of scrutiny for television and radio media than paper press.[92] This was due to the significance of a scarcity of broadcast channels and the tendency for interference on the radiofrequency spectrum.[93] The Court expressly recognized the fact that "the freedom of station operators to act as gatekeepers to the radio did not supersede the right of the public to open and robust debate, declaring that 'it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.'"[94]

Two subsequent cases further limited the breadth of editorial discretion. In *Columbia Broadcasting System v. Democratic National Committee*, the Court stated that broadcast media are not merely independent media outlets but also public trustees responsible for presenting a balanced representation of significant issues, and therefore additional deference should be afforded to regulations of broadcast radio.[95] In *FCC v. Pacifica Foundation*, the Court explicitly supported the notion that "the unique pervasiveness and accessibility of broadcasting provide[s] a further basis for subjecting broadcast regulations to a lower level of First Amendment scrutiny."[96] These cases also demonstrated the Court's cognizance of technological

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91. *Id.* at 368; *see also* Owens, *supra* note 7, at 227 ("The advent of radio and television posed new issues concerning the freedom of speech, due to the novel and unique characteristics of broadcast compared to the conventional press.").

92. *Compare* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 396 (1969) (holding that a radio or television station being required to give reply time to answer political editorials is not a violation of the First Amendment), *with* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that a statute requiring a newspaper to print replies from criticized politicians was a violation of the First Amendment).

93. *See Red Lion*, 395 U.S. at 388 (explaining the technological limits of new media, which only allow so many radiofrequencies to be available and only so many voices to be transmitted intelligibly at one time over broadcast television).

94. *Id.* at 390.

95. Columbia Broad. Sys. v. Democratic Nat'l Committee, 412 U.S. 94, 117–18, 127–28 (1973) ("[B]roadcasters' journalistic freedom is 'not as large as that exercised by a newspaper' because of the unique nature of broadcast. . . . [U]nlike newspaper readers, radio listeners are 'captive audience[s]' less capable of avoiding insidious and unwelcome messages transmitted into their homes.").

96. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 249 (2003); *see* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

advancements and their effect on the relationship between the existing FCC regulations and the First Amendment protections strained in enforcing those regulations.[97]

Eventually, courts began to consider a nuanced interpretation of First Amendment protections for cable television providers as well.[98] A pair of cases called *Turner Broadcasting System v. FCC* addressed must-carry provisions that compelled cable companies to carry certain channels and limited their ability to compete in the marketplace. In *Turner I*, the Court subjected the must-carry provisions to the same level of scrutiny applicable to content-neutral restrictions with incidental burdens on speech.[99] In *Turner II*, the Court found the provision to be content-neutral because it distinguished speakers by the type of media transmitted instead of by the type of message the media transmitted.[100] Ultimately, the Supreme Court enforced the FCC's mandate that cable operators must carry the signals of local broadcast stations.[101]

Although the Supreme Court decision upheld the must-carry provisions enacted by Congress, it declined to apply both the relaxed scrutiny standard of broadcast radio as well as the strict scrutiny standard used to protect newspapers from compelled speech.[102] It was inappropriate to apply the precedent of the broadcast cases "because cable television does not suffer from the inherent limitations [of scarcity and signal interference] that characterize the broadcast medium."[103] On the other hand, the Court differentiated cable television from newspapers due to its ownership as the essential pathway for cable speech.[104]

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97. *See, e.g.*, *Columbia Broad.*, 412 U.S. at 102 ("The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.").

98. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 44–46 (D.C. Cir. 1977) (stating that cable television providers are speakers under the First Amendment like television broadcasters).

99. Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 662 (1994).

100. Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180, 186 (1997) (Turner II); *see also* Owens, *supra* note 7, at 230 (elaborating that the legislation was not aimed at regulating content but rather ensuring that broadcast channels did not fail in a market dominated by cable companies who did not have any incentive to carry broadcast channels).

101. *See* Richman, *supra* note 4, at 20 (comparing this Supreme Court holding to the fact that companies similar to "common carriers are required to carry all messages indifferently and to grant access to anyone").

102. *Turner II*, 520 U.S. at 185.

103. *Turner I*, 512 U.S. at 638–39.

104. *Id.* at 656; *see also* Owens, *supra* note 7, at 231 (contrasting newspapers because they lack the bottleneck control unique to cable television services).

This broad spectrum of standards and technology-specific approaches to First Amendment protections creates weak precedent and a vast ambiguity when considering free speech rights for the latest communications technologies: ISPs.[105] Indeed, courts note that the internet lacks a history of government regulation and lacks the defining scarcity of radio broadcasts or the potential for invasive speech found in radio or television.[106] Additionally, internet access has never been related to the need for editorial discretion that results from inherent technological limitations.[107] These factors indicate the need for an in-depth analysis of the internet's modern framework, as well as a nuanced application of existing First Amendment protections to the multifaceted capabilities of today's ISPs.

IV. THE NEED FOR A SPLIT NET NEUTRALITY ANALYSIS

The multipurpose nature of modern internet technologies necessitates a nuanced platform-specific analysis for any potential regulations or constitutional rights applications of broadband service providers.[108] Specifically for a net neutrality application, the structure of broadband technology requires a split analysis between broadband providers acting in their traditional capacity of passive conduits and broadband providers acting in an edge provider capacity.[109] This section outlines the framework of modern internet services and then discusses how that framework is incompatible with a blanket application of First Amendment protections.

A. The Framework of Modern Internet Services

Due to the constantly evolving nature of the internet, it is important to understand the current technological framework within which Courts base their decisions.[110] In *Ashcroft v.*

105. *See* Richman, *supra* note 4, at 20 ("[W]hether Net Neutrality laws would violate the First Amendment remains unclear."); *see also* Owens, *supra* note 7, at 232–34. ("The standard of scrutiny to be applied to content-neutral regulations of broadband providers remains unclear.").

106. *E.g.*, Reno v. ACLU, 521 U.S. 844, 868–70 (1997).

107. *See* Brief for Tim Wu as Amicus Curiae Supporting Respondents at 5–8, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2012) (No. 11-1355) (describing the lack of internet service providers employing editorial discretion).

108. *See supra* Part III.C.

109. *See* discussion *infra* Part IV.B–D.

110. *See* ACLU v. Reno, 929 F. Supp. 824, 834 (E.D. Pa. 1996) (explaining that "methods of communication and information [retrieval] are constantly evolving and are therefore difficult to categorize"); *see also* Richard Epstein, *The Irrelevance of the First Amendment to the Modern Regulation of the Internet*, ICARUS 14, 27 (2013), http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at328100_newsletter_2013fall.authcheckdam.pdf ("It is always necessary to ask how traditional

ACLU, the Supreme Court specifically emphasized the significance of considering technological advancements in a First Amendment analysis for the internet, stating:

> [T]he factual record [here] does not reflect current technological reality—a serious flaw in any case involving the Internet. The technology of the Internet evolves at a rapid pace. Yet the factfindings [here] were entered in February 1999, over five years ago. Since then, certain facts about the Internet are known to have changed. . . . It is reasonable to assume that other technological developments important to the First Amendment analysis have also occurred during that time.[111]

The D.C. Circuit Court's opinion in *Verizon v. FCC*—decided in 2014—clearly outlines the relevant factors of the modern internet marketplace.[112] It separates the internet communications system into four distinct parts: (1) backbone networks; (2) broadband providers; (3) edge providers; and (4) end users.[113] This framework differs noticeably from courts' previous understanding of broadband internet. In *Brand X*, the Supreme Court only considered the two principal types of broadband internet service available at that time—cable modem service and DSL service[114]—to hold that broadband internet access should be classified as an information service.[115]

The FCC's 2015 Order even confirms that the Supreme Court's understanding of broadband services in *Brand X* is now outdated and irrelevant. Paragraph 43 of the 2015 Order states:

> [T]oday's Order concludes that the facts in the market today are very different from the facts that supported the Commission's 2002 decision to treat cable broadband as an information service . . . . Those prior decisions were based

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legal doctrines carry over to the novel institutions and practices of a new technological age.").

111. Ashcroft v. ACLU, 542 U.S. 656, 671 (2004).

112. Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014) ("Four major participants in the Internet marketplace are relevant to the issues before us . . . .").

113. *Id.*

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

115. *Id.* at 999. The Court recognized the FCC's construction of ISPs, where internet service involved more than just data transport, it also offered end users with information-service capabilities that were inextricably intertwined with that data transport. *Id.* at 997–98. Because of these considerations, the Court held that "ISPs, therefore, [are] not 'offering . . . telecommunications . . . directly to the public' . . . and so were not properly classified as telecommunications carriers." *Id.* at 978–79, 997 (alteration in original) (citation omitted) (quoting 47 U.S.C. § 153(46) (2012)).

> largely on a factual record compiled over a decade ago, during an earlier time when, for example, many consumers would use homepages supplied by their broadband provider. . . . [T]imes and usage patterns have changed . . . .[116]

Whereas in 2005 the Supreme Court placed pure data transmission and information-service capabilities under the single label of broadband internet service,[117] in 2014, the D.C. Circuit Court of Appeals distinguished between broadband providers and edge providers.[118] The Court explained that "[t]oday, access is generally furnished through 'broadband,' i.e., high-speed communications technologies, such as cable modem service. . . . Edge providers are those who, like Amazon or Google, provide content, services, and applications over the internet."[119] Additionally, the Circuit Court elaborated that "[t]hese categories of entities are not necessarily mutually exclusive," and sometimes broadband providers can deliver content, applications, or services similar to those offered by edge providers.[120]

The growing distinction between broadband providers and edge providers seems to follow along the long-conceptualized idea that computer networks operate in terms of layers,[121] or specifically, a network-layer and an application-layer.[122] The network-layer represents the physical foundation upon which other digital platforms and content are transmitted to end users, such as broadband structure, cable structure, and broadband

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116. Open Internet Order, 80 Fed. Reg. 19,737, 19,743 ¶ 43 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8 & 20).

117. *Id.*

118. *Verizon*, 740 F.3d at 629. The FCC's 2015 Order also distinguishes between these two categories while reworking its net neutrality rules in a modern context. Open Internet Order, 80 Fed. Reg. at 19,738 ¶ 2 ("[T]he Commission adopted open Internet rules to protect and promote the . . . innovation and investment on the Internet–both at the 'edges' of the network, as well as in the network itself.").

119. *Verizon*, 740 F.3d at 629.

120. *Id.* This convergence of broadband providers and content providers blurs the lines between communication platforms and makes previous case law even more difficult to apply. *See* Cecelia Kang, *Justice Dept. Probes Limits on Web Data*, WASH. POST, June 14, 2012, at A16; *see also* Owens, *supra* note 7, at 239 (giving the example that Comcast is an internet service provider also involved in supplying content through NBC).

121. Open Internet Order, 80 Fed. Reg. at 19,797 ¶ 378 ("[E]ngineers view the Internet in terms of network 'layers' that perform distinct functions.").

122. *See* Blevins, *supra* note 14, at 359–61 (stating that communications law literature "all share[s] the basic idea that the physical transmission layer is conceptually distinct from the data being transmitted"). Certain proponents of a layered analysis even contend that there are up to three different levels of the internet worth considering. *See* Frieden, *supra* note 39, at 53–58 (putting forth arguments that net neutrality rules are strongest at the low layer, contestable at the middle layer, and unnecessary at the high layer).

spectrum.[123] Congress regulates these platforms to prevent discriminatory behavior and to ensure equal access to the foundational platform itself.[124] Above the foundational layer of network-layer platforms are application-layer platforms such as Google's suite of services, iTunes, Facebook, and Apple's App Store.[125] These application platforms differ functionally and substantively from network platforms in that they are themselves transmitted data and apply to an entirely different location within the digital network.[126]

Such significant differences in the function and service provided indicate that broadband providers and edge providers deserve significantly distinct treatment in a constitutional analysis. A generic evaluation that treats broadband providers and edge providers as a single category is an inaccurate reflection of the internet's modern technologies and capabilities.

B. Broadband Providers and Edge Providers Deserve Different Treatment in a First Amendment Analysis

Just as the different platforms of network-layers and application-layers require different levels of regulation,[127] the District Court's recent distinction between broadband providers and edge providers calls for different First Amendment considerations.[128]

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123. *See* Blevins, *supra* note 14, at 360 ("Network-layer regulations govern the most fundamental communications platform of all–the physical infrastructure itself.").

124. *See id.* at 360–61. (explaining that the purpose of regulating these platforms is "generally to prevent discriminatory behavior within the physical transmission functionality").

125. *See id.* at 361 (citing several examples of application-layer platforms and stating that they are "platforms within platforms" which "exist at higher layers within modern network infrastructure").

126. *See id.* at 360–61 (contrasting application-layer platform regulations from foundational network-layer platforms); *see also* Open Internet Order, 80 Fed. Reg. at 19,743 ¶ 46 ("Today, broadband Internet access service is fundamentally understood by customers as a transmission platform through which consumers can access third-party content, applications, and services of their choosing.").

127. Blevins, *supra* note 14, at 360–63; *see also* Open Internet Order, 80 Fed. Reg. at 19,789 ¶ 341 (concluding that the current market of retail broadband internet access service is best viewed as two separate offers: (1) broadband internet access that is a telecommunications service; and (2) applications, content, and services that are information services).

128. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) ("Differences in the characteristics of new media justify differences in the First Amendment standards applied to them."). The framers of the Constitution were arguably only familiar with two out of the three distinct communications media of publisher, broadcaster, and carrier. U.S. CONST. amend. I (declaring Congress "shall make no law . . . abridging the freedom of *speech*, or of the *press*") (emphasis added).

Currently, a majority of the First Amendment analysis over the net neutrality debate only considers broadband ISPs as overall data and information service providers.[129] Proponents of this view argue that First Amendment protection extends to broadband ISPs because broadband ISPs engage in speech not only when they transmit data over the internet, but also when they distribute their own original content.[130] Specifically, one broadband service provider—Verizon—argued that broadband ISPs have a right to First Amendment protection because the Constitution "protects those transmitting the speech of others . . . in selecting which speech to transmit and how to transmit it."[131]

Arguments such as this are an outdated and inaccurate analysis of the modern internet framework, and utilize an imprecise view of the technological scope of net neutrality.[132] "[N]etwork neutrality requirements apply to the network transmission functionality and do not apply to content or applications that are transmitted across the network."[133] The fact that broadband service providers can now create original content in addition to supplying the transmission of third-party original content does not justify the blanket application of First Amendment protection to all ISPs.[134]

C. Broadband Service Providers as Passive Conduits

When considering broadband service providers under their basic function as networks for transmitting data, First Amendment protections do not apply because broadband service providers do not engage in protected speech.[135] Rather, authorities such as the FCC have stated that broadband service

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129. *E.g.*, Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 I/S: J.L. & POL'Y INFO. SOC'Y 197, 202 (2007) (stating that ISPs such as Comcast and Verizon are all "speakers" for First Amendment purposes, regardless of the medium or technology used to convey their speech).

130. Brief for Appellant at 42–44, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2012) (No. 11-1355); *see also* Shell, *supra* note 77, at 308.

131. Brief for Appellant, *supra* note 130, at 42–44.

132. *See* Blevins, *supra* note 14, at 361 ("'[N]etwork neutrality' is an imprecise term that refers to a broader set of nondiscrimination requirements for Internet access providers.").

133. *Id.* at 363 (emphasis omitted).

134. *See* Owens, *supra* note 7, at 209–10 (explaining that the convergence of broadband providers and content providers makes First Amendment rights even more difficult to apply); *see also* Epstein, *supra* note 110, at 23 (stating that "the scope of a common carrier duty is not enlarged when it is involved with the transmission of ideas rather than the shipment of goods," and therefore First Amendment protections do not apply).

135. 2010 Open Internet Order, *supra* note 9, at 17,982; Shell, *supra* note 77, at 317.

providers are simply channels through which information is delivered, akin to telecommunications providers.[136] Additionally, broadband service providers can be differentiated from curated channels of media, such as cable systems and news outlets, because broadband service providers do not exercise editorial discretion through the act of transmitting third-party original content.[137]

Broadband service providers play a passive role when providing content to end users.[138] This act of simply transmitting third-party original content does not convey any identifiable message, and it would be absurd to presume that end users would mistake such a situation.[139] Because broadband ISPs remain mere passive conduits for speech, they most closely resemble other common carriers, such as telecommunications providers, who have not been granted much First Amendment protection at all.[140] Therefore, when considering broadband providers in their traditional barebones capacity as ISPs—which only involves connecting end users to the internet—courts should follow the relaxed First Amendment scrutiny applied to common carriers.

D. Broadband Service Providers Acting as Edge Providers

On the other hand, it is more appropriate to apply First Amendment protections to broadband service providers when they act as edge providers who deliver original content and do actually exercise editorial discretion in that delivery. For

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136. *See* Brief for Appellee at 22, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014) (No. 11-1355) (explaining that broadband service providers simply "transport the speech of others, as a messenger delivers documents containing speech").

137. *Id.* ("Unlike cable systems, newspapers, and other curated media, broadband providers do not exercise editorial discretion."). Exercising editorial discretion through the selective transmission of original content has been outlined by the Supreme Court as an instance where First Amendment protection is extended. *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

138. Shell, *supra* note 77, at 319; *see also* Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "the Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1704 (2011) (discussing the lack of "substantive communication" by internet, cable, and telephone providers).

139. *See* Brief for Tim Wu as Amicus Curiae, *supra* note 107, at 7 ("'[N]o one . . . associates Verizon with the Internet content it carries[, and] it would be absurd to [see a comment such as] 'Can you believe the blog Verizon ran yesterday?'"). *But see* May, *supra* note 129, at 204 ("When a subscriber logs on to Comcast's broadband service, . . . the subscriber . . . is presented with a broad array of ISP-selected news, financial, entertainment, sports, and other content. Thus, it is inaccurate to suggest that ISPs are not presently functioning as 'speakers' in the sense of those traditionally within the ambit of First Amendment protection.").

140. HUBER, KELLOGG & THORNE, *supra* note 3, § 14.6.

example, the selection of on-demand videos or online multiplayer games grants service providers the power to select content and exercise editorial discretion over what to carry and what not to carry.[141] "When operating as non-conduits, [broadband service providers] perform tasks closely aligned with or analogous to speaking, editing, and processing content."[142] This distribution of content implicates broadband service providers as a speaker under the First Amendment, whereas the provision of broadband internet access alone did not.[143] In these aspects, edge providers can be closely analogized to the aforementioned types of curated media, such as cable systems and news outlets, which are granted a higher level of First Amendment protection.[144]

These nuanced technological and functional differences justify why a First Amendment constitutional analysis of broadband service providers should be split depending on which part of the framework one is examining: basic internet network access or the transmission of curated and specialized content.[145] Due to the constantly advancing and evolving nature of the internet, blanket applications of First Amendment standards to all ISPs are no longer appropriate.[146] Moreover, there are several policy considerations weighing strongly in favor of a split net neutrality analysis.

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141. *See* Samuel L. Feder & Luke C. Platzer, *FCC Open Internet Order: Is Net Neutrality Itself Problematic for Free Speech?*, COMM. LAW., June 2011, at 1, 24 (identifying examples of content offered by internet service providers that relate to editorial discretion).

142. Frieden, *supra* note 13, at 1305 ("ISPs create World Wide Web pages that contain [original] content or offer links to [such] content.").

143. Feder & Platzer, *supra* note 141, at 24. *But see* Protecting and Promoting the Open Internet Order, 80 Fed. Reg. 19,737, 19,832 (Apr. 13, 2015) (disregarding free speech rights for broadband providers because "[t]he manner in which broadband providers operate their networks does not rise to the level of speech protected by the First Amendment"). Although the FCC's 2015 Order seems to directly contradict First Amendment protections for ISPs, this is only because it has chosen to broadly classify broadband providers as strictly a telecommunications service. *Id.* at 19,832–33. Additionally, in the event that broadband providers are considered speakers under the First Amendment, the FCC anticipates that its rules would survive intermediate scrutiny because they "are tailored to an important governmental interest—protecting and promoting the open Internet." *Id.* at 19,833.

144. *See* Protecting and Promoting the Open Internet Order, 80 Fed. Reg. at 19,742 (explaining that in terms of offering specialized content, service providers are not unlike cable companies); *see also* Shell, *supra* note 77, at 310 (connecting the Supreme Court's analysis of how the First Amendment protects transmitters of original content with mass communication and media creators such as newspaper, radio, cable television, and the internet).

145. *See* Frieden, *supra* note 39, at 53 (stating that the need for government involvement in network neutrality "depends on which part of the Internet's networking infrastructure one examines").

146. *See* Feder & Platzer, *supra* note 141, at 24–25 (explaining that internet service providers could offer different services over their transmission facilities, which would involve different exercises of First Amendment rights).

V. POLICY CONSIDERATIONS FOR SPLIT NET NEUTRALITY

In addition to the technological advancements of the modern internet, courts should consider the numerous policy considerations weighing in favor of a split analysis of net neutrality. This section highlights these public policy benefits and weighs the advantages and disadvantages of a divided net neutrality application.

A. Ambiguity in the Immediate Effects of Net Neutrality Enforcement

Individuals following the net neutrality debate hoping for a clear resolution will be met with disappointment.[147] Advocates for net neutrality rest their argument on a valid concern that, if allowed to operate without any regulatory framework, ISPs will abuse their power to discriminate between the specific content and applications they provide.[148] Because network operators provide the essential link between end users and sources of content, and because consumers have limited options available, the risk of abuse is very high.[149]

On the other hand, net neutrality opponents warn that enforcing net neutrality rules will be difficult and prone to error.[150] Because ISPs are aware that increasing their discriminatory behavior would validate the necessity of regulation, they are currently on their best behavior, and the FCC's newest regulations still have several unknown side-effects.[151]

B. Long-Term Benefits of Net Neutrality as a Whole

On a larger scale, the net neutrality debate considers themes of an open and free society protecting the minority's opinions

147. *See* Edward W. Felten, Nuts and Bolts of Network Neutrality 10 (July 6, 2006) (unpublished essay) (https://www.cs.princeton.edu/courses/archive/fall09/cos109/neutrality.pdf) ("Readers looking here for a simple policy prescription will be disappointed.").

148. *See* Frieden, *supra* note 39, at 55 (stating that operators at the network level could accrue ample market power to possess both the incentive and the ability to abuse their regulation of subscriber content and applications).

149. *Id.* (elaborating that consumers typically select one and only one operator to provide all access services). "Roughly only one-third of America's consumers have a choice between cable and DSL broadband service, and the rest either have one or no choices at all." *Government Role in Promoting the Future of the Telecommunications Industry and Broadband Deployment: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 107th Cong. 44 (2002) (statement of Peter W. Huber, Senior Fellow, Manhattan Institute for Policy Research).

150. Felten, *supra* note 147, at 10.

151. *Id.*

versus an open market and the freedom of private corporations from unconstitutional government intervention.[152] Opponents of net neutrality argue that the FCC's regulation will hinder innovation and stifle the marketplace necessary for the advancement of broadband service providers.[153] However, economists note that network neutrality will actually "protect and encourage far more innovation than it blocks," and "will likely be a boost to the economy."[154] A neutral internet that is not optimized for a singular specific use is easier and less expensive for innovators to work with.[155] Therefore, anyone can write a new application, release it on the internet, and receive feedback from users.[156]

In addition to economic innovation, it is imperative to keep the internet an open marketplace of ideas by maintaining its status as a medium of communication free of anticompetitive and harmful network management requirements.[157] Because ISPs are the modern conduits of communication in our society,[158] they have a basic duty not to discriminate or hinder the free flow of information.[159]

Moreover, network neutrality helps prevent harmful business practices such as unfair advantages to large companies and censorship of individuals.[160] Any type of "pay to play" scheme set-up by broadband providers would hurt the

152. *See* Stanley, *supra* note 17, at 3 (pointing out that access to the internet is provided by private corporations enabled by government, and protecting this access requires the creation of strong governmental policies). "The openness of American society in general, and free speech in particular, have played a crucial role in supporting the artistic, intellectual, and social vitality of our nation, and therefore its economic vitality as well." *Id.*

153. *Id.* at 9–10.

154. *Id.*

155. *See id.* at 9 (explaining that on the other hand, if the network was customized, it would be much more expensive or even impossible for innovators to constantly invent new applications).

156. *Id.*

157. *See* Frieden, *supra* note 39, at 51 ("The marketplace of ideas available via the Internet is as vigorous and open as any medium of communications so long as facilities-based intermediaries cannot use the excuse of network management requirements to pursue anticompetitive and harmful strategies requiring interference with the flow of traffic upstream from content sources and downstream to end users.").

158. *See* Owens, *supra* note 7, at 246 ("The importance of the Internet as a conduit and source of speech cannot be taken for granted."); Jolie O'Dell, *For the First Time, More People Get News Online Than from Newspapers*, MASHABLE (Mar. 14, 2011), http://mashable.com/2011/03/15/online-versus-newspaper-news/#EHrpbVuaHiqF.

159. *See* Nunziato, *supra* note 2, at 2 ("Conduits for communications[,] . . . such as telephone companies [and] the postal service, . . . have long been under a legal obligation not to discriminate against the communications they are charged with carrying.").

160. Phil La Duke, *Loss of Net Neutrality Risks a Less Friendly Internet for Entrepreneurs*, ENTREPRENEUR, (July 2, 2014), http://www.entrepreneur.com/article/235306.

poor.[161] Specifically, there is a potential for net neutrality to protect providers of educational resources.[162] Without network neutrality, there is a "danger of prioritizing high-quality internet access for entertainment over education."[163] Providers of educational resources, such as public libraries, are constrained for financial resources and will be one of the first ones to lose.[164] Along with these public libraries, the communities that they serve will be hurt.[165]

The FCC's 2015 Order highlights all these benefits in the very first paragraph of its net neutrality report.[166] The Commission emphasizes that the internet must remain open for consumers, developers, and companies, and that "the benefits of an open internet are undisputed."[167] Such benefits include driving the American economy and serving "as a critical tool for America's citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them."[168]

C. The Specific Benefits of Split Net Neutrality

These policy considerations highlight the need for a case-specific split analysis when considering First Amendment protections for modern ISPs.[169] The Supreme Court has recognized that "categorical rules are blunt instruments that do not permit fine distinction."[170] While the economic impact of network neutrality regulation is still so uncertain, it is imperative for courts to utilize a case-by-case approach.[171]

Accepting the need for a split analysis also helps foster the advantages that net neutrality advocates seek by allowing

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161. Sonal Chokshi, *Three Dangers of Losing Net Neutrality That Nobody's Talking About*, WIRED, (Jan. 20, 2014, 6:30 AM), http://www.wired.com/2014/01/three-dangers-net-neutrality-nobodys-really-talking/.

162. *See id.* (identifying that the loss of net neutrality negatively affects libraries).

163. *Id.*

164. *Id.*

165. *Id.*

166. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,737, 19,738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, and 20).

167. *Id.*

168. *Id.*

169. *See* Christopher Yoo, *Network Neutrality After Comcast: Toward a Case-by-Case Approach to Reasonable Network Management* 27 (Feb. 1, 2009) (on file with University of Pennsylvania Law School), http://scholarship.law.upenn.edu/faculty_scholarship/289 ("The ambiguity of network neutrality's policy implications underscores the propriety of adopting a case-by-case approach.").

170. *Id.*

171. *See id.* at 27–28 ("When a practice is either new or when its economic impact is unclear, as seems to be the case with deviations from network neutrality, the better approach is to take an *ex post*, case-by-case approach.").

common carrier standards to apply to broadband network companies.[172] Through this approach, the FCC avoids putting ISPs under a "burdensome utility-like regulatory regime."[173] Hypothetically, those ISPs acting as common carriers cannot give an unfair advantage to specific content providers, and paid prioritization is limited to situations where it is proven to be just and reasonable.[174] This combination of standards allows the FCC to enforce rules against the blocking of legal content and install restrictions against discrimination among internet traffic, but still allow unique delivery arrangements for specialized services.[175]

Additionally, this split analysis may appease net neutrality opponents by recognizing the higher level of First Amendment scrutiny that should be afforded to ISPs acting as edge providers.[176] Most importantly, a split analysis is likely to hold up in court and withstand challenges against the FCC's authority to regulate broadband providers as Title II telecommunications services.[177]

VI. CONCLUSION

In the age of mass communication, owners of media platforms have a significant amount of influence and control over the quantity and quality of modern speech.[178] The fear of this potential power continually fuels the net neutrality movement, and emphasizes the need for a fair and open market of communication. However, the constantly evolving and technologically nuanced nature of modern sources of communication—especially the internet—creates a confusing legal landscape within which to consider constitutional concerns such as First Amendment rights.[179]

This Comment recognizes the tension between a generic application of First Amendment protection and the current complexity of the internet environment. This Comment also takes note of several court decisions that failed to recognize such a

172. *See* Edward Wyatt, *F.C.C. Is Said to Consider Hybrid Rules for Internet*, N.Y. TIMES, Nov. 1, 2014, at B3 (presenting the advantages of net neutrality protection along with the current regulatory limits to enforcing those protections).

173. *Id.*

174. *Id.*

175. *Id.*

176. *See* Brief for Tim Wu as Amicus Curiae, *supra* note 107, at 2.

177. Wyatt, *supra* note 172.

178. *See* Blevins, *supra* note 14, at 365 (explaining that these media platforms are the essential conduits through which media content is distributed and consumed).

179. *See supra* Part IV.A.

distinction, and that set an ambiguous and confusing precedent for future applications of net neutrality regulation. Additionally, this Comment advocates that courts should recognize the difference between broadband providers acting as passive conduits and broadband providers acting as content providers in order to avoid an erroneous blanket application of free speech protection for ISPs.

By appreciating this distinction, courts will be providing a more accurate and fair distribution of free speech protection to ISPs.[180] Furthermore, this type of split net neutrality application reaps the public policy benefits of network neutrality while maintaining the FCC's ability to accommodate specialized service providers.[181] Therefore, it is appropriate to utilize a split analysis of the current net neutrality debate in order to accurately determine the correct level of platform-specific First Amendment protection for today's ISPs. Such an understanding will help both net neutrality proponents and opponents face inevitable First Amendment Constitutional challenges to the FCC's latest attempts at regulating the unwieldy Interweb.

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180. *See supra* Part V.C (proposing that a platform-specific case-by-case approach would be a more accurate representation of the modern internet framework and therefore would extend free speech protection to those media outlets that truly require it).

181. *See* discussion *supra* Part V.B–C (citing specific benefits that stem from a split net neutrality analysis, such as fair application of First Amendment free speech protection).