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FREE SPEECH & NET NEUTRALITY: A RESPONSE TO JUSTICE KAVANAUGH

Raymond Shih Ray Ku*

ABSTRACT

Net neutrality is a shorthand term for a series of nondiscrimination rules promulgated by the Federal Communications Commission (“FCC”) in its 2015 Open Internet Order (the “Order”). Under the Order, broadband Internet access providers were treated as common carriers when they held themselves out to the public as providing access to the Internet at large. As common carriers, they were prohibited from blocking, throttling, engaging in paid prioritization, or otherwise engaging in unreasonable interference “with the ability of consumers or edge providers to select, access, and use broadband Internet access to reach one another.”

Opponents of net neutrality, including then Judge Kavanaugh, argued that the First Amendment prevents government from adopting nondiscrimination rules. In rejecting the FCC’s effort to find the line between speech and conduct, Justice Kavanaugh sets forth a sweeping argument that Internet access providers are always speakers. In the absence of a finding of market power, he argued that the First Amendment prohibits the government from regulating the owners of digital networks because the decision not to speak is itself protected speech. In his view, the FCC’s 2015 Order represented a heretofore unheard of “use it or lose it” theory of constitutional rights.

This Article argues that Justice Kavanaugh’s interpretation, not the FCC’s 2015 decision, is unsupported, unprecedented, and wholly foreign to the First Amendment. His interpretation of the rights of broadband access providers is inconsistent with the long and unbroken historical treatment of common carriers going as far back as mail carriers. His opinion blurs, if not obliterates, the line between speech and conduct. And, to the extent the blurring is intentional, it results in the First Amendment

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becoming the new constitutional vehicle for imposing a disputed vision of *laissez faire* economic theory upon the rest of the Nation.

INTRODUCTION

Net neutrality is shorthand for a series of nondiscrimination rules adopted by the FCC in its 2015 Order.¹ It also represents a more general policy principle that businesses that provide access to the Internet, especially broadband providers that provide high speed access, should not discriminate against the users of their networks or the data that passes through.² Under net neutrality, certain broadband providers (*i.e.*, Spectrum) must allow edge providers (*i.e.*, Amazon Prime, Netflix, or Hulu) to reach end users (subscribers) on the same terms and conditions.³ These nondiscrimination rules would also prevent Spectrum from, for example, charging Amazon more than Netflix to stream motion pictures, or denying both services access to Spectrum subscribers because Spectrum offers its own video subscription service.⁴ As such, net neutrality attempts to preserve an open Internet in which Internet subscribers can access the services and content of their choice in an environment that encourages innovation.⁵ Proponents of net neutrality argue that in the absence of legally imposed nondiscrimination rules, access providers will alter the open and innovative character of the Internet in order to pick winners and losers based upon the provider's preferences rather than the preferences of end users.⁶

Internet access providers are intermediaries with monopoly-like control over participants at either end of the digital network.⁷ Thus, providers have the technological ability and financial incentive, for example, to slow down Netflix making it less desirable or functional, either to demand higher fees from Netflix or to favor services of their own.⁸ Requiring access providers to remain neutral should guarantee a level playing field for businesses, speakers, and users to create and adopt new applications and uses for the network without interference from the access provider. The Obama administration agreed, and the FCC adopted the Open Internet

¹ *In re* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015) [hereinafter Open Internet Order].

² *See infra* Part I.

³ *See infra* Part III.

⁴ *See infra* Part III.

⁵ *See infra* Part III.

⁶ *See infra* Part I.

⁷ *See infra* Part III.

⁸ *See infra* Part III.

Order.⁹ However, like so many Obama administration policies, the Trump administration immediately reversed course.¹⁰ Despite this setback, the importance of principles of nondiscrimination, and the strength and commitment of its supporters, guarantees that even if net neutrality is not here to stay, it will also not go away.

If the Trump administration prematurely cut short the life of net neutrality, it also preempted courts from considering whether nondiscrimination rules violate the free speech rights of access providers. Opponents of net neutrality, including then Judge Kavanaugh, have argued that the First Amendment prevents government from imposing nondiscrimination rules upon cable providers and other access providers.¹¹ They argue, essentially, cable operators are speakers and cable operators are access providers, therefore, access providers are speakers.¹² Because the First Amendment guarantees speakers freedom to engage in expression without interference from the government, net neutrality is unconstitutional because nondiscrimination rules interfere with an access provider's decision to determine the terms and conditions upon which it will carry data.¹³ The argument is simple, straightforward, and raises serious issues—it is also wrong (or at least seriously misleading).

The U.S. Constitution guarantees freedom of speech.¹⁴ But who is a speaker? What constitutes speech? When the First Amendment was adopted in the 18th Century, speakers were individuals and publishers.¹⁵ Speech was oral or written.¹⁶ In the 21st Century, courts, policy makers, and scholars are struggling with questions such as: is artificial intelligence a speaker?¹⁷ Is a video game speech?¹⁸ While the transmission of data resembles the transmission of speech as commonly understood,

⁹ Open Internet Order, 30 FCC Red. 5601.

¹⁰ See *infra* Part III.

¹¹ See *infra* Part IV.

¹² See *infra* Part IV.

¹³ See *infra* Part IV.

¹⁴ U.S. CONST. amend. I.

¹⁵ See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247–51 (1974).

¹⁶ *Id.*

¹⁷ See Toni M. Massaro & Helen L. Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. L. REV. 1169 (2016).

¹⁸ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011).

data also includes signals that operate computers and create the boundaries of virtual spaces.¹⁹ Is all of this speech? And, who is responsible for this speech? These may appear to be esoteric questions; nonetheless, they challenge our basic understanding of freedom of speech, and how to apply what were once given terms and developed principles to a world in which technology continues to expand the opportunities for human communication and interaction.

While a full exploration of the questions is part of a much larger project, this Article begins by examining whether the Open Internet Order violates the First Amendment rights of Internet access providers. To answer this question, the Article provides the reader with an understanding of the role of access providers and how that role has changed over time.²⁰ It explains the theories and factual considerations that underlie calls for the protection of an open Internet and the different approaches for determining when access providers are speakers protected by the First Amendment.²¹ Whether the Order violates the First Amendment depends upon whether discrimination against digital content is the digital equivalent of editorial decisions made by newspapers and, therefore, protected speech. Alternatively, is the blocking and throttling of data equivalent to closing a tunnel or imposing tolls on traffic, and, therefore, the digital equivalent of conduct falling outside of the First Amendment?

Under the Open Internet Order, the FCC chose not to treat this as a simple yes or no problem.²² Instead, it concluded that the choice is up to the access provider.²³ If the access provider holds itself out as neutral, its actions represent conduct and are subject to the Order's nondiscrimination rules.²⁴ Otherwise, the access provider is a speaker and not bound by the rules and is free to edit its network without restrictions imposed by the FCC.²⁵

¹⁹ *Id.* at 815–19 (Alito, J., concurring).

²⁰ *See infra* Parts II & III.

²¹ *See infra* Part III.

²² *See infra* Part IV.

²³ *See infra* Part IV.

²⁴ *See infra* Part IV.

²⁵ *See infra* Part IV.

Specifically, this Article examines and responds to the argument by then Judge Kavanaugh that the Order violated the First Amendment.²⁶ In rejecting the FCC's effort to find the line between speech and conduct, he set forth a sweeping argument that access providers are always speakers.²⁷ In the absence of a finding of market power, Justice Kavanaugh argued that the First Amendment prohibits the government from regulating the owners of digital networks because the decision not to speak is itself protected speech.²⁸ According to Justice Kavanaugh, the FCC's position represented a heretofore unheard of "use it or lose it" theory of constitutional rights.²⁹

This Article argues that Justice Kavanaugh's argument is the unprecedented argument in this debate. It is also fundamentally flawed and inconsistent with the long and unbroken history of regulating common carriers. Properly understood, the FCC's approach in the Order properly recognized the complex relationship between messenger and message and the important role that nondiscrimination rules play in promoting and protecting free speech.

Part I lays the groundwork for understanding what is at stake in the net neutrality debate. It begins by outlining the structure of the Internet and the role that access providers play in that structure. Part I then explains the two principal elements of the open Internet, an end-to-end design and open network architecture.

Part II traces the origins of the current debate over net neutrality to earlier efforts to require broadband providers to unbundle their delivery of Internet access from their content delivery. Part II discusses the two court decisions, *AT&T Corp. v. City of Portland* and *Comcast Cablevision of Broward County, Inc. v. Broward County Florida*, that considered whether these open-access rules violated the cable operators' freedom of speech. It then goes on to evaluate open access in light of the Supreme Court's decision in *Turner Broadcasting Systems, Inc. v. FCC* and explains why it was still too early to conclude that cable Internet service providers ("ISPs") would have bottleneck control over broadband Internet access, and, therefore, have the same power to close off the Internet as cable television providers had the power to cut off access to television programming. Part II explains how the legal issues raised by open access suggested three different approaches that could be used to

²⁶ U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

²⁷ See *infra* Part IV.

²⁸ See *infra* Part IV.

²⁹ See *infra* Part IV.

evaluate the free speech claims of cable ISPs: categorical, functional, and editorial. It further explains how each of these approaches found some support in the multiple opinions from the Supreme Court splintered decision in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*. Furthermore, Part II discusses the Supreme Court's more recent decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.³⁰ While *Brand X* did not consider the First Amendment issues, it implicitly adopted the functional approach with all nine Justices concluding that cable access providers could be treated as common carriers.³¹

Part III describes the changes in technology, the market, and structure of Internet services that led to an environment in which cable broadband providers became capable of exercising sufficient power to threaten the open Internet, and how the FCC's Order proposed to respond to that threat.

Part IV outlines Justice Kavanaugh's position that the free speech rights of broadband access providers cannot be conditioned upon a "use it or lose it" theory and argues that his opinion is the only judicial opinion to adopt a categorical approach, as outlined in Part II, treating Internet access providers as speakers under all circumstances. Not only is this approach unprecedented, it ignores the fact that the approach adopted in the Order is consistent with the history of common carrier obligations from mail carriers, telegraph and telephone operators to broadcasters and cable operators, and now Internet providers. While freedom of speech is implicated in all of these instances, treating Internet access providers as common carriers accommodates the free speech interests of senders and recipients of messages and the crucial role that messengers play.

I. THE ROLE OF INTERNET SERVICE PROVIDERS

Understanding the net neutrality debate requires an understanding of the role ISPs, specifically access providers, play in the Internet and especially their essential role in providing Internet access to subscribers and users. While former Senator Ted Stevens was derided for stating that the Internet is "not a big truck. It's a series of tubes,"³² his oversimplified analogy is useful. While the technology used to deliver data over the network is far more complex than a series of tubes, data are delivered

³⁰ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

³¹ *See infra* Part II.

³² *Your Own Personal Internet*, WIRED (June 30, 2006, 12:47 AM), <https://www.wired.com/2006/06/your-own-personal/>.

using fiber optic cable, copper wire, and radio waves just as the pneumatic tubes of the past were used to deliver messages and packages.

A. Trucks, Tubes, Tunnels, and Other Metaphors

The key to understanding net neutrality is the role of access providers as part of this series of tubes. Internet communication relies upon protocols that divide data into a series of packets.³³ These packets are then transported through telecommunication networks, a series of computer processors connected by fiber optic cable, copper wire, and radio waves.³⁴ To play with the late Senator's metaphor, the Internet uses trucks to deliver data through a series of tunnels. For example, the data that comprise email messages, social media posts, or streaming video are divided by computers applying these communication rules and loaded onto separate trucks. These trucks then leave their loading docks and travel along a series of highways and through a series of tunnels until they reach their destination and unload their cargo to be reassembled.

Net neutrality does not concern the trucks, but rather the thoroughfares they must traverse to deliver their cargo. In this network, different telecommunication providers own and operate the tunnels that form the Internet.³⁵ Some providers' tunnels are connected to local roads, local roads are connected to state highways, state highways are connected to interstate highways and interstate highways are connected to global transportation routes.³⁶

Net neutrality primarily concerns itself with those providers who provide the last-mile in this system—the access providers that own and control the tunnels that are used to begin and end a journey.³⁷ These are the ISPs that own and control the tunnels that give users access to the entire network.³⁸ Without this last tunnel, users would be unable to connect to the information superhighway.³⁹ Currently,

³³ U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 690 (D.C. Cir. 2016); Verizon v. FCC, 740 F.3d 623, 629 (D.C. Cir. 2014); see also Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87, 93–98 (2000) (outlining the structure of the Internet).

³⁴ *Verizon*, 740 F.3d. at 628–29.

³⁵ *Id.* at 628–29.

³⁶ *Id.*

³⁷ *Id.* at 629.

³⁸ *Id.*

³⁹ *Id.*

individuals connect to the Internet through three separate technologies: wirelessly over radio waves provided by a mobile phone or a satellite provider, through copper wire by a traditional telephone service, or by high-speed cable through a cable provider.⁴⁰

Because of the physical and technological characteristics of each delivery system, cable is the fastest, most reliable means of delivering large quantities of data and, therefore, the most useful and valuable tunnel.⁴¹ In other words, if you want to stream multiple videos, play online video games, all while Snapchatting or working on Google Docs at home, you want the fastest, most reliable tunnel to carry all of that data traffic at once.⁴² Otherwise, you end up with traffic congestion which limits your use of these services by impeding your connection to them. For some services, the consistency and the speed of the connection is not that important. Email messaging or word processing on cloud based programs do not require high-speed or even continuous connections.⁴³ In contrast, binge watching your favorite television series, Facetiming with friends, or playing multiplayer video games requires the transmission of large quantities of data at fast and consistent speeds in order to function properly; otherwise videos are interrupted, connections are dropped, and games become unplayable.

Regardless of which provider you use, each has absolute control over their tunnel.⁴⁴ The access provider has the ability to choose who may enter and exit the tunnel, and to determine the conditions under which the tunnel may be used.⁴⁵ They may decide to charge tolls, create slow and fast lanes, and can do so for all trucks, some trucks, or even for trucks carrying specific cargo.⁴⁶

⁴⁰ *Id.*

⁴¹ See *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 687 (S.D. Fla. 2000); *AT&T Corp. v. Portland*, 43 F. Supp. 2d 1146, 1149–50 (D. Or. 1999), *rev'd on other grounds*, 216 F.3d 971 (9th Cir. 2000).

⁴² See FCC, 15–10, *Broadband Progress Report* ¶¶ 28–40 (Jan. 29, 2015) [hereinafter *Broadband Report*].

⁴³ *Id.* (dissenting statement of Commissioner Michael O’Rielly) (“[A]ctivities, such as email, VoIP calls, and web browsing are simply not data intensive enough.”).

⁴⁴ *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 694 (D.C. Cir. 2016).

⁴⁵ *Id.*

⁴⁶ *Id.*

The power of broadband access providers, especially cable access providers, is amplified by the fact that they are often geographic monopolies.⁴⁷ As a result of a combination of local regulation and anti-competitive business practices, most communities are served by a single cable operator.⁴⁸ As such, these access providers not only exercise absolute power over the tunnels they provide to individual subscribers, their tunnel is the only tunnel connecting thousands, and in some cases millions, of individuals in towns, cities, and regions across the United States.⁴⁹ This is the communications equivalent of having a single tunnel connect the island of Manhattan to the continental United States. Moreover, in this scenario, because the tunnel is the fastest and most reliable way to reach Manhattan, users prefer the tunnel over alternatives such as bridges and ferries. In other words, while satellite, telephone lines, and wireless telephone access are alternatives, they do not match the services provided by broadband access. The essential role of these tunnels (or tubes, to return to Stevens' metaphor) and the competitive advantage of cable to deliver high-speed access are what concern proponents of net neutrality.

B. *Open by Design*

As it was originally conceived, designed, and implemented, the Internet followed two fundamental principles of network design: the end-to-end principle and open network architecture.

The end-to-end principle means that specific functions, services, and features of a computer network are left to the end of the network rather than being designed as part of the network itself.⁵⁰ For example, rather than design email directly into the modems and routers that connect one computer to the next, that function is left to the devices connected by network.⁵¹ Thus, the primary function of the network itself is

⁴⁷ *Broadband Report*, *supra* note 42, ¶¶ 78–89.

⁴⁸ *Telecom*, 825 F.3d at 694; *Broadband Report*, *supra* note 42, ¶ 83; *see also* Jon Brodtkin, *US Broadband: Still no ISP choice for many, especially at higher speeds*, ARS TECHNICA (Aug. 10, 2016), <https://arstechnica.com/information-technology/2016/08/us-broadband-still-no-isp-choice-for-many-especially-at-higher-speeds/>.

⁴⁹ *Broadband Report*, *supra* note 42, ¶ 84.

⁵⁰ *See* 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, 930–33 (2001); Tim Wu, *Network Neutrality, Broadband Discrimination*, J. TELECOMM. & HIGH TECH. L. 141, 146–47 (2003).

⁵¹ Lemley & Lessig, *supra* note 50, at 930–33; Wu, *supra* note 50, at 146–47.

to connect the ends.⁵² As such, the network carries data and is agnostic to the nature of that data, its purpose, and its source.

Correspondingly, open network architecture allows anyone at the end of the network to connect to the network and to add functions and services of their choice.⁵³ Open architecture means anyone has the freedom to become an “edge provider” and create or provide a service through the network, whether it is Apple, Google, or a teenager working out of her bedroom. Open architecture accommodates existing and newly invented services alike. Contrast this with a closed system like the one used by Apple’s iPhone in which Apple determines not only the functions directly available on the iPhone itself, but determines who may design applications for the iPhone and whether those applications may be available to iPhone owners.⁵⁴

For many of the founders of the Internet, the end-to-end principle and open architecture were essential to the Internet’s growth and the technological innovations associated with that growth.⁵⁵ For example, because of the Internet’s open design, a college student could create Facebook without having to obtain anyone’s permission, and Facebook introduced social media to the world. In turn, Facebook inspired other innovators and entrepreneurs to create new forms of social media who likewise did not have to obtain permission, let alone Facebook’s permission, to create Twitter.

In contrast, if the network is a closed design controlled by a single entity or decision-making body, there is no guarantee that any form of social media would exist today.⁵⁶ Those decision-makers could prohibit applications from using the network because they do not see the value of those applications; object to the service or content; demand payment from entrepreneurs who are unable to afford or unwilling to make those payments; or intend to offer a similar application of their

⁵² Lemley & Lessig, *supra* note 50, at 930–33; Wu, *supra* note 50, at 146–47.

⁵³ See FCC, WC Docket No. 17–108, JOINT COMMENTS OF INTERNET ENGINEERS, PIONEERS, AND TECHNOLOGIES 6–9 (July 17, 2017).

⁵⁴ See JONATHAN L. ZITTRAIN, *THE FUTURE OF THE INTERNET: AND HOW TO STOP IT* 106–07 (Yale Univ. Press 2008).

⁵⁵ See FCC, *supra* note 53, at 13 (“The key takeaway from these examples is that Internet innovation is ongoing—but more importantly, this sort of innovation relies on the open, neutral nature of the Internet.”).

⁵⁶ See generally ZITTRAIN, *supra* note 54 (discussing the differences in creativity/generativity made possible by open versus closed networks).

own.⁵⁷ While closed systems may promote stability and security, critics argued that they do not promote innovation.

II. OPEN ACCESS

Concerns over the power of cable Internet access providers is not new. Around the turn of the 21st century, when it became clear that cable providers would be able to deliver data at higher speeds more reliably than any other providers, proponents of an open Internet, including Lawrence Lessig and Mark Lemley, sided with America Online (“AOL”) and other ISPs to support a policy of open access.⁵⁸ At the time, AOL and other companies provided users with more than just a connection to the Internet, they provided a suite of services including connection to the World Wide Web, search engines, email, messaging, forums, and original content.⁵⁹ To reach their consumers, however, these ISPs relied upon local telephone companies to carry their services, and these telephone companies were required to carry that data on a nondiscriminatory basis just as they would a person-to-person telephone call.⁶⁰

A. Open Access and the First Amendment

When cable companies began to offer Internet services, many chose to offer their own suite of services bundled together with their high-speed cable modems and pipelines.⁶¹ As such, Time Warner subscribers would not need AOL to enjoy many

⁵⁷ Verizon v. FCC, 740 F.3d 623, 629 (D.C. Cir. 2014).

Proponents of net neutrality—or . . . “Internet openness”—worry about the relationship between broadband providers and edge providers. They fear that broadband providers might prevent their end-user subscribers from accessing certain edge providers altogether, or might degrade the quality of their end-user subscribers’ access to certain edge providers, either as a means of favoring their own competing content or services or to enable them to collect fees from certain edge providers. Thus, for example, a broadband provider like Comcast might limit its end-user subscribers’ ability to access the *New York Times* website if it wanted to spike traffic to its own news website, or it might degrade the quality of the connection to a search website like Bing if a competitor like Google paid for prioritized access.

Id.

⁵⁸ Lemley & Lessig, *supra* note 50.

⁵⁹ *Id.* at 941–42; Ku, *supra* note 33, at 97.

⁶⁰ Ku, *supra* note 33, at 97.

⁶¹ Lemley & Lessig, *supra* note 50, at 940–41; Ku, *supra* note 33, at 88.

of the basic functions associated with the online experience.⁶² They would, however, have to subscribe to AOL if they wanted access to AOL exclusive services, forums, or content.⁶³ Open access would have required cable companies to unbundle their Internet services from their data delivery services.⁶⁴ In other words, Time Warner would be required to allow AOL and other competing ISPs to compete directly with Time Warner's ISP, RoadRunner. In exchange, its competitors would pay Time Warner for delivering the data through Time Warner's tunnels.

Cable providers opposed open access for the same reasons they oppose net neutrality. First, they argued that bundling ISP services with high-speed delivery was an important business model that would improve their ability to invest in broadband and expand broadband Internet access.⁶⁵ In contrast, if they were prevented from bundling, they claimed that they would either be unable or unwilling to make the same level of investment to improve and/or expand their high-speed networks.⁶⁶ As a result, consumers would suffer. Second, the decision to bundle was not simply a business decision, but an editorial judgment protected by the First Amendment.⁶⁷ The cable operators argued that they are publishers exercising the same editorial judgments as newspapers, and should receive the same First Amendment protection.⁶⁸ By imposing restrictions upon their editorial judgment, open access violated their freedom of expression.⁶⁹

The constitutionality of open access was tested in two federal district courts which reached opposite conclusions. In *AT&T Corp. v. City of Portland*, Judge Panner concluded that Portland's decision to impose the open access nondiscrimination requirement upon cable franchises did not violate their freedom of speech.⁷⁰ Instead, he considered open access an effort to regulate economic

⁶² Ku, *supra* note 33, at 97.

⁶³ *Id.* at 117–18, 121.

⁶⁴ *Id.* at 108.

⁶⁵ *Id.* at 121–22; *see also* Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685, 690 (2000).

⁶⁶ *Comcast*, 124 F. Supp. 2d at 691.

⁶⁷ *Id.* at 691; Ku, *supra* note 33, at 110.

⁶⁸ *Comcast*, 124 F. Supp. 2d at 691.

⁶⁹ *Id.* at 686.

⁷⁰ *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1154 (D. Or. 1999).

conduct rather than speech.⁷¹ According to Judge Panner, open access was merely an economic regulation because it did not “force plaintiffs to carry any particular speech.”⁷² Cable operators were like other property owners, whose free speech rights would only be implicated if they would be associated with the messages conveyed by the speakers given access to that property.⁷³ As such, cables and cable modems were no different than shopping centers⁷⁴ and apartment buildings.⁷⁵ While speech occurs on those properties, compelling those property owners to accommodate speech of others does not violate the free speech rights of the property owners. In other words, subscribers would not associate the speech carried by newspapers or other speakers traveling through their tunnel as the speech of the tunnel owner. As such, requiring cable providers to provide access to their tunnels on a nondiscriminatory basis did not infringe their freedom of speech because no one would associate AOL’s speech with Time Warner or consider Time Warner responsible for AOL’s speech.⁷⁶ Moreover, because the court considered open access a regulation of conduct rather than speech, it applied the Supreme Court’s decision in *United States v. O’Brien*, which governs the regulation of expressive conduct.⁷⁷ According to Judge Panner, open access satisfied *O’Brien* because the policy furthered a substantial government interest in preserving competition in Internet access, was unrelated to the suppression of speech, and any incidental restrictions upon cable operators were no greater than necessary to achieve the government’s interest.⁷⁸

In contrast, in *Comcast Cablevision of Broward County, Inc. v. Broward County Florida*, the District Court concluded that open access did infringe upon the cable operators’ freedom of expression.⁷⁹ Judge Middlebrooks reasoned that a cable operator’s decision to offer its suite of Internet services was equivalent to choosing

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

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

⁷⁸ *Portland*, 42 F. Supp. 2d at 1154.

⁷⁹ *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 686 (S.D. Fla. 2000).

original programming or making the editorial decision to offer HBO or ESPN.⁸⁰ In so doing, he accepted the cable operators' argument that "they are not, and do not want to become, a transport service, and that their offerings are a matter of choice."⁸¹ Critically, the companies explained that they refused to carry certain Internet services "because of offensive or hateful programming."⁸² As such, the court rejected the County's argument that the cable operators "mistake the truck for the newspapers—the delivery service (or transmission) for the content."⁸³ To the extent the providers in *Broward* actually exercised or planned to exercise editorial control over the content available to subscribers, the case is readily distinguishable from *Portland*. The *Broward* court analogized open access with the must-carry rules considered by the Supreme Court's decision in *Turner Broadcasting Systems, Inc. v. FCC*,⁸⁴ which applied First Amendment protection to cable television operators when they act as speakers by exercising editorial discretion over "which stations or programs to include in [their] repertoire."⁸⁵

In *Turner*, cable television providers challenged the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992.⁸⁶ Must-carry required cable television providers to set aside a certain number of channels for local television broadcasters.⁸⁷ Congress mandated this access because the popularity and continued growth of cable television potentially threatened the availability of free television programming.⁸⁸ At the time, cable provided programming to over 60% of television viewing households, and as discussed earlier, most households were served by a single cable provider.⁸⁹ As such, Congress determined that cable operators enjoyed undue market power, and their market position gave "cable operators the power and the incentive to harm broadcast

⁸⁰ *Id.* at 691.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 692.

⁸⁴ *Id.* at 696–97.

⁸⁵ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (quoting *Los Angeles v. Preferred Commc'n, Inc.*, 476 U.S. 488, 494 (1986)).

⁸⁶ *Id.* at 630.

⁸⁷ *Id.* at 630–32.

⁸⁸ *Id.* at 632–34.

⁸⁹ *Id.* at 633.

competitors.”⁹⁰ In other words: “By refusing carriage of broadcasters’ signals, cable operators, as a practical matter, can reduce the number of households that have access to the broadcasters’ programming, and thereby capture advertising dollars that would otherwise go to broadcast stations.”⁹¹ Under these circumstances, Congress believed that it needed to act to preserve the economic viability of free broadcast television not only as an alternative to cable, but because, at the time, broadcast television was the nation’s principal source of free information.⁹²

Applying the *O’Brien* standard, a majority of the Supreme Court concluded that while cable television providers were protected by the First Amendment, must-carry was constitutional even though it interfered with their editorial discretion.⁹³ Initially, a majority of the Supreme Court concluded that must-carry was a content neutral regulation of speech, “designed to guarantee the survival of a medium that has become a vital part of the Nation’s communication system, and to ensure that every individual with a television set can obtain access to free television programming.”⁹⁴ It was not triggered by anything the cable operators said, nor did it require cable operators to change or alter their message.⁹⁵

Moreover, the Court noted that significant technological differences distinguished cable from more traditional publishers like newspapers. According to the Court, while both may enjoy local monopolies, “[a] daily newspaper . . . does not possess the power to obstruct readers’ access to other competing publications.”⁹⁶ In contrast, cable operators can “silence the voice of competing speakers with a mere flick of the switch.”⁹⁷

When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is

⁹⁰ *Id.*

⁹¹ *Id.* at 633–34.

⁹² *Id.* at 634.

⁹³ *Id.* at 662–63.

⁹⁴ *Id.* at 647.

⁹⁵ *Id.* at 655.

⁹⁶ *Id.* at 656.

⁹⁷ *Id.*

channeled into the subscriber's home. Hence, simply 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.⁹⁸

While the First Amendment limits the government's ability to "impede the freedom of speech," it does not prevent "the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."⁹⁹ In light of this bottleneck control, the Supreme Court concluded that it was appropriate for Congress to treat cable operators differently than other members of the press.¹⁰⁰

Under intermediate scrutiny, the must-carry provisions would survive if: (1) they further an important or substantial governmental interest; (2) the governmental interest furthered by imposing the provision is not related to the suppression of free expression; and (3) the means chosen do not substantially burden more speech than is necessary to further the government's legitimate interest.¹⁰¹ In support of must-carry, the government identified three "interrelated" interests: "(1) preserving the benefits of free, over-the-air local broadcast television; (2) promoting the widespread dissemination of information from multiple sources; and (3) promoting fair competition in the market for television programming."¹⁰² While the Supreme Court agreed that these interests were sufficiently substantial in the abstract, it remanded for further factual findings as to the actual threat to broadcast television and harm to cable operators.¹⁰³ According to the Court, to justify the must-carry provisions, Congress "must demonstrate that the recited harms are real, not merely conjectural,"¹⁰⁴ and that "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry."¹⁰⁵ Similarly, the Court found genuine issues of material fact with respect to whether the must-carry provisions were sufficiently narrow or whether there were other less

⁹⁸ *Id.*

⁹⁹ *Id.* at 657.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 662 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

¹⁰² *Id.*

¹⁰³ *Id.* at 668.

¹⁰⁴ *Id.* at 664.

¹⁰⁵ *Id.* at 664–65.

restrictive means of protecting broadcast television.¹⁰⁶ Ultimately, the Court upheld the must-carry provisions based upon its conclusion that there was substantial evidence supporting Congress' conclusion that broadcast television was threatened, and that there were no other adequate alternatives to protect the viability of free local broadcasting.¹⁰⁷

According to the court in *Broward*, open access required a different result. Applying *Turner* and *O'Brien*, the court distinguished open access for two primary reasons. First, it concluded that unlike cable television providers, cable internet access did not represent a bottleneck, and as such, cable providers did not exercise gatekeeper control over the Internet.¹⁰⁸ Judge Middlebrooks reached this conclusion by defining the relevant market as Internet access in general, noting that at the time of the decision the vast majority of Americans accessed the Internet through their local telephone companies.¹⁰⁹ Second, he relied upon the FCC's conclusion that even in the market for high speed Internet access, there was no evidence that cable companies had monopoly control.¹¹⁰ At the time, the FCC believed that the introduction of new technologies would prevent "the consumer market for broadband [from] becoming a sustained monopoly or duopoly," and Broward County had no evidence to the contrary.¹¹¹ Accordingly, open access was unconstitutional because the County's fear that cable providers would threaten Internet competition and freedom were purely conjectural.¹¹²

B. *Reconciling the Irreconcilable?*

Before turning to net neutrality, it's important to understand the divergent responses to open access. While it is not unusual for courts to reach opposite conclusions, how is it that the two courts framed the First Amendment issue in diametrically opposed terms? As I argued in *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, the debate over open access failed to answer

¹⁰⁶ *Id.* at 668.

¹⁰⁷ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 180 (1997).

¹⁰⁸ *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 696 (S.D. Fla. 2000).

¹⁰⁹ *Id.* at 697.

¹¹⁰ *Id.* at 698.

¹¹¹ *Id.* (citing Advanced Services Report, 14 FCC Rcd. 2398 §§ 48, 52 (1999)).

¹¹² *Id.*

two fundamental related questions.¹¹³ First, what was the actual problem for which open access was the solution?¹¹⁴ And, second, how should courts determine when an ISP is a speaker, and, therefore, entitled to First Amendment protection?¹¹⁵ Depending upon the answer to these questions, the parties could find themselves in a catch-22 in which both parties are protected by the First Amendment or neither.¹¹⁶

At the turn of the century, were cable ISPs interfering with the open nature of the Internet and freedom of speech? As illustrated by *Portland* and *Broward*, the answer was: sometimes. As such, the results are not so much in conflict, but instead, highlight the complexity of the problem raised by Internet access. When we think of Internet access today, we tend to think of the delivery of data alone. The applications we run online are considered “separate” from that access. For example, if you want to browse the web, you might choose Internet Explorer, Safari, or Firefox. If you want to run a search, you could choose among Google, Bing, or AOL. Your email could be provided by school, work, Google, or Apple, among others. If you want to discuss crafts you might visit Pinterest. If you want to read or discuss other topics you might visit Reddit. You might stream music from Spotify and buy products from Amazon. And, if you want access to news you might visit the *New York Times* website and stream video from Netflix. These services are not provided by your access provider and have very little, if anything, to do with your access provider.

At the time open access was being considered, the online experience was quite different. The major ISPs at the time, such as AOL, CompuServe, and Prodigy, provided most of your online applications and forums as part of their online communities.¹¹⁷ These companies provided software to connect to their networks, and you had to dial in to connect to those networks.¹¹⁸ Once connected, the ISPs hosted your email and provided your email application.¹¹⁹ They decided what information to display, including news, weather, and stock quotes; how to display it,

¹¹³ See generally *Ku*, *supra* note 33.

¹¹⁴ *Id.* at 118.

¹¹⁵ *Id.* at 124.

¹¹⁶ *Id.* at 131.

¹¹⁷ See FCC, *supra* note 53, at 17–18. See generally *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

¹¹⁸ See FCC, *supra* note 53, at 13–14.

¹¹⁹ *Id.*

either on your login page or other pages; and what content you would have access to through partnerships with existing news outlets, journalists, or paid writers creating original content.¹²⁰ They created and moderated groups, forums, and chat rooms, and hosted bulletin boards. They provided you with e-commerce and video games, and they provided you with a portal to the rest of the Internet. In short, ISPs assembled services and content hoping to attract subscribers to create unique and exclusive online communities, and these decisions often required them to determine what content would be available in their community.

Cable ISPs including Time Warner's Road Runner and AT&T's @Home provided some but not all of the same services as established ISPs like AOL. They provided email, original content, and a portal to the Internet, but aside from wanting to attract a larger subscriber base, their business model did not focus upon building a content based or user based online community. Instead, cable ISPs focused upon speed.¹²¹ Time Warner's RoadRunner did not evoke community; the cartoon character was a lonely, unintelligible bird living in the desert chased by a coyote. No, the RoadRunner was all about high speed access. And, like its cartoon mascot, cable Internet was all about instant access to the Internet and downloading at high speeds. While cable ISPs still published content including news and entertainment stories, users could skip that content and go directly to AOL if they desired. Most importantly for this discussion, the cable ISPs did not block other ISPs like AOL or otherwise discriminate against the data delivered by those ISPs. In the absence of discrimination, competing ISPs and edge providers were free to innovate and add content and services, and the cable ISP would deliver them to the public. By bundling its cable connection with RoadRunner, Time Warner did not close off content or services available to its subscribers. Facebook could still come into being, and, in fact, did come into being without an open access mandate.

To the extent that consumers were denied access to services or speech, that denial was based upon the decisions of the edge provider. For example, if a consumer wanted access to AOL's instant messenger, exclusive content written by Matt Drudge, or access to a specific group or forum, Time Warner would deliver what the consumer desired as long as the consumer agreed to AOL's terms and conditions. Because AOL charged for access, individuals would have to pay AOL. While a consumer might be influenced by the sunk costs incurred for subscribing to RoadRunner, Time Warner created no technical or financial barriers to accessing AOL or any other content or service available online. If AOL offered access to its community for free, RoadRunner would deliver that content. While cable ISPs could

¹²⁰ See *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

¹²¹ *U.S. Telecom Ass'n v. FCC*, 835 F.3d 674, 699 (D.C. Cir. 2016).

threaten the principles of an open Internet or restrict freedom of speech in theory, they were not necessarily doing so in practice.

As such, the *Portland* court's conclusion that open access represented a regulation of economic decisions, as opposed to speech, appeared to be consistent with AT&T's policies and practice. AT&T acknowledged that it did not block access to competing ISPs.¹²² Unfortunately for AT&T, to the extent that it chose not to discriminate in content delivery, regulators had greater discretion to regulate its decisions. In other words, while there were significant policy choices and tradeoffs in how best to ensure growth and competition in the market for delivering Internet content, free speech was not one of the interests in the balance.¹²³ The decision to bundle @Home service with cable service was conduct not speech.¹²⁴ Likewise, to the extent that a competing ISP such as AOL planned to deliver content on a nondiscriminatory basis, it had no stronger First Amendment claim than AT&T.¹²⁵ Neither side could claim that they were entitled to First Amendment protection, because whether the public was best served by an exclusive delivery service or by a competitive market for delivery did not implicate the free speech of the deliverers.¹²⁶ In other words, the court did not consider the potential to be a speaker or the mere status of an ISP as sufficient to warrant additional First Amendment protection. Determining that open access was unrelated to the content of speech and served the legitimate government interest in promoting competition sufficed.

In contrast, the ISPs in *Broward* raised a more specific First Amendment claim. As discussed above, the cable companies argued that they rejected nondiscrimination in both principle and practice.¹²⁷ They argued that their selection of ISP providers such as RoadRunner or @Home was based upon the content and format offered by those providers.¹²⁸ Moreover, they represented to the court that they refused to carry certain providers because they objected to the content those services offered.¹²⁹ In

¹²² AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1154 (D. Or. 1999).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See Ku, *supra* note 33, at 131.

¹²⁶ *Id.* at 132.

¹²⁷ Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685, 696 (S.D. Fla. 2000).

¹²⁸ *Id.*

¹²⁹ *Id.*

agreeing with the cable companies, the court noted the online growth of “white supremacist groups and other purveyors of hate” as examples of “Internet information services” that, if “granted access to the cable systems,” would “be offensive to the operator and its subscribers.”¹³⁰ While it is not clear whether this meant that white supremacists were attempting to offer services in competition with @Home or in competition with the content otherwise available on the Internet, the court took the cable companies’ statement that they chose what data to carry based upon editorial judgments regarding the content of that data at face value. While such judgments would discriminate against the speech of white supremacists, the First Amendment guarantees the freedom to engage in precisely this type of discrimination.¹³¹ Because their freedom of speech was directly implicated, open access would only survive First Amendment scrutiny if the city could “demonstrate that the harm[s] it [sought] to prevent [were] real, not merely conjectural.”¹³² Under this more stringent standard, open access failed because the city could not demonstrate that Internet access in general or high speed access in particular were in genuine jeopardy.¹³³

In addition to the facts of the two cases, the open access decisions can also be understood as applying to different approaches for determining when a cable operator is a speaker under the First Amendment. In *Broward*, the court treated cable operators as the digital equivalent of a newspaper, and likened the decision to offer Internet access as equivalent to a cable company deciding to offer a new cable channel.¹³⁴ As such, it rejected the County’s argument that “the conduit or transmission capability of speech can be separated from the content.”¹³⁵ In contrast, this appears to be precisely what the district court did in *Portland*. Because AT&T was not blocking access to competing ISPs, the court concluded that there was no free speech violation.¹³⁶ AT&T was transmitting speech, not creating content. The following section considers this problem in greater detail.

¹³⁰ *Id.* at 397 n.4.

¹³¹ *Id.* at 693.

¹³² *Id.* at 697.

¹³³ *Id.* at 698.

¹³⁴ *Id.* at 694.

¹³⁵ *Id.* at 692.

¹³⁶ *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1154 (D. Or. 1999).

C. One Question. Three Possible Answers

In *Open Access*, I argued that, “in light of the different functions and services provided by ISPs, three approaches for analyzing the First Amendment claims of ISPs are possible: categorical, functional, and editorial.”¹³⁷ The categorical approach would consider ISPs protected speakers under all circumstances. “In other words, an ISP’s ownership and control of its networks would be treated as the equivalent of the ownership and editorial control of newspaper publishers, without any corresponding limitation due to the means of dissemination or the type and source of information disseminated.”¹³⁸

The functional approach “conceptually severs the services offered by ISPs and assigns fixed First Amendment rights and duties to each distinct Internet service.”¹³⁹ Data delivery would be treated separately from content creation. Under this approach, ISPs would not be considered speakers when providing email or access to the Internet. They would, however, be speakers when, for example, publishing their own websites.¹⁴⁰ Under this approach, the regulation of data delivery would be subject to a more deferential First Amendment review.

Lastly, under the editorial approach, First Amendment protection would be based upon the actual exercise of content-based editorial judgments.¹⁴¹ ISPs would receive the same protection as newspapers when they behave as newspapers.¹⁴² Like the functional approach, the editorial approach would require courts to consider the services offered by an ISP separately, otherwise, it would be no different than the categorical approach.¹⁴³ Unlike the functional approach, the editorial approach would provide ISPs with the same protection as newspaper publishers even with

¹³⁷ Ku, *supra* note 33, at 127.

¹³⁸ *Id.*

¹³⁹ *Id.* at 128.

¹⁴⁰ *Id.* at 128–29.

¹⁴¹ *Id.* at 129–30.

¹⁴² *Id.* at 130. See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (recognizing that newspapers are entitled to First Amendment protection because “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment”).

¹⁴³ Ku, *supra* note 33, at 129–30.

regard to email and Internet access.¹⁴⁴ Rather than imposing rigid categories upon what should or should not be considered expressive activity, the editorial approach would allow for the possibility that changes in technology would open the possibility for new methods of expression.¹⁴⁵ Under the editorial approach, First Amendment protection would only be triggered when an ISP makes content-based judgments by blocking access to white supremacist email or websites for example.¹⁴⁶

So which approach does the First Amendment require? Unfortunately, courts have not yet agreed upon an answer. For example, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the Supreme Court considered whether Congress' decision to allow cable operators to censor offensive sexual content on public access and leased access channels violated the free speech rights of the content creators who would otherwise have had access to those channels.¹⁴⁷ Prior to the law in question, cable companies were required to set aside these channels and prohibited from exercising "any editorial control over the content of any program broadcast over" these channels.¹⁴⁸ The Supreme Court decided that cable operators could censor leased access channels, but not public access channels.¹⁴⁹ However, in reaching this conclusion, the Court could not agree upon a standard for evaluating the free speech claims of cable operators.¹⁵⁰

In a highly fractured decision, four Justices declined to adopt any standard.¹⁵¹ Writing for himself and Justices Stevens and O'Connor, Justice Breyer's plurality opinion argued that under the circumstances, importing pre-existing categories "into a new and changing environment," would deny the Court the flexibility required "to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas, the First Amendment is designed to protect."¹⁵² In his

¹⁴⁴ *Id.* at 130.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 732–33 (1996).

¹⁴⁸ *Id.* at 734 (emphasis added).

¹⁴⁹ *Id.* at 733.

¹⁵⁰ *See generally id.*

¹⁵¹ *Id.* at 741–43.

¹⁵² *Id.* at 740–42 (declining to make a "definitive choice among competing analogies (broadcast, common carrier, bookstore)" or "to declare a rigid single standard, good for now and for all future media and purposes").

concurring opinion, Justice Stevens reached the same conclusion arguing against a rule-based “approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this.”¹⁵³

Likewise, because “the relevant characteristics of cable are presently in a state of technological and regulatory flux,” Justice Souter argued that deciding upon a single standard would “demand a subtlety tantamount to prescience.”¹⁵⁴ Moreover, he argued that deciding upon such a standard would have profound and arguably unanticipated consequences. According to Justice Souter, the problem before them:

portends fundamental changes in the competitive structure of the industry and, therefore, the ability of individual entities to act as bottlenecks to the free flow of information. As cable and telephone companies begin their competition for control over the single wire that will carry both their services, we can hardly settle rules for review of regulation on the assumption that cable will remain a separable and useful category of First Amendment scrutiny. And as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.¹⁵⁵

As such, prematurely deciding upon a rule, would run the risk that the Court “would get it fundamentally wrong.”¹⁵⁶

In contrast, five Justices argued that the Court should adopt a clear standard, but could not agree upon that standard. Justices Kennedy and Ginsburg adopted a functional approach. “Access channels . . . are property of the cable operator, dedicated or otherwise reserved for programming of other speakers or the government. A public access channel is a public forum, and laws requiring leased access channels create common-carrier obligations.”¹⁵⁷ When providing these access channels, Justices Kennedy and Ginsburg concluded that the cable operators were not exercising free speech rights of their own, but were instead serving “as conduits

¹⁵³ *Id.* at 768.

¹⁵⁴ *Id.* at 776 (Souter, J., concurring).

¹⁵⁵ *Id.* at 776–77 (citations and footnotes omitted).

¹⁵⁶ *Id.* at 777 (quoting Lawrence Lessig, *The Path of Cyberlaw*, 104 *YALE L.J.* 1743, 1745 (1995)).

¹⁵⁷ *Id.* at 783 (Kennedy, J., concurring).

for the speech of others.”¹⁵⁸ Furthermore, Justice Kennedy noted that imposing common carrier obligations on cable companies is analogous to imposing those same requirements upon telephone companies.¹⁵⁹ Having imposed a nondiscrimination rule, Congress could not selectively remove that protection for one category of speech.¹⁶⁰

Lastly, Justice Thomas, Chief Justice Rehnquist, and Justice Scalia appear to argue for the editorial approach recognizing the free speech rights of cable operators as “preeminent.”¹⁶¹ In other words, the speech rights of those claiming access to a cable system must “give way to the operator’s editorial discretion.”¹⁶² Cable systems, Justice Thomas argued, are like bookstores.¹⁶³ The owner of a bookstore is not obligated to carry any particular book or author.¹⁶⁴ Rather than complete the analogy and argue that bookstore owners could not be required to carry books, the opinion argues instead that government could not force the editor of a collection of essays to publish other essays.¹⁶⁵ For the purposes of this discussion, it is noteworthy that despite the broad language used to describe the free speech rights of cable operators, Justice Thomas did not argue that common carrier obligations violated those rights, but rather that the constitutionality of those obligations were not at issue.¹⁶⁶

More recently, a unanimous Supreme Court recognized the legitimacy of evaluating Internet services under a functional approach. In *National Cable v. Brand X Internet*,¹⁶⁷ the Justices acknowledged that an ISP’s delivery of data could be treated separately from other Internet services such as email and its own content.¹⁶⁸ The Justices only split on whether the FCC was required to treat those services as separate or whether it was in its discretion to consider them integrated. Writing for

¹⁵⁸ *Id.* at 793.

¹⁵⁹ *Id.* at 796–97.

¹⁶⁰ *Id.* at 797.

¹⁶¹ *Id.* at 816 (Thomas, J., concurring).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* at 820–21, 824–26 (citations and footnotes omitted).

¹⁶⁷ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

¹⁶⁸ *Id.* at 997–1000 (majority opinion), 1005–07 (Scalia, J., dissenting).

the Court, Justice Thomas concluded that it was within the FCC's authority and discretion to conclude that cable companies offered data carriage and Internet access as functionally integrated services.¹⁶⁹ In contrast, Justice Scalia, writing for himself and Justices Ginsburg and Souter, concluded that the FCC must treat cable operators' data carriage services separately from its other Internet services, and should be classified as common carriers.¹⁷⁰ The First Amendment, however, was not at issue in *Brand X*. Instead, the decision answered the administrative law questions raised by the FCC's decision which exempted cable Internet access providers from common carrier duties when telephone companies offering similar services were subject to those rules. The Court's decision, however, provides us with at least some insight into how it might approach this question under the First Amendment.

As the remainder of this Article discusses, by adopting the historical approach towards regulating common carriers, the FCC avoided this constitutional quagmire. In contrast, Justice Kavanaugh's approach would push it into the mud.

III. NET NEUTRALITY

Given the nature of the open access debate, it should be no surprise that cable operators raised the same objections to net neutrality's nondiscrimination rule. If cable operators are protected by the First Amendment because they determine the content available to their subscribers, a nondiscrimination rule interferes with that freedom no matter what the policy is called. This section proceeds in two parts, and because the policy arguments for and against net neutrality have been well covered in the literature and in this symposium, that discussion will not be repeated here.¹⁷¹

¹⁶⁹ *Id.* at 992 (majority opinion).

¹⁷⁰ *Id.* at 1005–06 (Scalia, J., dissenting). In support of his conclusion, Justice Scalia offered the following analogy:

If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common “usage,” would prevent them from answering: “No, we do not offer delivery—but if you order a pizza from us, we’ll bake it for you and then bring it to your house.” The logical response to this would be something on the order of, “so, you do offer delivery.”

Id. at 1007 (citations omitted).

¹⁷¹ Wu, *supra* note 50; Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?*, 59 FED. COMM. L.J. 575 (2007); Dawn C. Nunziato, *By Any Means Necessary? The FCC's Implementation of Net Neutrality*, 8 FIRST AMEND. L. REV. 138 (2009); James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225 (2012); Thomas B. Nachbar, *The Public Network*, 17 COMM.LAW CONSPICUOUS 67 (2008); Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1 (2005); Adam Candeub, *Networks, Neutrality & Discrimination*, 69 ADMIN. L. REV. 125 (2017).

Likewise, to the extent that the Supreme Court's decision in *Turner* is considered the relevant precedent, this Article will not engage in that analysis as that too is well covered.¹⁷² Instead, Part III(A) begins by discussing what has changed since open access and why these changes prompted the FCC to adopt a nondiscrimination policy when it rejected a similar policy roughly twenty years earlier. Part III(B) then explains how the FCC dealt with the First Amendment questions raised by regulating cable operators specifically and broadband access providers in general.

A. *The Danger is Real*

While it may have been premature to adopt a nondiscrimination policy during the open access debates, the same cannot be said today. As discussed in Part II, the threat posed by cable operators during that debate was largely conjectural. As previously discussed, the potential threat was twofold. First, cable operators would obtain bottleneck or gatekeeper control over broadband access to homes. Second, they would use the gatekeeper control to discriminate against Internet services and content. Over the past 20 years, evidence has mounted that both concerns were coming to fruition.

When nondiscrimination was proposed under open access, the Internet was still new and as recognized by the FCC and the courts, dynamic and in a tremendous state of flux.¹⁷³ In 1993, there were only fifty web servers in the entire world, and the World Wide Web did not see significant commercial growth until the late 1990s.¹⁷⁴ As evidenced by the Dot.com boom and busts, business models both large and small were coming and going at a rapid pace.¹⁷⁵ Napster introduced the world to peer-to-

¹⁷² See Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343 (2014); Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673 (2011); Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483 (2006); see also Geoffrey A. Manne, R. Ben Sperry, Tom Struble & Berin Szoka, *A Conflict of Visions: How the "21 Century First Amendment" Violates the Constitution's First Amendment*, 13 FIRST AMEND. L. REV. 319 (2014); Fred B. Campbell, Jr., *The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carrier Regulation*, 94 NEB. L. REV. 559 (2016).

¹⁷³ See *History of the Internet*, Under subheading *Rise of the Global Internet Late 1980s/Early 1990s Onward*, WIKIPEDIA, [https://en.wikipedia.org/wiki/History_of_the_Internet#Rise_of_the_global_Internet_\(late_1980s/early_1990s_onward\)](https://en.wikipedia.org/wiki/History_of_the_Internet#Rise_of_the_global_Internet_(late_1980s/early_1990s_onward)) (last visited Aug. 21, 2019).

¹⁷⁴ See *History of the World Wide Web*, Under subheading *1996–1998: Commercialization of the Web*, WIKIPEDIA, https://en.wikipedia.org/wiki/History_of_the_World_Wide_Web#1996%E2%80%931998:_Commercialization_of_the_Web (last visited Aug. 21, 2019).

¹⁷⁵ *Id.*

peer file sharing, and was then closed for facilitating copyright infringement.¹⁷⁶ Microsoft and Netscape engaged in the “browser wars.”¹⁷⁷ Yahoo! began as a web directory and grew into one of the largest web portals,¹⁷⁸ only to have its search services supplanted by Google which was founded in 1998.¹⁷⁹ Amazon sold books¹⁸⁰ and Mark Zuckerberg was still in High School.¹⁸¹

While the broadband access provided by cable was clearly superior to other modes of data delivery, there was reason to believe that the market for broadband access would be competitive. Before the turn of the century, telephone, wireless, and satellite services were seen as possible competitors capable of building their own high speed tunnels to close the last mile.¹⁸² Mobile phones were beginning to take hold in the consumer marketplace, though they were primarily limited to text messaging and voice services.¹⁸³ Internet service was not introduced until 1999,¹⁸⁴ and broadband/3G cellular phones would not even begin to see their real potential

¹⁷⁶ See *Napster*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Napster> (last visited Aug. 21, 2019).

¹⁷⁷ See *United States v. Microsoft Corp.*, 253 F.3d 34, 47, 59–60 (D.C. Cir. 2001); *Browser Wars*, WIKIPEDIA, https://en.wikipedia.org/wiki/Browser_wars (last visited Aug. 21, 2019).

¹⁷⁸ See *History of Yahoo!*, WIKIPEDIA, https://en.wikipedia.org/wiki/History_of_Yahoo! (last visited Aug. 21, 2019).

¹⁷⁹ See *History of Google*, WIKIPEDIA, https://en.wikipedia.org/wiki/History_of_Google (last visited Aug. 21, 2019).

¹⁸⁰ See *Amazon (company)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Amazon_\(company\)](https://en.wikipedia.org/wiki/Amazon_(company)) (last visited Aug. 21, 2019).

¹⁸¹ See *History of Facebook*, WIKIPEDIA, https://en.wikipedia.org/wiki/History_of_Facebook (last visited Aug. 21, 2019).

¹⁸² See *Ku*, *supra* note 33, at 119–20; see also *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd. 2398, 2406 ¶¶ 55–60 (1999) [hereinafter *FCC Advanced Services Report*]; James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. REG. 39, 49, 87–88 (2000) (arguing that alternative broadband options make open access unnecessary).

¹⁸³ See *History of Mobile Phones*, WIKIPEDIA, https://en.wikipedia.org/wiki/History_of_mobile_phones#Handheld_mobile_phone (last visited Aug. 21, 2019).

¹⁸⁴ *Id.*

until they became capable of streaming music in the mid-2000s. And, AOL purchased Time Warner in one of the largest mergers in history in 2000.¹⁸⁵

Furthermore, while cable ISPs were interested in bundling portal content with delivery, it was by no means clear that they would use whatever gatekeeper power they had to prevent the introduction of new uses or to discriminate against the content available to subscribers. In fact, as Professor Wu noted, the open access debate itself led cable operators to evaluate their business models with many choosing to allow rival ISP access, and became a useful inflexion point to consider the types of network restriction that would have the potential to threaten the principles of an open Internet.¹⁸⁶ Likewise, as Professors Farrell and Weiser argued, rational cable operators would welcome innovation in applications as it would improve the value of their networks.¹⁸⁷ Against this backdrop, it was not surprising that the Supreme Court was unwilling to adopt a single bright line rule, or that the court in *Broward* concluded that open access was unconstitutional.¹⁸⁸

By the mid-2000s, concerns that cable providers would threaten the open internet were no longer conjectural. The FCC and courts recognized that cable operators did, in fact, exercise gatekeeper control over Internet access, and not only had the financial incentive to discriminate against edge providers and end users, but in some cases had already exercised that power.¹⁸⁹ The increasing power of cable providers was driven in large measure by technological and consumer demands for the delivery of ever increasing amounts of data at faster and faster speeds. For example, in 1996, Congress defined broadband, high speed Internet access, as the capability to allow “users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”¹⁹⁰ In 1999, the FCC concluded that networks capable of delivering 200 kilobits per second (kbps) in the

¹⁸⁵ See Stephen Grocer, *What Happened to AOL Time Warner?*, N.Y. TIMES (June 15, 2018), <https://www.nytimes.com/2018/06/15/business/dealbook/aol-time-warner.html>.

¹⁸⁶ Wu, *supra* note 50, at 143–44.

¹⁸⁷ See Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 143–44 (“[T]he platform monopolist has an incentive to be a good steward of the application sector for its platform.”).

¹⁸⁸ See *supra* Part II.A. (discussing *Broward*).

¹⁸⁹ *Verizon v. FCC*, 740 F.3d 623, 629, 646–47 (D.C. Cir. 2014).

¹⁹⁰ 1996 Telecommunications Act, 47 U.S.C. § 1302(d)(1).

last mile qualified as broadband.¹⁹¹ By 2010, the FCC concluded that 200 kbps was no longer sufficient. Instead, the services demanded by users now required delivery speeds twenty times higher than the original threshold.¹⁹² Under the updated definition, the FCC found that the services used by 80 million Americans did not meet the threshold, and that approximately 14 to 24 million did not have access to those speeds at all.¹⁹³ Because the technology used by cable companies is capable of more reliably delivering larger quantities of data at higher speeds, cable operators developed a market advantage over time.¹⁹⁴

In addition to technological advantages, the cable companies' geographic advantage gives them total control over their subscribers and correspondingly, those subscribers' access to the Internet.¹⁹⁵ As the *Verizon* court recognized, cable operators are terminating monopolies because "all end users generally access the Internet through a single broadband provider" and, as the owner of the only tunnel to the home, providers exercise gatekeeper control.¹⁹⁶ But are not users free to choose a different gatekeeper? Unfortunately, no. Most end users do not have a choice in cable providers. It is estimated that 50 million U.S. households have access to only one Internet provider capable of delivering speeds that meet the FCC's current definition of broadband (25 mbps download) or none at all.¹⁹⁷ Even when consumers have access to more than one provider, the costs associated with switching to different cable provider can be a significant deterrent.¹⁹⁸ Consequently, even if end users were aware that their cable providers were blocking, degrading, or price discriminating against content as well as services and those users disapproved, many would have only two options: live with it or unplug, foregoing broadband access altogether.

¹⁹¹ *Verizon*, 740 F.3d at 640 (quoting *FCC Advanced Services Report*, *supra* note 182, ¶ 20).

¹⁹² *Id.* at 640–41.

¹⁹³ *Id.*

¹⁹⁴ While wireless Internet access continues to improve, it is still not capable of matching the speed offered by cable. For example, 4G wireless networks are capable of delivering speeds up to 50 mbps. In contrast, cable is capable of three times that speed.

¹⁹⁵ *Verizon*, 740 F.3d at 647.

¹⁹⁶ *Id.* at 646.

¹⁹⁷ See Jon Brodtkin, *50 Million U.S. Homes Have Only One 25 MBPS Internet Provider or None at All*, ARS TECHNICA (June 20, 2017), <https://arstechnica.com/information-technology/2017/06/50-million-us-homes-have-only-one-25mbps-internet-provider-or-none-at-all/>.

¹⁹⁸ *Verizon*, 740 F.3d at 647.

Lastly, both cable and wireless providers not only signaled their intent to discriminate,¹⁹⁹ some engaged in such discrimination.²⁰⁰ For example, Comcast prevented subscribers from using peer-to-peer applications and favored its own online video services when streaming over Microsoft Xbox.²⁰¹ And, in one of the most significant and visible examples, Comcast allowed Netflix data speeds to degrade until Netflix entered into a separate agreement with Comcast for better speeds.²⁰² Consequently, the fears that initially prompted open access and, subsequently, net neutrality are no longer conjectural. The threat posed by cable providers was and remains real.

B. Provider's Choice

In the Order, the Commission adopted four nondiscrimination rules and new transparency requirements.²⁰³ With respect to nondiscrimination, the 2015 Order prohibited broadband providers from: blocking, throttling, engaging paid prioritization, and engaging in unreasonable interference “with the ability of consumers or edge providers to select, access, and use broadband Internet access to reach one another.”²⁰⁴ In light of the preceding discussion, the FCC could have adopted a functional approach and treated all broadband providers as common carriers. If it had done so, the question of whether a functional approach is consistent with the First Amendment would have been presented. Under those circumstances, courts would have to determine which of the three approaches, categorical, functional, or editorial must be adopted. Alternatively, courts could assume that broadband access providers are speakers, but that net neutrality or similar common carrier obligations are still consistent with the First Amendment’s protection of

¹⁹⁹ See Open Internet Order, *supra* note 1, ¶ 8.

²⁰⁰ *Id.* 79 n.123; see FCC, *supra* note 53, at 33–40.

²⁰¹ Open Internet Order, *supra* note 1, ¶ 79 n.123.

²⁰² Edward Wyatt & Noam Cohen, *Comcast and Netflix Reach Deal on Service*, N.Y. TIMES (Feb. 23, 2014), <https://www.nytimes.com/2014/02/24/business/media/comcast-and-netflix-reach-a-streaming-agreement.html>; Chris Morran, *Netflix Agrees to Pay Comcast to End Slowdown*, CONSUMERIST (Feb. 23, 2014), <https://consumerist.com/2014/02/23/netflix-agrees-to-pay-comcast-to-end-slowdown/>.

²⁰³ Open Internet Order, *supra* note 1, ¶¶ 104–09.

²⁰⁴ *Id.* ¶ 108.

freedom of speech under *Turner* or some other precedent.²⁰⁵ However, in the Order, the FCC simply assumed that cable operators could be treated as speakers.

Rather than imposing restrictions upon all broadband providers, the FCC avoided the First Amendment question by giving providers a choice. Under the Order, the nondiscrimination rules did not apply to cable operators that chose to exercise editorial authority over their networks.²⁰⁶ Instead, the nondiscrimination rules only applied to “mass-market retail services.”²⁰⁷ According to the FCC, these would be services marketed and sold on a standardized basis as providing the “capability to transmit data to and receive from all or substantially all Internet endpoints.”²⁰⁸ As noted by the D.C. Circuit, the FCC’s “definition, by its terms, includes only those broadband providers that hold themselves out as neutral, indiscriminate conduits.”²⁰⁹ Therefore, net neutrality rules would not apply to providers that chose to speak by “opt[ing] to exercise editorial discretion.”²¹⁰ In other words, net neutrality only applied to cable operators when they chose to carry anyone’s messages, but not when they wished to convey their own. The choice was entirely up to the provider.

Notably, the Order adopts an editorial approach with respect to the rights of broadband access providers. As such, the Order acknowledges that broadband providers may exercise editorial control over their networks even when they do not provide content and allows them to exercise that authority. Under these circumstances, net neutrality differs from open access which did not differentiate between an ISP’s decision to deliver data or content.²¹¹ On its face, the FCC’s framework would exempt access providers from the nondiscrimination rules even if they do not actual actually engage in data discrimination, but merely reserve the right

²⁰⁵ Susan Crawford makes a compelling argument that the Supreme Court’s decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), is the proper precedent, and not *Turner*. See Crawford, *supra* note 172, at 2379–85.

²⁰⁶ See Open Internet Order, *supra* note 1, ¶¶ 336, 556, 558.

²⁰⁷ *Id.* ¶ 336.

²⁰⁸ *Id.*; see U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 743 (D.C. Cir. 2016) (citing Open Internet Order, *supra* note 1, ¶ 336).

²⁰⁹ *Telecom*, 825 F.3d at 743.

²¹⁰ *Id.*

²¹¹ See Ku, *supra* note 33, at 102–08 (discussing the FCC’s prior classification of Internet services as enhanced/information services rather than basic/telecommunication services).

to do so.²¹² The only factor is whether they present themselves to the public as neutral conduits. As such, the Order accepts the position that broadband access providers can be speakers by asserting editorial control over their networks.²¹³ Correspondingly, when access providers reject that and instead choose to be in the business of delivering data, they are engaging in conduct not expression, and, as such, how they deliver data can be the subject of regulation. The choice is up to the access provider.

IV. CRICKETS

The FCC's effort to accommodate the First Amendment interests of broadband access providers drew a scathing critique from then Judge Kavanaugh. In *United States Telecom Ass'n v. FCC*, a panel of the D.C. Circuit upheld the FCC's authority to issue the Open Internet Order.²¹⁴ Issuing a dissenting opinion from the D.C. Circuit's decision to deny rehearing *en banc*, Judge Kavanaugh queried, "What First Amendment case or principle supports [the FCC's] theory? Crickets."²¹⁵ The following argues that Judge Kavanaugh's opinion is not only wrong as a matter of law, logic, and history, but that it represents a disturbing trend in First Amendment jurisprudence as well.

A. Judge Kavanaugh's First Amendment Objection

In support of the only cable operator to raise the argument, then Judge Kavanaugh concluded that the Open Internet Order violated the free speech rights of broadband access providers.²¹⁶ By imposing restrictions upon ISPs "when they exercise editorial discretion and choose what content to carry and not to carry,"²¹⁷ the Order violated the First Amendment absent a demonstration that cable operators possessed "market power in a relevant geographic market."²¹⁸ According to Judge Kavanaugh, this conclusion was compelled by the Supreme Court's decisions in *Turner*, which he described as "landmark decisions that were intended to (and have)

²¹² See Open Internet Order, *supra* note 1, ¶ 336.

²¹³ See *Telecom*, 825 F.3d at 743.

²¹⁴ *Id.* at 744.

²¹⁵ U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 429 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

²¹⁶ *Id.* at 418.

²¹⁷ *Id.* at 426–27.

²¹⁸ *Id.* at 418.

marked the First Amendment boundaries for communications gatekeepers in the 21st century.”²¹⁹ However, to reach this conclusion, he had to address the fact that under the Order, ISPs were free to choose whether they should be considered speakers or conduits.

Adopting what amounts to an absolute categorical approach described in Part II, then Judge Kavanaugh argued that, at least with respect to data carriage, access providers are always speakers and always speaking.²²⁰ In so doing, he rejected what he described as an unsupported, unprecedented, and wholly foreign, “use it or lose it” theory.²²¹ According to Judge Kavanaugh, the FCC was not accommodating the speech interests of ISPs by allowing them to determine whether they should act as speakers or common carriers.²²² Instead, the FCC was requiring broadband providers to exercise their free speech rights or lose them altogether. As such, Judge Kavanaugh argued that the FCC failed to accept a simple, fundamental truth—all decisions regarding access to networks are protected by the First Amendment because the decision not to exercise editorial discretion is, itself, an exercise of editorial discretion.²²³ Put differently, a decision to not block access to all or most Internet content is still an editorial decision regarding content.

Think about what the FCC is saying: Under the rule, you supposedly can exercise your editorial discretion to refuse to carry some Internet content. But if you choose to carry most or all Internet content, you cannot exercise your editorial discretion to favor some content over other content. What First Amendment case or principle supports that theory? Crickets.²²⁴

To illustrate his position, then Judge Kavanaugh drew an analogy with other constitutional rights. For example, he argued that accepting the FCC’s position:

would be akin to arguing that people lose the right to vote if they sit out a few elections. Or citizens lose the right to protest if they have not protested before. Or

²¹⁹ *Id.* at 430.

²²⁰ *Id.* at 429.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

a bookstore loses the right to display its favored books if it has not done so recently.²²⁵

In other words, the FCC's theory of the First Amendment was akin to waiver. And, of course, individuals do not lose their constitutional rights simply because they have not exercised them before. It logically follows then that broadband providers do not lose their First Amendment rights simply because they choose not to exercise them.

In addition to blocking, Judge Kavanaugh argued that the First Amendment guarantees the freedom of broadband providers to throttle, engage in paid prioritization, and otherwise interfere with the ability of end users to gain access to edge providers.²²⁶ According to Kavanaugh, any limitation upon an ISP's decision to favor content "when it comes to price, speed, and availability" would be tantamount to forcing bookstores, newsstands, and Amazon "to feature and promote all books in the same manner" and "to price them equally."²²⁷ Under this analogy, a bookstore's decision to carry a book, where and when to display a book, and to determine the price of the book are all protected examples of the bookstore owner's expression. If those decisions are protected, then so are comparable decisions made by ISPs. If he characterized the FCC's approach as a use it or lose it, Kavanaugh's position is, quite simply: you never lose it.

While Justice Kavanaugh's position may be superficially appealing, it was so controversial it prompted two judges to write a separate opinion responding only to his dissent.²²⁸ With regard to Judge Kavanaugh's use or lose it interpretation, Judges Srinivasan and Tatel argued that this was not a legitimate First Amendment claim because

[w]hen a broadband provider holds itself out as giving customers neutral, indiscriminate access to web content of their own choosing, the First Amendment

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *See id.* at 388–93 (Srinivasan, J. & Tatel, J., concurring).

poses no obstacle to holding the provider to its representation. That amounts to an “if you say it, do it” theory, not a “use it or lose it” theory.²²⁹

In response, Judge Kavanaugh argued that, given the controversy, it was unlikely that compliance with net neutrality was truly voluntary and, as such, equivalent to a proscription against false advertising.²³⁰ However, he conceded that if the nondiscrimination rules were in fact voluntary and equivalent to prohibitions against false advertising, they would not raise First Amendment problems.²³¹

As the remainder of this Article argues, Justice Kavanaugh’s position is fundamentally flawed because the categorical position he adopts suggests that broadband access providers can never be subject to nondiscrimination rules. While they may voluntarily adopt such policies, the First Amendment would prohibit the government from enforcing such policies. Justice Kavanaugh’s interpretation—not the 2015 FCC’s—is not only unsupported, unprecedented, and wholly foreign to the First Amendment, it is inconsistent with the long and unbroken historical treatment of messengers going as far back as mail carriers. Moreover, if accepted, Justice Kavanaugh’s position fundamentally threatens all communications-related common carrier regulations. Furthermore, because his position blurs, if not obliterates, the line between speech and conduct, it raises the specter of a new *Lochner* era. This time, however, the First Amendment is the constitutional mechanism for imposing a disputed vision of *laissez faire* economic theory upon the rest of the Nation.

B. *For Whom the Crickets Chirp*

While Justice Kavanaugh’s opinion accuses the FCC of adopting a theory of the First Amendment unsupported by any case or principle, his opinion is itself unsupported by First Amendment cases or principles. In chastising the FCC for distinguishing between broadband access providers that choose to assert editorial control over their networks and those that eschew such a role, Justice Kavanaugh failed to cite a single authority to support his conclusion that it is unconstitutional to draw such a distinction. Instead, his argument is built upon faulty analogies and careful word play that hides the conclusory nature of his analysis. As the following demonstrates, Justice Kavanaugh’s opinion never addresses the possibility that access providers may not be engaged in expression. Instead, it is an elaborate

²²⁹ *Id.* at 389.

²³⁰ *Id.* at 429 n.8 (Kavanaugh, J., dissenting).

²³¹ *Id.*

restatement of his conclusion that decisions regarding data carriage always represent the speech of broadband access providers.

As discussed above, Justice Kavanaugh's position is based upon two analogies and a concession.²³² The first analogy addresses the Open Internet Order's rule that network owners that hold themselves out as neutral conduits cannot block access to end users or edge providers. The analogy equates a network owner's decision to not block content with a decision not to exercise constitutional rights.²³³ For example, he argues that voters do not lose their right to vote simply because they "decide to sit out a few elections."²³⁴ His examples, however, are inapposite as the questions presented are not whether broadband providers waive their First Amendment right, but whether such a right exists and whether the Order regulates such a right. Justice Kavanaugh's opinion ignores that such fundamental distinctions exist or can be made. Instead, he assumes that cable operators are always speakers and that any decisions relating to their network involve expression.²³⁵

This approach is especially flawed because it fails to acknowledge, let alone address, the separate and conflicting opinions discussed in Part II.C.²³⁶ As explained above, the Supreme Court Justices have not been silent on this question. While the Court in *Turner* recognized that cable operators are protected by the First Amendment, the Justices have provided more guidance since *Turner* in cases more analogous to net neutrality. As a reminder, in *Denver*, four Justices believed that the First Amendment problems raised by efforts to regulate cable providers were too complex and fluid to adopt a bright line rule.²³⁷ Instead, those Justices argued for a balancing test.²³⁸ Two would have adopted a functional approach, which would have

²³² See *supra* Part IV.A.

²³³ *Telecom*, 855 F.3d at 429 (Kavanaugh, J., dissenting).

²³⁴ *Id.* While generally true, this analogy is misleading, as the Supreme Court recently upheld the purging of voter rolls based upon the failure to vote in prior elections. See *generally* *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (upholding the Ohio Secretary of State's decision to "trigger" the process for purging voters based upon a failure to vote).

²³⁵ See *supra* notes 224–31 and accompanying text.

²³⁶ See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 742 (1996); see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 992 (2005).

²³⁷ See *supra* Part II.C.

²³⁸ *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 742.

allowed Congress to impose common carrier obligations on cable companies.²³⁹ Three would have adopted an editorial approach and expressly declined to address whether an editorial approach would prohibit cable operators from being treated as common carriers.²⁴⁰ Subsequently, in *Brand X*, a unanimous Court employed a functional approach which would allow—and for three of the Justices require—cable providers to be treated as common carriers.²⁴¹ While the FCC’s 2015 position can be reconciled with these approaches, none of those positions support Justice Kavanaugh’s categorical approach, and he can cite to no authority that would.

Furthermore, Justice Kavanaugh’s analogy blurs any line between conduct and expression. Even assuming, as the FCC does, that broadband access providers can engage in speech by exercising editorial authority, that assumption does not compel the conclusion that all decisions regarding the use of the network are editorial or expressive. In other words, his waiver analogy does not acknowledge the possibility that the Order regulates how a business chooses to operate and conduct its business, as opposed to how to express itself. To use Justice Kavanaugh’s waiver analogy, the question is not whether speakers have the right to express themselves by speaking or remaining silent, but whether an individual walking down a street is marching in protest or simply walking. Similarly, a song is composed by a combination of sounds and silence. But while the rests within a song are part of the song, this silence that follows the end of the song is not. In both illustrations, the first example represents a choice regarding how to express oneself. The latter involves a choice between engaging in expression or nonexpressive conduct. Justice Kavanaugh’s analogy would have the reader believe choosing not to engage in an activity other than expression is itself expression.

The second analogy responds to the rules preventing broadband providers from “favor[ing] some content over other content when it comes to price, speech, and availability.”²⁴² To illustrate that the FCC’s approach is “half-baked,” he equates broadband providers with bookstores and newsstands.²⁴³ “If a bookstore (or Amazon) decides to carry all books, may the Government then force the bookstore

²³⁹ *Id.* at 783.

²⁴⁰ *Id.* at 816.

²⁴¹ *Brand X*, 545 U.S. at 992.

²⁴² U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 429 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (emphasis added).

²⁴³ *Id.*

(or Amazon) to feature and promote all books in the same manner?”²⁴⁴ In other words, because the First Amendment protects the right of bookstores to favor content, it provides the same protection to broadband providers. As such, it relies upon the uncontroversial position that we can and should answer unsettled questions by referencing equivalent settled questions. The analogy, however, is deceptive, as it suggests that the examples of bookstores, newsstands, and Amazon are clear and settled examples of protected expression. If Justice Kavanaugh were asked what authority supports this conclusion? “Crickets.”²⁴⁵

Justice Kavanaugh’s analogy would have the reader believe that broadband providers are not only equivalent to book sellers, but that the law is settled on whether decisions of how to carry a book, how to display books, and to determine the price of books are protected expression rather than conduct. This is simply not accurate. While the freedom to add or remove books from a collection is clearly settled First Amendment law, his other examples are not.²⁴⁶ His price example is the most glaring problem. Earlier in the same year he issued his opinion, the Supreme Court made it clear that price regulations are regulations of conduct, not speech.²⁴⁷ In *Expressions Hair Design v. Schneiderman*, the Supreme Court explained that price controls regulate conduct, not expression, because price controls regulate the amount of money that may be collected.²⁴⁸ While there may be reasons and precedent for distinguishing the price of books from other goods and services, or circumstances in which prices become part of expression, Judge Kavanaugh made no effort to do

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry.”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64–65 n.6 (1963) (“The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication.”); *Smith v. California*, 361 U.S. 147, 150 (1959) (stating that “the free publication and dissemination of books and other forms of the printed word furnish very familiar applications” of the First Amendment); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (“The right of freedom of speech and press has broad scope This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.”); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (holding that the circulation of expressive material is constitutionally protected).

²⁴⁷ *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150 (2017).

²⁴⁸ *Id.* at 1150.

so because he did not even acknowledge the possibility that he might be overplaying his hand.

While not as clear, Justice Kavanaugh's argument that the placement of books is clearly protected expression and not conduct is still misleading. While I agree with Justice Kavanaugh that, in principle, the First Amendment should provide at least some protection regarding how books may be displayed, the question is by no means settled, and certainly not settled as conclusively as he implies. In multiple cases, courts have upheld such restrictions when the asserted interest is protecting minors from being exposed to potentially offensive content.²⁴⁹ The litigation in this area focuses primarily on whether display regulations are impermissibly based upon the content of the materials being displayed rather than the discretion of the store owner.²⁵⁰ Moreover, at least one court has concluded that content-based regulations of this sort are not regulations of pure speech but regulations of conduct plus speech.²⁵¹ What authority guarantees Amazon the freedom to display books as it sees fit? Once again, "crickets."²⁵²

Even the one example that is settled adds no support for his argument. The First Amendment clearly protects a bookstore owner's right to decide what books to purchase.²⁵³ However, the acquisition of books is protected by the First Amendment because it represents a clear example of editorial discretion and, therefore, is expression.²⁵⁴ As such, this analogy merely reframes his first analogy and suffers

²⁴⁹ See generally *Upper Midwest Booksellers Ass'n v. Minneapolis*, 780 F.2d 1389 (1985) (upholding a state law requiring booksellers to place opaque covers of "adult" books or magazines or to physically segregate those materials in an "adults only" section); see also *M.S. News Co. v. Casado*, 721 F.2d 1281 (1983) (upholding the requirement of blinder racks for material harmful to minors).

²⁵⁰ *Id.* See also *State Agrees to Permanently Block Law Restricting Marijuana Magazines*, ACLU COLO. (June 10, 2013), <https://aclu-co.org/state-agrees-to-permanently-block-law-restricting-marijuana-magazines/>; see generally *Trans-High Corp. v. Colorado*, 58 F. Supp. 3d 1177 (2013) (challenging a state law that required magazines whose primary focus was marijuana to be segregated in establishments that where persons under the age of 21 would be present).

²⁵¹ *Am. Booksellers v. Webb*, 919 F.2d 1493, 1500 (11th Cir. 1990).

²⁵² *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 429 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

²⁵³ See *supra* note 245.

²⁵⁴ *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 ("The choice of material to go into a new paper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public official—whether fair or unfair—constitute the exercise of editorial control and judgment."); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1997) ("Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable

from the same logical flaw. Both analogies only work if one assumes that the First Amendment problem has already been resolved and resolved in favor of Justice Kavanaugh's categorical approach.

In addition to the two analogies, then Judge Kavanaugh offered a concession of sorts when responding to his colleagues' argument that the Order raised no First Amendment problems because the nondiscrimination rules only apply when broadband providers voluntarily decide to hold themselves out as neutral network providers.²⁵⁵ At first blush, he appears to concede that a rule against such false advertising would avoid any First Amendment problems.²⁵⁶ As such, in the language of Justice Blackmun, Kavanaugh would be "launching a missile to kill a mouse."²⁵⁷

Justice Kavanaugh's concession, however, really concedes nothing at all. Immediately, the opinion expresses doubt that the debate surrounding net neutrality could be so easily resolved.²⁵⁸ In support, he argues that the Open Internet Order establishes a rule and as such is not in fact voluntary.²⁵⁹ What would be voluntary? According to Kavanaugh, "a supposed 'rule' that actually imposes no mandates or prohibitions and need not be followed would not raise a First Amendment issue."²⁶⁰ To the extent that this statement suggests that broadband providers must be free to ignore nondiscrimination rules whenever they see fit, his definition of voluntary is breathtaking. It implies that voluntary compliance is the only acceptable means of imposing net neutrality or any form of nondiscrimination.²⁶¹

Of course, this understanding of voluntary is at odds with the Order and the opinions of the original panel and concurring judges. To be clear, those opinions did

programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.')

²⁵⁵ *Telecom*, 855 F.3d at 392.

²⁵⁶ *Id.* at 430 n.8 (Kavanaugh, J., dissenting).

²⁵⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

²⁵⁸ *Telecom*, 855 F.3d at 430 n.8 (Kavanaugh, J., dissenting).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ This approach is not entirely without precedent. See *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004) (concluding that Congressional efforts to prevent children from being unwillingly exposed to pornographic content online were unconstitutional because parents could choose to install content filtering programs instead); see also *id.* at 684 (Breyer, J., dissenting) ("It is always less restrictive to do *nothing* than to do *something*.").

not suggest that compliance with the Order was voluntary.²⁶² Rather, broadband access providers may voluntarily choose what business model to adopt and whether they will exercise editorial control over their networks.²⁶³ If they decide to act as a neutral conduit, they would be subject to the mandates and prohibitions of the nondiscrimination rules. Presumably, broadband providers would be free to change that decision prospectively and become exempt from those rules. Either way, providers would be complying with the Order. Nonetheless, in the absence of a formal and explicit change of policy, providers holding themselves out as neutral conduits would be prohibited from blocking, throttling, engaging paid prioritization, and otherwise engaging in unreasonable interference.²⁶⁴

Under these circumstances, Justice Kavanaugh is falsely equating what net neutrality represents with how the 2015 FCC decided to implement the nondiscrimination rules. It is not surprising that much of the scholarly debate surrounding net neutrality presented the First Amendment question as whether government may limit the editorial discretion of ISPs.²⁶⁵ In other words, could Congress, the FCC, or state and local governments impose common carrier obligations on all ISPs? A direct constitutional confrontation of this sort is fun, sexy, and garners the attention of law review editors, and as Justice Kavanaugh recognized, would lead almost immediately to the Supreme Court's decisions in *Turner*. And, if all broadband access providers or, worse, edge providers were required to comply with the nondiscrimination rules set forth in the Order, First Amendment issues would loom large indeed. But that was not the question raised by the Order and *U.S. Telecom*.

It was crystal clear that the FCC did not require all ISPs to become common carriers.²⁶⁶ Instead, it only subjected nondiscrimination duties on broadband access providers that practically held themselves out as common carriers. As the following demonstrates, this approach is consistent with the long history of common carriage in general and the treatment of communication carriers in particular. Moreover, Part IV.D. argues that it is highly unlikely that Justice Kavanaugh was fighting the wrong

²⁶² See *Telecom*, 855 F.3d at 390 (Srinivasan, J. & Tatel, J., concurring).

²⁶³ *Id.*

²⁶⁴ Open Internet Order, *supra* note 1, ¶¶ 104–09.

²⁶⁵ See *supra* note 171.

²⁶⁶ See *supra* Part III.B.

fight. Instead, it is more likely that he was fighting a different fight with even greater implications than the battle over net neutrality.

C. *A Chapter of History*

If, “a page of history is worth of volume of logic,” as Justice Holmes once suggested, how valuable is a chapter of history?²⁶⁷ The Order regulated broadband providers as common carriers, not speakers.²⁶⁸ While this distinction may be esoteric, it is critical to understanding why the Order does not violate the First Amendment. Despite Justice Kavanaugh’s argument that the FCC’s “use it or lose it” theory is wholly foreign to the First Amendment, the FCC’s approach is consistent with the history of common carriage in general, and communications common carriers in particular.

It is impossible to discuss access to media without running across one particular quote from Benjamin Franklin. The quote goes like this: a newspaper is not “like a stagecoach, in which anyone who would pay had a right to a place.”²⁶⁹ This quote is used to support the position that media, in this case newspapers, should not be treated as common carriers, like stagecoaches. Instead editors, like Franklin, believed that they should be free to exercise their editorial judgment to determine what should and should not be printed on the pages of their papers. Of course, this is the argument made by Justice Kavanaugh and other opponents of net neutrality. Not surprisingly, Franklin’s views on speech and nondiscrimination are much more complicated and nuanced.

Not only was Franklin a newspaper editor and publisher, he was also a printer. As is often true with quotes—especially snippets—context matters. The quote comes from a discussion in which Franklin describes his practice of excluding “libeling and personal abuse” from the pages of his newspaper.²⁷⁰ He writes:

Whenever I was solicited to insert anything of that kind, and the writers pleaded, as they generally did, the liberty of the press, and that a newspaper was like a stagecoach, in which anyone who would pay had a right to a place, my answer was, that I would print the piece separately if desired, and the author might have

²⁶⁷ N.Y. Trust Co. v. Eisner, 41 S. Ct. 506, 507 (1921).

²⁶⁸ See Open Internet Order, *supra* note 1, ¶¶ 48–50.

²⁶⁹ BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 119 (Houghton, Mifflin Co., 1886).

²⁷⁰ *Id.*

as many copies as he pleased to distribute himself, but that I would not take upon me to spread his detraction; and that, having contracted with my subscribers to furnish them with what might be either useful or entertaining, I could not fill their papers with private altercation, in which they had no concern, without doing them manifest injustice.²⁷¹

So yes, Franklin the newspaper editor believed the newspaper publisher had the right, in fact a duty, to reject these letters. However, Franklin the printer believed that the authors had a right to be published by his printing presses (as long as they paid).²⁷² As such, Franklin subscribed to a functional approach to speech. His printing presses were used for two separate and distinct purposes and each purpose was subject to its own rights and obligations. His presses would print his newspaper which was closed to the public, and those same presses would print the writings of anyone willing to pay. If Benjamin Franklin provided broadband services, he would likely argue that he had the right to determine what appeared on his webpage, blog, vlog, tweet, or snap, but his network would have been open to all. This approach would protect his freedom of speech and give others the ability to engage in speech as well.

But why would stagecoaches have to be open to the public? The common law tradition in England and the United States recognized that certain businesses were subject to what were described as public service duties.²⁷³ In their simplest form, these special duties were placed on professionals that offered their services to the public.²⁷⁴ According to Charles Burdick, these duties included serving all that asked for their services with a promise that they were capable of providing those services.²⁷⁵ Originally, these duties applied to “anyone who held himself out to service all who might apply,”²⁷⁶ including innkeepers, bargemaster, farriers, tailors, workmen, mail carriers, and surgeons.²⁷⁷ Having opened themselves up to the public,

²⁷¹ *Id.*

²⁷² I do not mean to imply or suggest that printers are common carriers, only that Franklin stated that he would print such letters.

²⁷³ See generally Charles K. Burdick, *Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514 (1911).

²⁷⁴ Crawford, *supra* note 172, at 2365–66.

²⁷⁵ Burdick, *supra* note 273, at 518.

²⁷⁶ *Id.* at 522.

²⁷⁷ *Id.* at 518–19.

these businesses assumed a responsibility to serve the public and to do so competently. As societies grew, the list of these professions dwindled to common carriers which originated with innkeepers and ferryman.²⁷⁸ The list of common carriers, however, did not remain limited to those specific businesses but expanded to “any Man undertaking for Hire to carry the Goods of all Persons indifferently.”²⁷⁹

As goods, packages, and letters were transformed into electrical signals, the telegraph and the telephone were added to the list of common carriers. As Susan Crawford writes:

[T]he idea of “common carriage” persisted, both in public consciousness and in the regulation of telegraph and telephone companies as general-purpose, networked industries akin to transportation (but now carrying communications from place to place instead of goods). We continue to understand that these medieval concepts of nondiscrimination and public access are relevant.²⁸⁰

As carriers of data, it should come as no surprise that broadcasters, cable operators, wireless carriers, and Internet access providers should face the same questions. Can they be treated as common carriers? If the name and the historical origins of the duties are a guide, the answer should turn on whether these businesses hold themselves out as open to the public. And, of course, this is the position adopted in the Order.

One might be tempted to argue that the post office, telegraph, and telephone are easily distinguishable because who would ever argue that they could be considered speakers? At one point, all three could have been considered speakers. In his seminal work, *Technologies of Freedom*, Ithiel de Sola Pool examined the complex relationship between communications technology and freedom.²⁸¹ One might take it for granted that mail carriers, telegraph operators, and telephone providers were always neutral conduits and readily analogous to ferrymen. Pool’s work demonstrates that this was not always the case. Like broadband access providers, the post office and telegraph were originally used to deliver content chosen by the

²⁷⁸ *Id.* at 524.

²⁷⁹ *Id.*

²⁸⁰ Crawford, *supra* note 172, at 2368.

²⁸¹ See generally ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM: ON FREE SPEECH IN AN ELECTRONIC AGE* (Harvard Univ. Press, 1983).

operators, and the telephone companies refused to connect to other telephone companies.²⁸²

As Pool details, the post office and telegraph were originally used to favor particular content. Commercial mail delivery was not a simple or profitable enterprise.²⁸³ In its infancy, mail delivery was for government use.²⁸⁴ As its coverage expanded, it was often an add-on to another business.²⁸⁵ Newspapers were one of these businesses.²⁸⁶ In the colonies and the new republic, postmasters were often also newspaper publishers.²⁸⁷ Before the First Amendment was adopted the postmasters obtained their jobs through political patronage, and the “government was pleased to have him publish a paper.”²⁸⁸ In some cases, like that of the Nation’s first postmaster general, Benjamin Franklin, he was already a publisher. According to Pool, the publisher-postmasters used their power to “discriminate against competing papers. Postmasters did not charge themselves for carrying their own papers.”²⁸⁹

Likewise, the phrase “wire service” comes from the fact that newspapers and telegraph operators saw the potential of the telegraph for delivering reports to newspapers more quickly across longer distances.²⁹⁰ As Pool describes, this led to major battles between fledgling news services like the Associated Press (“AP”) and incumbent telegraph operators who refused to carry AP reports in order to favor their own reporting services.²⁹¹ Eventually, the AP entered into an exclusive contract with Western Union which agreed to give its stories priority.²⁹² Likewise, telephone companies initially refused to connect to competing networks.²⁹³

²⁸² *Id.* at 75–107.

²⁸³ *Id.* at 75.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 75–76.

²⁸⁸ *Id.* at 75.

²⁸⁹ *Id.* at 76.

²⁹⁰ *Id.* at 92.

²⁹¹ *Id.* at 92–94.

²⁹² *Id.* at 95.

²⁹³ *Id.* at 101–02.

Despite these efforts to exercise editorial authority over the means of delivering expression, eventually, the mail and telegraph—and subsequently the telephone as the successor to the telegraph—became common carriers without any First Amendment objections.²⁹⁴ As Pool notes, “[i]n decisions about common carriers the First Amendment has simply disappeared.”²⁹⁵ If Justice Kavanaugh’s interpretation of speech is accepted, it would mean that mail and package deliverers, telegraph operators, and telephone operators would all be speakers and exempt from common carrier obligations. After all, under his approach the post office or Federal Express speak when they choose not to exercise their authority to refuse to carry certain letters or packages, and not simply when they deliver their own mail. Likewise, Ben Franklin’s speech was not limited to the content of his newspaper, but extended to how his printing presses were used. Not only does Justice Kavanaugh’s approach find no support in history, it threatens to radically overturn centuries of historic precedent and reshape the entire communications landscape. However, this may be exactly what he intends.

D. *Lochner Resurgent*

If Justice Kavanaugh’s target is not a mouse, than what is his salvo targeting? His objection to net neutrality represents an approach that would return to the Supreme Court the authority to void economic regulations. As Susan Crawford recognized, “the extreme logical endpoint of the providers’ First Amendment claims would be to constitutionalize all oversight of their activities when it comes to controlling, charging for, or editing the information moving over their networks.”²⁹⁶ In other words, the argument that net neutrality, especially as implemented by the Order, violates the First Amendment would result in a return to the era of *Lochner v. New York*.²⁹⁷ Only this time, freedom of speech, rather than freedom of contract, is the vehicle for imposing the Justice’s disputed view of economic theory and policy.

In the Supreme Court’s First Amendment jurisprudence, the specter of *Lochner* has been rising for some time. One can trace the origins of this back to the Court’s opposition to campaign finance reform beginning with *Buckley v. Valeo* in which it

²⁹⁴ *Id.* at 105.

²⁹⁵ *Id.*

²⁹⁶ Crawford, *supra* note 172, at 2389.

²⁹⁷ *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting)).

concluded that the campaign donations and expenditures were protected speech.²⁹⁸ It was applied more recently in the controversial decision *Citizens United v. Federal Elections Commission* in which the conservative majority of the Court concluded the corporate expenditures were also protected speech.²⁹⁹ Beyond campaign finance reform, the conservative majority used the First Amendment to strike down privacy legislation in *Sorrell v. IMS Health, Inc.*, deciding that the sale of prescription data was protected expression.³⁰⁰ In *Expression Hair Design v. Schneiderman*, the Court concluded that the First Amendment protected a business that wished to impose credit card surcharges.³⁰¹ And, just this last term, a majority of the Court signaled quite clearly in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, that the First Amendment's speech and religion clauses protected a baker's right to refuse to bake a wedding cake for a gay couple even when state law prohibited discrimination in businesses serving the public.³⁰²

Seen in isolation, Justice Kavanaugh's opinion, especially his response to his colleagues, Judges Srinivasan and Tatel, would appear to be out of place and unresponsive. However, Kavanaugh's opinion fits perfectly into the new *Lochner*. As such, net neutrality is simply one battle in a concerted effort to redefine economic conduct into protected expression and, as such, to use the First Amendment to impose a *laissez faire* agenda. Thus, the argument arises that net neutrality is unconstitutional, even when nondiscrimination rules are based upon the providers' choice, because broadband providers should always be free to discriminate.

V. CONCLUSION

There is certainly a sense of irony in that one of the most significant First Amendment issues in the 21st century, the regulation of the vast digital networks of the Internet, should be determined by a rule developed in the Middle Ages. Sometimes a page of history is really worth more than a volume of logic. However, the FCC's decision to apply common carrier obligations on broadband service providers when those providers voluntarily present themselves as neutral conduits to the public, is supported by more than history. To quote Justice Holmes, it would be

²⁹⁸ *Buckley v. Valeo*, 424 U.S. 1, 17–23 (1976).

²⁹⁹ *Citizens United v. FEC*, 558 U.S. 310, 362 (2010).

³⁰⁰ *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011).

³⁰¹ *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).

³⁰² *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.³⁰³

Net neutrality is not such an example. The principle of nondiscrimination has been a cornerstone of communication regulation since the establishment of the post office. It guarantees that those who own and operate channels of communication may use those channels to deliver their own expression. At the same time, these policies guarantee the public access to those very same channels to deliver their speech as well.

³⁰³ Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897).