Free Speech and the Myth of the Internet as an Unintermediated Experience

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Introduction

When the Internet first emerged, many commentators hailed its potential to enable individuals to speak directly to mass audiences without having to rely on gatekeepers that had long determined the substance of media content.[1] The language of the Supreme Court's landmark decision in *Reno v. ACLU*[2] echoed similar themes when it lauded how the Internet enables "any person with a phone line" to become a "pamphleteer" or a "town crier with a voice that resonates farther than it could from any soapbox."[3] Other commentators were less optimistic, arguing that regulation might be needed to guarantee that the Internet represented an unintermediated experience in which speakers could communicate directly with audiences.[4]

In recent years, concerns about the role of Internet intermediaries have continued to grow. The debate initially focused on last-mile broadband providers' abilities to favor certain content or applications either by giving them different levels of higher priority or by

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1 The classic statement is Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1834–38 (1995). For other similar observations, see, e.g., Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 Nw. U. L. REV. 1083, 1130–31 (1999); Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1670–73 (1998); Eli M. Noam, *Media Concentration in the United States: Industry Trends and Regulatory Responses* (1996), http://www.vii.org/papers/medconc.htm.

2 Reno v. ACLU, 521 U.S. 844 (1997).

3 *Id.* at 870.

4 *See, e.g.*, Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1628–29, 1636–37 (1995).

charging them different amounts.[5] The issue came to a head in 2008 when the Federal Communications Commission ("FCC") sanctioned Comcast for slowing down the traffic associated with a single application, only to see that decision overturned on judicial review.[6] Commentators have also warned of search engines' abilities to influence the speech environment by skewing search results.[7] Other commentators have called for mandating open access to key file-sharing and social networking technologies, such as YouTube, BitTorrent, Facebook, and MySpace.[8] Most recently, controversy has arisen over access to key device technologies, as demonstrated by the decision of the FCC to open an investigation into Apple's decision not to carry certain voice applications developed by Google.[9] Still other commentators have focused not on these intermediaries' abilities to shape Internet speech in accordance with their own views, but rather on the government's ability to impose regulation of intermediaries as an indirect means for imposing its own speech preferences.[10] Newspaper accounts constantly raise concerns about the manner in which in-

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5 The initial debate focused on multiple internet service provider ("ISP") access to cable modem systems. *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 (2001). More recently, the debate has been framed in terms of network neutrality. *See Network Neutrality: Hearing Before the S. Comm. on Commerce, Science & Transportation*, 109th Cong. (2006) (statement of Professor Lawrence Lessig), *available at* http://commerce.senate.gov/pdf/lessig-020706.pdf; Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003).

6 Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Memorandum Opinion and Order, 23 F.C.C.R. 13028 (2008), *vacated sub nom.* Comcast Corp. v. FCC, No. 08-1291, 2010 WL 1286658 (D.C. Cir. Apr. 6, 2010).

7 *See* Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1161–79 (2008); Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095 (2007); Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 26 U. DAYTON L. REV. 179 (2001).

8 *See* Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 936–37 (2008); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 996–1002 (2008).

9 *See* Reed Abelson, *F.C.C. Looking into Rejection of Google App for iPhone*, N.Y. TIMES, Aug. 1, 2009, at B5.

10 *See* Michael D. Birnhack & Niva Elkin-Koren, *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, 8 VA. J.L. & TECH. 6 (2003), http://www.vjolt.net/vol8/issue2/v8i2_a06-Birnhack-Elkin-Koren.pdf; Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006); Felix Wu, *Collateral Censorship and the Limits of Intermediary Immunity* (on file with author) (paper presented at 2009 Intellectual Property Scholars Conference, Aug. 7, 2009).

termediaries such as Comcast, Google, Facebook, and Apple select and prioritize content and applications.[11]

Note that these claims reflect a deep internal inconsistency. Sometimes the network provider is the actor charged with wielding its market power in a manner that harms the hapless device and application providers. In other cases, it is the device manufacturer that is accused of abusing its dominance, while in still other cases it is the application provider (particularly search engines and social networking software). Simply put, these claims cannot be advanced simultaneously in a coherent manner. If, in fact, more than one level of this chain of distribution is dominated by a single player, the economics of "double marginalization" suggests that consumers would be better off if both were controlled by a single entity.[12]

Although the discussion initially focused on the impact that intermediation would have on economic considerations, such as competition and innovation, more recently scholars have begun framing their arguments against intermediation in terms of the First Amendment,[13] although not in a literal sense. Under current law, the First Amendment only restricts the actions of state actors and does not restrict the actions of private actors.[14] Thus, under the conventional understanding of the First Amendment, it is governmental attempts to restrict private actors' freedom of speech that would be constitutionally problematic. Scholars have long advanced theories that would transform the First Amendment from a negative limitation on government action into an affirmative obligation on the government to provide the means for the meaningful exercise of free speech rights.[15] Although

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11 *See, e.g.*, Saul Hansell, *F.C.C. Vote Sets Precedent on Unfettered Web Usage*, N.Y. TIMES, Aug. 2, 2008, at C1; Joe Nocera, *Stuck in Google's Doghouse*, N.Y. TIMES, Sept. 13, 2008, at C1; Jeffrey Rosen, *Google's Gatekeepers*, N.Y. TIMES MAG., Nov. 30, 2008, at 50; Jenna Wortham, *Even Google Is Blocked with Apps for iPhone*, N.Y. TIMES, July 29, 2009, at B1.

12 *See* Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 192–93, 260–61 (2002).

13 *See, e.g.*, DAWN C. NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE (2009); Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 428–33 (2009); Bracha & Pasquale, *supra* note 7, at 1188–1201; Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103, 112–19 (2006); Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 I/S: J.L. & POL'Y FOR INFO. SOC'Y 197, 202–10 (2007); Hannibal Travis, *Of Blogs, eBooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1564–81 (2007); Moran Yemini, *Mandated Network Neutrality and the First Amendment: Lessons from* Turner *and a New Approach*, 13 VA. J.L. & TECH. 1 (2008), http://www.vjolt.net/vol13/issue1/v13i1_a1-Yemini.pdf.

14 *See* NUNZIATO, *supra* note 13, at 35–39; Balkin, *supra* note 13, at 429–30.

15 For the seminal statement of this position, see Jerome A. Barron, *Access to the Press—*

the Supreme Court briefly entertained the possibility that broadcasters and common carriers might be state actors for purposes of the First Amendment,[16] the Court's later decisions squarely foreclosed this possibility.[17] Despite the best efforts of some advocates to expand the scope of the First Amendment, it remains a limit on governmental action that does not reach private action. As a result, invoking the First Amendment as requiring governmental intervention to redress private power would stand the First Amendment on its head.

Instead, these commentators are more properly regarded as offering policy arguments that are informed by the free speech values embodied in the Court's First Amendment jurisprudence.

As a general matter, proponents of regulating intermediaries contend that the speech interests of those seeking to transmit their content and applications through the network are the ones that matter.[18]

A New First Amendment Right, 80 HARV. L. REV. 1641 (1967). *See also* OWEN M. FISS, LIBERALISM DIVIDED 15–18 (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 44–45 (paperback ed. 1995). For proposals to apply this reasoning to the Internet, see LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 164–68 (1999); NUNZIATO, *supra* note 13, at 41–69; Herman, *supra* note 13, at 112.

16 *See* Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952) (holding that the fact that a street railway operated under the supervision of a public utility commission was sufficient state action to subject the railway's decision to play radio programming to First Amendment scrutiny). In a subsequent decision, the Court split 4–2 on whether broadcasters were state actors. *Compare* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 115–21 (1973) (plurality opinion) (concluding that broadcasters are not state actors), *and id.* at 133–41 (Stewart, J., concurring in part) (same), *and id.* at 150 (Douglas, J., concurring in the judgment) (same), *with id.* at 172–81 (Brennan, J., joined by Marshall, J., dissenting). Three Justices declined to reach the issue. *See id.* at 146–47 (White, J., concurring in part); *id.* at 148 (Blackmun, J., joined by Powell, J., concurring in part).

17 *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 352–53 (1974) (holding that rendering utility services is not sufficient to constitute state action). *See generally* Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 334 (2003). For decisions holding that ISPs are not state actors, see Green v. Am. Online (AOL), 318 F.3d 465, 472 (3d Cir. 2003); Howard v. Am. Online, Inc., 208 F.3d 741, 754 (9th Cir. 2000); Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 546 (E.D. Va. 2003); Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 443–44 (E.D. Pa. 1996). For decisions holding that search engines are not state actors, see Langdon v. Google, Inc., 474 F. Supp. 2d 622, 631–32 (D. Del. 2007). For a decision holding that Yahoo! e-mail groups are not state actors, see Murawski v. Pataki, 514 F. Supp. 2d 577, 588 (S.D.N.Y. 2007). Another court notes: "Because these Internet providers are not state actors, they are free to impose content-based restrictions on access to the Internet without implicating the First Amendment." Sanger v. Reno, 966 F. Supp. 151, 163 (E.D.N.Y. 1997).

18 *See* Bracha & Pasquale, *supra* note 7, at 1200; Herman, *supra* note 13, at 113; Travis, *supra* note 13, at 1577; *Ex parte* Letter from Timothy Wu, Assoc. Professor, Univ. of Va. Sch. of Law, and Lawrence Lessig, Professor of Law, Stanford Law Sch., to Marlene H. Dortch, Sec'y, FCC 9–10 (Aug. 22, 2003), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=6514683884 (Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Declar-

Such an approach might have been appropriate for person-to-person communications, as was the case with telephony and the applications that dominated the early Internet, such as e-mail or file transfers. When that is the case, these proponents argue that the only free speech interests at play are those of the end users, not the network providers.[19] As we shall see, the extent to which common carriers possess First Amendment rights is more uncertain than is generally recognized.[20] More importantly for our purposes, the modern Internet is no longer simply a medium for person-to-person communications. It is now perhaps the dominant platform for mass communications. Mass-media speech implicates a broader range of free speech values that include interests of audiences and intermediaries, as well as speakers.

In determining how to balance this more complex array of values, we can take guidance from a body of knowledge that has not yet been fully explored in the literature: the Supreme Court's decisions applying the First Amendment to mass media, particularly those addressing the leading historical forms of electronic communication (broadcasting and cable television). These precedents have long recognized that the editorial discretion that intermediaries exercise promotes important free speech values by helping shield audiences from unwanted speech and by helping them identify and access desired content. With respect to the Internet, intermediaries help protect end users from exposure to spam, pornography, and viruses and other forms of malware, while helping them sift through the ever-growing avalanche of desired content that appears on the Internet every day.[21] Thus, courts have recognized that the editorial discretion exercised by search engines and network providers implicates important free speech values.[22] Indeed, unless one expects all end users to crawl the

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atory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798 (2002), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514683884.

19 For commentary employing this logic to conclude that telephony does not implicate the First Amendment, see, e.g., HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW § 2.3(A)(3), at 185–89 (1999); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 42 n.144 (1976); Daniel Brenner, *Telephone Company Entry into Video Services: A First Amendment Analysis*, 67 NOTRE DAME L. REV. 97, 125 (1991).

20 *See infra* Part II.D.

21 *See* Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188, 195–96 (2006), http://www.yjolt.org/files/goldman-8-YJOLT-188.pdf; James Grimmelmann, *The Google Dilemma*, 53 N.Y.L. SCH. L. REV. 939, 941 (2008–2009).

22 *See Langdon*, 474 F. Supp. 2d at 629–30 (search engine); Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685, 693–94 (S.D. Fla. 2000) (cable modem provider).

entire web themselves every day, even critics of intermediation have recognized that it can be beneficial and may be inevitable.[23]

In short, the image of the Internet as an unintermediated experience, in which speakers speak directly to audiences without passing through any gatekeepers, is more myth than reality. The real question is not whether *some* actor, but rather *which* actor, will serve as the intermediary. The Supreme Court's First Amendment jurisprudence underscores that important free speech considerations fall on both sides of the debate over intermediation.[24] Moreover, in terms of deciding how that balance should be struck, the cases indicate that free speech considerations favor preserving intermediaries' editorial discretion unless the relevant technologies fall within a narrow range of exceptions, all of which the Court has found to be inapplicable to the Internet. Indeed, Supreme Court precedent recognizes the importance of this editorial discretion even when intermediaries are simply serving as the conduit for the speech of others.[25] Moreover, the Court has long held that the fact that an intermediary may wield monopoly power[26] and the danger that intermediaries may act as private censors[27] do not justify regulating their editorial discretion. That would substitute government decisionmaking for private decisionmaking, and although Supreme Court precedent and our free speech traditions are agnostic as to which private actor should serve as the intermediary, they are very clear that it should not be the government, and when choosing between censorship by a private actor and the government, the choice should always favor the former over the latter.[28]

The balance of this Article proceeds as follows: Part I discusses the inevitability of intermediation, both in terms of protecting end users from exposure to unwanted content and in helping them identify and obtain access to desirable content. It also analyzes the manner in

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23 *See* Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 HOFSTRA L. REV. 1211, 1220–23 (2007); Kreimer, *supra* note 10, at 17; Amit M. Schejter & Moran Yemini, *"Justice, and Only Justice, You Shall Pursue": Network Neutrality, the First Amendment and John Rawls's Theory of Justice*, 14 MICH. TELECOMM. & TECH. L. REV. 137, 167 (2007); Neil Weinstock Netanel, *New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 968–69 (2008); Yemeni, *supra* note 13, at 17–20.

24 *See* Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 226–27 (1997) (Breyer, J., concurring in part).

25 *See infra* notes 106, 166, 249, 260, 262, 265 and accompanying text.

26 *See infra* notes 107, 124, 279 and accompanying text.

27 *See infra* notes 96, 99–102, 108, 112, 125, 146–49, 168, 261 and accompanying text.

28 *See, e.g.*, CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124–26 (1973); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 327 (1994).

which intermediaries may be essential to solving certain bargaining problems that may prevent end users from obtaining access to the content they desire. Part II analyzes the judicial precedents recognizing the important free speech values promoted by intermediaries' exercises of editorial discretion, including the Supreme Court's decisions regarding newspapers, broadcasting, and cable television. It also examines lower court decisions on dial-a-porn and on telephone companies' First Amendment rights to offer video programming to explore how editorial discretion can promote free speech values even when exercised by common carriers such as telephone companies. Part III reviews the inauspicious history of past attempts to regulate the editorial discretion wielded by electronic intermediaries. Together, these insights underscore how Internet intermediaries' exercises of editorial discretion can foster rather than impede free speech values.

I. The Benefits and Inevitability of Intermediation

When the Internet first arose, it served primarily as a medium for person-to-person communications, such as e-mail and file transfers. Although some forms of mass communications did exist on the early Internet (such as newsgroups and electronic bulletin boards), they represented a relatively small proportion of overall Internet traffic.

The nature of the Internet underwent a fundamental change during the mid-1990s. The privatization of the Internet backbone and the concomitant elimination of the commercialization restrictions triggered an explosion of mass-media web content.

The emergence of the Internet as an important medium for mass communications effected an equally important shift in the importance of Internet intermediaries, both in terms of helping end users filter out bad content and in helping them identify and obtain access to good content. In addition, the literature on the economics of intermediation underscores how intermediaries can play key roles in helping end users obtain access to the content they desire. Together, these insights demonstrate that intermediation should not be regarded as a necessary evil, as some commentators have suggested. On the contrary, intermediation can play a key role in helping end users obtain access to the content and applications they desire.

A. Controlling Unwanted Content

The emergence of the Internet as an important source of mass-media content has led end users to look to intermediaries to help insulate them against unwanted content (such as spam, malware, and por-

nography) and unwanted attacks (such as viruses, Trojan horses, and other forms of malware). By the late 1990s, such intermediation was generally performed by firewall and filtering software installed on the desktop computers through which end users connected to the Internet.[29] Many commentators lauded edge-based filtering as the best way of ensuring that control over content remained in the hands of end users.[30] Concentrating the intelligence in applications operating at the edge of the network was also consistent with the end-to-end argument and the layers principles that many commentators regard as an essential part of the Internet's architecture.[31]

Other commentators took a less sanguine view of edge-based filtering. Some raised the concern that the introduction of filtering technologies would inadvertently prevent end users from obtaining access to benign content and would give the software companies that create and update the filtering software gatekeeper control over what speech end users could receive.[32] Others observed that widespread deployment of filtering technologies by end users can facilitate government control of content.[33] Still others warned that widescale deployment of edge-based filtering would also have the unintended side effect of skewing innovation.[34]

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29 *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 877 (1997); *see also* Ashcroft v. ACLU, 542 U.S. 656, 667 (2004) (offering a more recent reaffirmation of the edge-based vision of filtering).

30 *See, e.g.*, Berman & Weitzner, *supra* note 4, at 1632–35; *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1641 (1999); PICS, Censorship, & Intellectual Freedom FAQ (Paul Resnick, ed.), http://www.w3.org/PICS/PICS-FAQ-980126.html (last modified Aug. 4, 1999).

31 On edge-based filtering's consistency with the end-to-end argument, see, e.g., Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629, 660 (1998). On edge-based filtering's consistency with a layered architecture, see, e.g., Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 892–94 (2004).

32 *See, e.g.*, J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1145–47, 1152–53 (1996); Lessig, *supra* note 31, at 652–70; Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395, 424–26 (1999); Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215 (2000); R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755 (1999); Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453 (1997); ELEC. PRIVACY INFO. CTR., FAULTY FILTERS: HOW CONTENT FILTERS BLOCK ACCESS TO KID-FRIENDLY INFORMATION ON THE INTERNET (1997), http://epic.org/reports/filter_report.html.

33 *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1227 (1998); Tim Wu, *Cyberspace Sovereignty?—The Internet and the International System*, 10 HARV. J.L. & TECH. 647, 654 (1997); Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653, 688 (2003).

34 *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A

Over time, many firewall and filtering functions have begun to migrate from the edge of the network into the network itself. Many last-mile network providers include proprietary antivirus and firewall protection as part of the software needed to access their system. Network providers have also begun building spam and malware filters into the core of their networks.

The shift of these filtering functions away from the end user into the network itself is driven in part by the change in the nature of Internet users. When it first arose, the Internet served primarily as a means for connecting university-based technologists who shared a common set of values and enjoyed a fairly high degree of technical sophistication and institutional support. Since that time, the Internet has evolved into a mass-market technology. The shift to a user base dominated by nonexperts without any technical support strengthened the case for transferring more of those functions into the network itself.[35]

Another consideration is cost. Requiring that all filtering occur at the edge means that the network must bear the full cost of delivering content even if it is unwanted. Screening out undesired content at the earliest possible moment minimizes the consumption of network resources. In addition, a filter operating in the core of the network may be able to take advantage of aggregate information that is unavailable to individual users.[36] End-user filters are also more expensive to deploy and maintain, since deploying them requires thousands of installations and a continuous series of security updates.

Finally, the prevalence of Trojan horses, spyware, key loggers, and other forms of hostile code have made end users increasingly distrustful of their own computers.[37] Although one solution is to attempt to reclaim control of the end node by making it more secure, an alternative solution is to reduce the vulnerability of the end node by out-

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CONNECTED WORLD 172–74 (2001); JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET (AND HOW TO STOP IT) 36–61, 101–26 (2008).

35 *See* Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition?: A Comment on the End-to-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 23, 35 (2004); *see also* Marjory S. Blumenthal & David D. Clark, *Rethinking the Design of the Internet: The End-to-End Arguments vs. the Brave New World*, 1 ACM TRANSACTIONS ON INTERNET TECH. 70, 74 (2001), *reprinted in* COMMUNICATIONS POLICY IN TRANSITION: THE INTERNET AND BEYOND 91, 95–96 (Benjamin M. Compaine & Shane Greenstein eds., 2001).

36 *See* David D. Clark & Marjory S. Blumenthal, The End-to-End Argument and Application Design: The Role of Trust 5, 24 (Aug. 2007) (unpublished manuscript, presented at the 35th Annual Telecommunications Policy Research Conference), *available at* http://web.si.umich.edu/tprc/papers/2007/748/End%202%20end%20and%20trust%2010%20final%20TPRC.pdf.

37 *Id.* at 16.

sourcing security functions to servers located in the core of the network.[38]

Leading technologists generally recognize that the Internet's current design is not well suited to addressing problems of security.[39] As a recent article in *The New York Times* reports, the increasing need for network security has led many technologists to suggest that the Internet must be redesigned in a way that makes level security and identity verification more central features of the network.[40] For example, the National Science Foundation is sponsoring the Global Environment for Network Innovations (GENI) and Future Internet Design (FIND) initiatives to create a new architecture that makes security a more integral part of the network.[41] The 100x100 Clean Slate Project and Northwestern's International Center for Advanced Internet Research are pursuing similar goals.[42]

My point here is not to resolve whether such functions are better performed by computers operating at the edge of the network or within the network itself. Whether network-based or end-user-based intermediation will ultimately prove the better solution is most likely a question that cannot be answered a priori. Considerations such as deployment costs and scale economies vary over time, which increases the likelihood that the optimal locus of screening out unwanted content will vary from context to context. In addition, the advent of new technologies, such as video and audio fingerprinting, may cause the least-cost locus to shift toward the core of the network over time.[43] Moreover, the Internet is comprised of an increasingly diverse range of network technologies, and the intensity of demand varies widely in different portions of the network. The decision between the two approaches also depends on the heterogeneity of what end users regard as unwanted content. Network-based solutions are more likely to be

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38 *Id.* at 16–17.

39 *See, e.g.*, Jon M. Peha, *The Benefits and Risks of Mandating Network Neutrality, and the Quest for a Balanced Policy*, 1 INT'L J. COMM. 644, 659 (2007), http://ijoc.org/ojs/index.php/ijoc/article/view/154/90.

40 John Markoff, *A New Internet?*, N.Y. TIMES, Feb. 15, 2009, at A9.

41 *See* Global Environment for Network Innovations, http://www.geni.net (last visited Mar. 31, 2010); National Science Foundation, NeTS FIND Initiative, http://www.nets-find.net (last visited Mar. 31, 2010).

42 *See* 100x100 Clean Slate Project, Mission, http://100x100network.org/mission.html (last visited Mar. 31, 2010); Northwestern University Information Technology, iCAIR: International Center for Advanced Internet Research, http://www.icair.org (last visited Mar. 31, 2010).

43 Justin Hughes, *Copyright Enforcement on the Internet—in Three Acts* 41, 45–47, 62 (Univ. of Hokkaido Workshop Working Paper, 2009), *available at* http://www.juris.hokudai.ac.jp/gcoe/article/hughes_4Mar2009.pdf.

effective with respect to content like spam, from which almost all users would like to be shielded. At the same time, network-based solutions may allow less customization by individual users. As the proportion of end users who may want access to a particular type of content increases, the balance tends to favor an end-user-based over a network-based solution. Indeed, if what end users want is sufficiently heterogeneous, a nonuniform solution may result, in which the particular solution would vary from provider to provider.

My point is more limited. As the existence of controversies over gatekeeper control even when filters were end-user-based reveals, intermediaries will exist regardless of whether filtering technology is placed at the edge of the network or in its core. Indeed, the migration of filtering technologies into the network simply represents a shift in the locus of intermediation, not the rise of intermediation where previously there was none.

B. Identifying Good Content

Equally importantly, intermediaries help end users locate and obtain access to content they find desirable. The privatization of the Internet and the development of the World Wide Web have transformed the Internet into a vast and vibrant source of media content whose magnitude grows ever more vast with every passing day. The broad-scale deployment of applications associated with Web 2.0, which turn end users into important generators of content as well as consumers of content, should dramatically increase both the volume of content available and the variability of its quality.

End users are unable to sift through the avalanche of new and existing content that appears on the Internet by themselves. Instead, they depend on a wide variety of content aggregators, such as e-mail bulletins, bloggers, and search engines, to help them identify and retrieve content about which they did not previously know, but are likely to find interesting. No two such intermediaries are precisely alike. Indeed, the content that they select and the manner in which they present them represent a distinct editorial voice that constitutes the primary source of value they provide to end users.

Consider Google's emergence as the leading search engine. Google was able to displace AltaVista and a host of other well-established search engines because it employed an algorithm that did a better job in identifying content that end users found interesting.[44] Of

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[44] *See* Greg Lastowka, *Google's Law*, 73 BROOK. L. REV. 1327, 1334–37 (2008).

course, Google's ranking protocol displays results in an order different from other search engines, and that fact inevitably favors certain websites over others. Although such differentiation inevitably displeases those Google's ranking protocol disfavors, these differences are the key to such intermediaries' successes. It is thus hard to see how to make sense of criticisms that search engine results are "biased"[45] when bias is the very essence of the enterprise.[46] Moreover, compelled adherence to any particular search approach threatens to limit the benefits they can provide and, to the extent that it would apply to all search engines and not just Google, would discourage entry by narrowing the dimensions along which a new search engine could compete.[47]

In addition to vying with their direct competitors, different Internet industry players are vying with providers of complementary services to become the intermediary of choice. Web-error redirection, which is a new service that has the potential to provide real benefits to end users, is one such example. Until recently, when most users mistyped a website name into the address line of a browser, the browser returned a screen indicating "404 Error—File Not Found." With increasing frequency, the browser now transmits the mistyped web address to a search engine, which in turn suggests alternatives that are likely to provide the end user with one-click access to the correct address. A struggle has emerged among web-browser providers, search engines, and last-mile network providers over who will determine the search engine that will perform this function.

Although some commentators may have strong convictions about which types of providers may perform particular functions and which may not,[48] I am ultimately agnostic about which type of player should intermediate this particular transaction.[49] For current purposes, my more limited point is the inevitability that some firm will intermediate end users' access to content. This emerging competition among differ-

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45 *See* Bracha & Pasquale, *supra* note 7, at 1167–71; Chandler, *supra* note 7, at 1105; Elkin-Koren, *supra* note 7, at 187–91.

46 *See* Goldman, *supra* note 21, at 195–98; Ellen P. Goodman, *No Time for Equal Time: A Comment on Professor Magarian's Substantive Media Regulation in Three Dimensions*, 76 GEO. WASH. L. REV. 897, 910–12 (2008).

47 *See* James Grimmelmann, *Don't Censor Search*, 117 YALE L.J. POCKET PART 48 (2007), http://thepocketpart.org/ylj-online/intellectual-property/582-dont-censor-search.

48 *See, e.g.*, Ed Felten, *Verizon Violates Net Neutrality with DNS Deviations*, posting to Freedom to Tinker (Nov. 12, 2007, 11:02 AM), http://freedom-to-tinker.com/blog/felten/verizon-violates-net-neutrality-dns-deviations.

49 Indeed, attempts by industry players to expand into adjacent markets may represent the best available form of rivalry on the Internet. *See* Yoo, *supra* note 12, at 282–85.

ent types of network players underscores that the choice is not between intermediation and nonintermediation, but rather which firm will serve as the intermediary. Preventing any particular player from serving as the intermediary will simply transfer those functions to another player.

C. The Potential Benefits of Intermediation

In addition to helping end users screen out bad content and locate and access good content, intermediaries can play a number of beneficial economic roles. Although the Internet is often described as if it were a unified system, it is actually a combination of autonomous systems interacting through a web of interconnection agreements. Each autonomous system makes its own independent decisions about the other networks with which it will interconnect and determines the terms of interconnection with those networks through arms-length negotiations.

The result is that similar content may take radically different paths through the network, depending on the particular interconnection arrangements that their network provider has negotiated. In addition, the price that particular traffic will pay will vary, depending on the precise terms negotiated in the interconnection agreements.[50] Most importantly, reliance on arms-length negotiations makes it inevitable that the terms of interconnection will depend in no small part on whatever bargaining power that the various network participants may possess. Indeed, short-run exercises of bargaining power play an important role in reallocating resources and in providing incentives for markets in long-run disequilibrium to reequilibrate. As a general matter, so long as competitive entry in that particular segment of the industry is feasible, any supracompetitive returns should prove to be short-lived. Regulatory interventions that prevent the realization of such short-run returns would thus have the unfortunate effect of short-circuiting the market from reallocating resources to their highest and best use.[51]

That said, the economic literature has identified conditions that cause such negotiated outcomes to deviate from the long-run optimum. As the following Sections will discuss in greater detail, the number of players, asymmetric information, and the ability to act op-

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50 *See* Christopher S. Yoo, *Innovations in the Internet's Architecture that Challenge the Status Quo*, 8 J. ON TELECOMM. & HIGH TECH. L. 79, 80, 85–90, 95–99 (2010).

51 *See* Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 9–10, 29–33, 48–53 (2005).

portunistically can cause parties to fail to reach agreement even when doing so would be in their mutual best interest. The literature also recognizes that intermediaries can help solve these market failures.[52]

1. Multiparty Bargaining

One of the classic ways that bargaining can fail is when it necessarily involves a multitude of parties. At a minimum, the sheer friction of bringing together and negotiating with multiple parties increases the transaction costs of multiparty bargaining.[53] In addition, parties to a multiparty bargain have the incentive to free ride or to hold out in order to capture a greater proportion of the available surplus.[54]

One classic solution to the problems associated with multiparty bargaining is to have the government serve as an intermediary by imposing a liability rule, which forecloses opportunistic behavior by establishing a price at which the bargain will take place.[55] Subsequent work has shown that the intermediary need not be the government. Robert Merges's classic work "Contracting into Liability Rules" provides rich and important examples in which the parties created private intermediaries to solve multiparty bargaining problems.[56] That said, private intermediation should not be regarded as a panacea. Indeed, scholars have explored the circumstances in which such privately created collective solutions are likely to fail.[57] The possibility that such collective solutions might fail does not, however, justify rejecting private intermediation out of hand. Particularly when combined with the threat that governmental intermediation can pose to free speech, discussed below, the benefits of private intermediation suggest that it should be encouraged whenever possible.

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52 For a nontechnical overview of the economic roles played by intermediaries, see Daniel F. Spulber, *Market Microstructure and Intermediation*, J. Econ. Persp., Summer 1996, at 135. *See also* Thomas F. Cotter, *Some Observations on the Law and Economics of Intermediaries*, 2006 Mich. St. L. Rev. 67, 69–74 (2006).

53 *See* Mancur Olson, Jr., The Logic of Collective Action 46–48 (1965).

54 *See* James M. Buchanan & Gordon Tullock, The Calculus of Consent 105–09 (1962).

55 *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1106–07 (1972).

56 *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal. L. Rev. 1293 (1996).

57 For the classic analyses, see generally Gary D. Libecap, Contracting for Property Rights (1989); Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action (1990).

2. Asymmetric Information

Intermediaries can also solve another classic problem that can prevent bargaining from reaching efficient solutions: informational asymmetry.[58] Informational asymmetry occurs when one or both parties have private information that the other party cannot verify.[59] Two parties that are bargaining must perform two distinct functions. First, they must determine whether gains from trade exist and, if so, how best to maximize them. In this aspect of the bargaining process, the parties' interests are aligned, since both benefit from ensuring that the surplus they will divide is as large as possible. Second, they must determine how to divide the surplus created by their bargain. In this aspect of the bargaining process, the zero-sum aspect of the surplus division makes the parties' interests quite divergent.

If both parties had complete information, the parties would resolve both functions fairly easily. Perfect knowledge of each other's reservation prices would allow both parties to determine whether gains from trade exist. In addition, perfect knowledge of each other's bargaining power would provide guidance as to how to divide the surplus. The situation is quite different when one or both parties have private information. In that case, the parties must communicate some of that private information to one another in order for them to determine whether a mutually beneficial bargain exists and how to divide up the benefits created by that bargain.[60]

The problem is that revealing the private information needed to determine whether a mutually beneficial agreement exists affects the manner in which the parties will divide up the surplus created by the agreement. Thus, the information that each party chooses to reveal involves a profit-maximizing tradeoff. On the one hand, candidly disclosing the party's true valuation increases the likelihood that the parties will identify a mutually beneficial bargain if one exists, but reduces the proportion of the available surplus that the party will claim should an agreement be reached. This provides the parties with the incentive to misrepresent their true valuations. Knowing that the other party has the incentive to misrepresent its true valuations in this manner means that both parties will greet the other side's representa-

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58 The literature on bargaining in the face of informational asymmetry is vast. For a brief overview, see JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 361–88 (1988).

59 OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 31–35 (1975).

60 *See* Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 332 (1994).

tions with skepticism unless backed up by actions.[61] At best, this increases the costs of reaching agreement. At worst, it prevents a welfare-enhancing agreement from being reached at all. A similar problem arises when multiple parties are bargaining for the same asset. The bidding rules may give both parties the incentive to misrepresent their preferences. This can cause the resource not to be allocated to its highest and best use.[62]

Economists have long recognized that intermediaries can solve the problems of asymmetric information. Precommitment to a mechanism that allocates the surplus in the same way that would occur under perfect information can induce both parties to reveal their private information truthfully.[63] Once the private information has been revealed, both parties have incentives to attempt to renegotiate the deal. Thus, the intermediary must have the authority to enforce the mechanism in order to prevent it from unraveling.

Such problems are likely to exist with respect to the Internet and are likely to become more acute as the Internet becomes more complex. Unlike previous networks, the Internet is not owned or managed by a single entity. Instead, it consists of a series of interconnected autonomous systems. Because each interconnection agreement is negotiated through arms-length bargaining, the Internet represents precisely the type of market in which asymmetric information is likely to cause problems. If so, the best solution will often be an intermediary that can make a credible commitment to follow a pricing mechanism sufficient to induce both parties to reveal the intensity of their preferences.

3. Two-Sided Markets

The insights of the emerging field of two-sided markets further increase the likelihood that intermediation is likely to play a key role on the Internet.[64] The literature on network economic effects has long

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61 *See* Peter C. Cramton, *Bargaining with Incomplete Information: An Infinite-Horizon Model with Two-Sided Uncertainty*, 51 REV. ECON. STUD. 579, 581 (1984).

62 For a useful illustration, see DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 280–91 (1990).

63 The literature on mechanism design is vast. The seminal contribution is Roger B. Myerson & Mark A. Satterthwaite, *Efficient Mechanisms for Bilateral Trading*, 29 J. ECON. THEORY 265 (1983). For a survey, see DREW FUDENBURG & JEAN TIROLE, GAME THEORY 243–318 (1991). For an accessible description appearing in the legal literature, see Eric L. Talley, Note, *Contract Renegotiation, Mechanism Design, and the Liquidated Damages Rule*, 46 STAN. L. REV. 1195, 1220–24 (1994).

64 For surveys of the literature on two-sided markets, see Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645 (2006); Roberto Roson,

recognized that the value of communication is determined in large part by the total number of users connected to the network.[65] For example, the value of the telephone network to a particular customer depends on the number of other customers she can reach through it.[66] Another classic example arose during the struggle between the Beta and VHS standards for video cassette recorders ("VCR").[67] Despite the heated debates at the time, most users did not base their decision on each technology's relative technical merits or even its cost. Prospective adopters cared most about which type of VCR most other consumers would adopt. In short, the value to consumers was determined almost exclusively by which VCR standard would have the larger network.[68]

Some networks, however, may be comprised of two distinct classes of users, with the value of the network to any particular user depending not on the total number of other users, but rather only on the number of users of the other class. When this is the case, the market is said to be a "two-sided market."[69] Consider the example of a singles club or a singles bar for heterosexuals, in which the universe of customers is comprised of two classes of members: males and females. In this case, the value of the club to any particular member is not determined by the total size of the club, but rather the number of club members of the other gender.[70]

Credit cards are another classic example of a two-sided market. Credit card networks bring together two types of network participants: merchants and retail customers. The value of a credit card network to merchants depends on the number of retail purchasers belonging to the network. The number of other merchants on the network is not important in and of itself, but rather only to the extent it

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Two-Sided Markets: A Tentative Survey, 4 REV. NETWORK ECON. 142 (2005), http://www.bepress.com/rne/vol4/iss2/3.

65 *See, e.g.*, Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985).

66 *See* Christopher S. Yoo, *Network Neutrality, Consumers, and Innovation*, 2008 U. CHI. LEGAL F. 179, 223 n.139 (collecting sources).

67 *See* Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1889 n.200 (2006).

68 *See id.* at 1889–92; Yoo, *supra* note 12, at 278–82.

69 *See* Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. ECON. 668, 668 (2006); Roson, *supra* note 64, at 142, 144.

70 *See* Armstrong, *supra* note 69, at 668; David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE. J. ON REG. 325, 327–28 (2003). Although the value may increase given an increase in the number of members of the other class, the value may decrease given an increase in the number of members of the same class, which would intensify competition.

provides incentives for additional retail customers to belong to the same credit card network. Conversely, retail customers care primarily about the number of merchants that are part of the network rather than the number of other retail customers (although, again, increases in the number of retail customers on the network may provide incentives for more merchants to join).[71]

Another example is broadcast television networks, which bring together two classes of customers: advertisers and viewers. Advertisers focus not on the number of other advertisers, but rather on the number of viewers.[72] In each of these examples, it is the number of network participants of the other class that determines the value of the network, not the total number of network users.

Two-sided markets have a number of distinctive characteristics. For example, two-sided markets suffer from what has been called the classic "chicken and egg problem": stated in terms of the credit card example given above, retail customers will not carry a credit card unless it is accepted by a large number of merchants, while merchants will not agree to take the card unless a large number of retail customers already carry it. Under these circumstances, an intermediary may be able to play a key role by using innovative pricing strategies to get both sides of the two-sided market on board.[73]

Although the precise determinants of optimal prices are complex, the prices charged to each side of the market tend to be asymmetric, with one side often being charged little or nothing for its participation.[74] For example, in singles bars, admission prices for males are often much higher than prices for females.[75] In credit card networks, merchants are charged on a per-transaction basis, while retail custom-

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71 For the seminal analysis, see generally William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & Econ. 541 (1983) (describing the incentive structure of credit card market participants). *See also* Jean-Charles Rochet, *The Theory of Interchange Fees: A Synthesis of Recent Contributions*, 2 Rev. Network Econ. 97 (2003), http://www.bepress.com/rne/vol2/iss2/4.

72 Christopher S. Yoo, *Network Neutrality After* Comcast*: Toward a Case-by-Case Approach to Network Management*, *in* New Directions in Communications Policy 558, 723–74 (Randolph J. May ed., 2009).

73 *See* Bernard Caillaud & Bruno Jullien, *Chicken & Egg: Competition Among Intermediation Service Providers*, 34 RAND J. Econ. 309, 310–11, 322–23 (2003); Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. Eur. Econ. Ass'n 990, 990, 1013, 1018 (2003).

74 *See* David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 Competition Pol'y Int'l 151, 155 (2007); Rochet & Tirole, *supra* note 73, at 1013–17.

75 *See* Evans, *supra* note 70, at 327.

ers are not (although retail customers may have to pay a membership fee).[76] Moreover, the welfare-maximizing prices generally do not cover the costs. As a result, a firm intermediating a two-sided market may have to engage in Ramsey pricing or some similar form of price discrimination in order to be sustainable.[77]

In addition, the prices on each side of a two-sided market are interdependent. Any force that tends to raise the margins on one side of a two-sided market will tend to push down prices on the other side. That is because if activities become more profitable on one side of the market, it pays to promote connectivity on the other side. This gives rise to what Rochet and Tirole have called the "seesaw principle."[78] Indeed, it is quite common for prices on one side of a two-sided market to be below marginal cost or even zero.[79] Indeed, activities on one side of a two-sided market may become so profitable that that side may find it beneficial to subsidize customers on the other side of the market by paying them to participate in the network.[80]

The dynamics that lead to this cross-subsidization are well illustrated by the economics of broadcast television.[81] For decades, the standard arrangement for broadcast television networks has been to pay local television stations to serve as their affiliates.[82] This is because the primary revenue model for broadcast television was based on national advertising inserted into the programming provided by the television network. The fact that the value to advertisers increased with the number of viewers meant it made economic sense for the television network to subsidize the connectivity of viewers, since they would make whatever money they had to pay back in increased advertising prices.[83]

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76 *See* Rochet & Tirole, *supra* note 73, at 1013–14.

77 *See* Wilko Bolt & Alexander F. Tieman, *Social Welfare and Cost Recovery in Two-Sided Markets*, 5 REV. NETWORK ECON. 103, 115 (2006), http://www.bepress.com/rne/vol5/iss1/7/; Roson, *supra* note 64, at 148; Bruno Jullien, *Two-Sided Markets and Electronic Intermediaries* 12–13 (CESifo, Working Paper No. 1345, 2004), *available at* http://SSRN.com/abstract=634212; *see also* Victor P. Goldberg & Richard A. Epstein, *Introductory Remarks: Some Reflections on Two-Sided Markets and Pricing*, 2005 COLUM. BUS. L. REV. 509, 510 (arguing that price discrimination will likely emerge).

78 Rochet & Tirole, *supra* note 64, at 659.

79 *See* Evans & Schmalensee, *supra* note 74, at 152; Rochet & Tirole, *supra* note 64, at 658–60, 665; Jullien, *supra* note 77, at 8.

80 Caillaud & Jullien, *supra* note 73, at 310, 314, 324; Goldberg & Epstein, *supra* note 77, at 510; Roson, *supra* note 64, at 147–48.

81 *See* Yoo, *supra* note 51, at 73–74.

82 *Id.* at 74.

83 *Id.*

Equally interesting is the manner in which this business practice has changed over time. Networks began to vary the prices paid by asking weaker stations to accept lower payments.[84] More recently, networks have begun to refuse to pay the weakest stations at all. Instead, they have insisted that the stations will have to begin paying the network if they are to remain affiliated with the network.[85] Business models based on advertising make it likely that these types of payments will occur. The broadcasting example shows that the magnitude and even the direction of the payments will vary across different stations and across time.

Most of the implications drawn from the broadcast television example apply to the modern Internet.[86] The fact that advertising revenue flows to content providers increases the likelihood that the optimal solution would be for content providers to make side payments to last-mile providers to subsidize the connectivity of end users. Although the practice of backbone peering has historically foreclosed such side payments from flowing through the contracts established by the network, the emergence of new interconnection arrangements, such as "paid peering," will solve that problem, assuming that network neutrality regulation does not foreclose such practices.[87] In addition, the economics of two-sided markets also underscores the importance of facilitating price flexibility, so that the platform provider can get both sides of the market on board and engage in some form of Ramsey-style pricing to cover their costs.

Although the literature typically presumes that some firm will serve as a third-party intermediary that brings both sides of the two-sided market together,[88] it need not necessarily be so. As a theoretical matter, parties on either side of a two-sided market may contract in a

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84 *Id.*

85 *Id.*

86 *See id.* at 71–76; Yoo, *supra* note 66, at 222–27.

87 *See* Peyman Faratin et al., *The Growing Complexity of Internet Interconnection*, 72 COMM. & STRATEGIES 51, 58–61 (2008). For other analyses applying the economics of two-sided markets to the Internet, see Benjamin E. Hermalin & Michael L. Katz, *The Economics of Product-Line Restrictions with an Application to the Network Neutrality Debate*, 19 INFO. ECON. & POL'Y 215 (2007); John Musacchio et al., *A Two-Sided Market Analysis of Provider Investment Incentive with an Application to the Net-Neutrality Issue*, 8 REV. NETWORK ECON. 22 (2009), http://www.bepress.com/cgi/viewcontent.cgi?article=1168&context=rne; J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 J. COMPETITION L. & ECON. 349, 361–62 (2006); and ANDREA RENDA, CTR. FOR EUR. POL'Y STUD., I OWN THE PIPES, YOU CALL THE TUNE: THE NET NEUTRALITY DEBATE AND ITS (IR)RELEVANCE FOR EUROPE 11–15 (2008), *available at* http://www.ceps.be/ceps/download/1579.

88 *See, e.g.*, Armstrong, *supra* note 69, at 668; Rochet & Tirole, *supra* note 64, at 645.

decentralized manner so long as a standardized interface exists to structure their transactions. That said, the presence of large parties and asymmetric information make third-party intermediation the more likely outcome.[89] Indeed, a network player such as an internet service provider ("ISP") may be the only player in a position to bring both sides of the market together.[90]

Intermediaries can thus create new solutions to a wide range of potential bargaining problems associated with multiparty bargaining, asymmetric information, and two-sided markets. Intermediation has its costs as well. The optimal level of intermediation thus represents an extension of the Coasean theory of the firm and should exist whenever the costs of direct exchange exceed the costs of intermediation.[91] The continued persistence of Internet intermediaries, however, suggests that intermediation provides real benefits in a significant number of cases. The complexity of the calculus makes it difficult to predict which intermediaries are likely to provide the greatest benefits.[92]

II. Judicial Decisions Recognizing Intermediation and Editorial Discretion as Promoting Important Free Speech Values

The foregoing discussion demonstrates that intermediaries can promote end users' abilities to obtain access to the speech that they want and only the speech that they want in a wide variety of ways. They can help shield end users from unwanted content. They play an essential role in helping end users identify and obtain access to desired content. They can help mitigate bargaining problems that can prevent end users from obtaining access to the content that they seek.

This Part extends this analysis by analyzing the Supreme Court's mass media precedents. Section A analyzes the Supreme Court's jurisprudence with respect to newspapers, which the Court's decisions recognize as the baseline standard. These decisions firmly reject any attempt to interfere with newspapers' editorial discretion, even if the newspaper is the only such outlet available in that geographic area and despite the fact that the newspaper might exercise its editorial discretion to favor certain perspectives and disfavor others.

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89 *See* Daniel F. Spulber, *Firms and Networks in Two-Sided Markets*, *in* 1 HANDBOOKS IN INFORMATION SYSTEMS: ECONOMICS AND INFORMATION SYSTEMS 137, 141–48, 152 (Terrence Hendershott ed., 2006).

90 *See* RENDA, *supra* note 87, at 11.

91 *See* DANIEL F. SPULBER, MARKET MICROSTRUCTURE: INTERMEDIARIES AND THE THEORY OF THE FIRM 345–47 (1999).

92 *See* Cotter, *supra* note 52, at 73–74.

Sections B and C analyze how the Supreme Court has applied these principles to the leading forms of electronic communication prior to the Internet: broadcasting and cable television. These precedents uniformly recognize that intermediaries' exercises of editorial discretion promote free speech values even if these actors simply serve as the conduit for others' speech, and even if they exercise their editorial discretion to give preference to particular points of view.

Section D analyzes how these free speech principles have been extended beyond mass media to common-carriage technologies, such as telephony. The cases suggest that common carriers have the right to exercise some degree of editorial discretion over the messages that they carry. In addition, to the extent that common carriers decide to offer more than just person-to-person communications and begin to offer mass media content, they are entitled to full First Amendment protection.

Together, this corpus of judicial decisions provides a powerful demonstration of how intermediaries' exercises of editorial discretion promote important free speech values. It also eloquently illustrates the potential harms to free speech that can arise if that editorial discretion is curtailed.

A. Newspapers as the Free Speech Baseline

The Supreme Court's decisions regarding the free speech rights of newspapers consistently recognize the paramount nature of newspapers' editorial discretion. For example, in *CBS, Inc. v. Democratic National Committee* (*CBS v. DNC*),[93] a plurality of the Court contrasted the editorial discretion of broadcasters with that of newspapers by setting the editorial discretion of newspapers outside of governmental interference. The plurality opinion noted, "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two facts: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers."[94] Justice Stewart's partial concurrence similarly concluded that the First Amendment "gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of the Government."[95]

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93 CBS, Inc. v. Democratic Nat'l Comm. (*CBS v. DNC*), 412 U.S. 94 (1973).

94 *Id.* at 117 (plurality opinion).

95 *Id.* at 145 (Stewart, J., concurring).

Any alleged bias on the part of the reporters did not justify governmental intervention. A majority of the Court later explicitly noted:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.[96]

Even the Justices who refused to join the majority opinion acknowledged the importance of preserving newspapers' editorial discretion. In his opinion concurring in the judgment, Justice Douglas noted:

> It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide "guidelines" for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made.[97]

Douglas firmly rejected any claim that allegations of editorial bias justified regulatory intervention. After citing Thomas Emerson's opposition to "'forcing newspapers to . . . print all viewpoints'" and Benjamin Franklin's rejection of forcing publishers to open their columns "'to any and all controversialists'" on the simple grounds that a "'newspaper was not a stagecoach,'"[98] Douglas concluded:

> Some newspapers in our history have exerted a powerful—and some have thought—a harmful interest on the public mind. But even Thomas Jefferson, who knew how base and obnoxious the press could be, never dreamed of interfering. For he thought that government control of newspapers would be the greater of two evils.[99]

Thus, Jefferson concluded the "'putrid state'" into which newspapers had passed remained "'an evil for which there is no remedy, our liberty depends on the freedom of the press.'"[100]

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96 *Id.* at 124–25 (plurality opinion).

97 *Id.* at 150–51 (Douglas, J., concurring in the judgment).

98 *Id.* at 151–52.

99 *Id.* at 152–53.

100 *Id.* at 153.

The fact that the editorial discretion wielded by newspaper publishers might result in a form of private censorship did not justify regulatory intervention. Douglas noted, "Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the Government is the censor, administrative *fiat*, not freedom of choice, carries the day."[101] Douglas continued, "Both TV and radio news broadcasts frequently tip the news one direction or another . . . . Yet so do the newspapers and the magazines and other segments of the press. The standards of TV, radio, newspapers, or magazines—whether of excellence or mediocrity—are beyond the reach of Government."[102]

Justice Brennan's dissent, in which Justice Marshall joined, similarly concluded that any attempt to require newspapers to carry editorial advertisements would violate the First Amendment.[103] Thus, despite the Court's disagreement on other issues, it was unanimous in endorsing the importance of preserving newspapers' editorial discretion and in rejecting arguments that alleged bias on the part of those editors justified restricting it.

The Court reiterated these principles later that same year in *Miami Herald Publishing Co. v. Tornillo*,[104] which remains perhaps the Court's most definitive endorsement of the importance of preserving newspapers' editorial discretion. In that case, the Court unanimously invalidated a Florida right-of-reply statute because it represented an impermissible "intrusion into the function of editors."[105] The Court elaborated:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to the 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.[106]

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101 *Id.*

102 *Id.* at 155; *accord id.* at 165 ("The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. . . . Only a free and unrestrained press can effectively expose deception in government."); Yale Broad. Co. v. FCC, 414 U.S. 914, 916–17 (1973) (Douglas, J., dissenting) (discussing "the inevitable danger resulting from placing [censorship] powers in governmental hands").

103 *CBS v. DNC*, 412 U.S. at 182 n.12 (Brennan, J., dissenting).

104 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

105 *Id.* at 258.

106 *Id.*

The wave of newspaper bankruptcies that had rendered most cities one-newspaper towns was not enough to vitiate this conclusion.[107] Nor was the fact that newspapers may collapse into "a homogeneity of editorial opinion, commentary, and interpretive analysis" or may be subject to "abuses of bias and manipulative reportage."[108] In the words of the Court, "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[109]

Justice White's concurring opinion echoed the same concerns. Using language that would later be endorsed by the entire Court,[110] Justice White began by noting:

> According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media as far as government tampering, in advance of publication, with [sic] news and editorial content is concerned. A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. . . . Regardless of how beneficent-sounding the purpose of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.[111]

The potential lack of balance or bias did not justify governmental intervention:

> Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital maters will not be comprehensive and that all viewpoints may not be expressed. . . . Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.[112]

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107 *Id.* at 249, 251, 253.

108 *Id.* at 250.

109 *Id.* at 256.

110 *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 560–61 (1976).

111 *Tornillo*, 418 U.S. at 259 (White, J., concurring) (citation and footnote omitted) (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

112 *Id.* at 260.

The inviolability of newspapers' editorial discretion was echoed in the Court's subsequent opinions. For example, in *Pittsburgh Press Co. v. Human Relations Commission*,[113] the Court "reaffirm[ed] unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."[114] Justice Stewart's dissent, in which Justice Douglas joined, echoed this view, noting that no "governmental agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot."[115]

Similarly, in *FCC v. League of Women Voters of California*,[116] the Court recognized that regulation to ensure "a balanced presentation of information on issues of public importance . . . has never been allowed with respect to the print media."[117] The Court further noted that newspaper publishers enjoy "the absolute freedom to advocate [their] own positions without also presenting opposing viewpoints."[118]

The Court again endorsed the importance of preserving the editorial independence of newspapers in *Turner Broadcasting System, Inc. v. FCC* (*Turner I*),[119] in which the Court observed that "*Tornillo* affirmed an essential proposition: The First Amendment protects the editorial independence of the press."[120] The Court reiterated "that right-of-reply statutes . . . are an impermissible intrusion on newspapers' 'editorial control and judgment.'"[121] In contrasting newspaper monopolies with cable monopolies, the Court explicitly recognized that the mere fact that a particular newspaper was the only such outlet in a particular city did not justify requiring it to carry additional viewpoints, noting, "[a] daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications."[122]

Moreover, in *Arkansas Education Television Commission v. Forbes*,[123] the Court recognized that "choos[ing] among speakers expressing different viewpoints" represented an essential part of what

113 Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973).

114 *Id.* at 391.

115 *Id.* at 400 (Stewart, J., dissenting).

116 FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984).

117 *Id.* at 377.

118 *Id.* at 380.

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

120 *Id.* at 653.

121 *Id.* (quoting Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

122 *Id.* at 656.

123 Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

newspaper (and broadcast) editors do.[124] By reiterating the language from *CBS v. DNC*, the Court reaffirmed that the fact that editors might favor certain viewpoints and disfavor others did not justify imposing regulation: "'That editors . . . can and do abuse this power is beyond doubt,' but '[c]alculated risks of abuse are taken in order to preserve higher values.'"[125]

B. The Importance and Limits of Editorial Discretion Exercised by Broadcasters

Supreme Court precedent thus uniformly recognized the critical role that preserving newspapers' editorial discretion plays in promoting and preserving free speech values. As phrases such as "absolute freedom"[126] and "virtually insurmountable barrier"[127] suggest, this discretion was inviolable even if a particular newspaper wielded de facto monopoly power and regardless of how biased or skewed the editorial policies of a particular newspaper might be.[128]

The Court was soon called upon to determine the extent to which these principles applied to broadcasting, which was the first important form of electronic mass communications to appear on the scene. The Court's decisions employed language that was quite similar to that in its newspaper precedents, offering numerous powerful endorsements of the importance of according broadcasters editorial discretion. Indeed, the broadcast decisions clearly regard the newspaper standard as the baseline against which broadcast regulations are measured.

Nonetheless, the Court recognized two exceptions that justified upholding regulations that clearly would have been impermissible if imposed on newspapers: the alleged scarcity of the electromagnetic spectrum and the supposed pervasiveness and accessibility of broadcast programming. Subsequent scholarship has raised serious questions about the conceptual viability of those rationales even with respect to broadcasting. More importantly, the Court has already held both of these rationales inapplicable to the Internet. Precedent has thus already foreclosed any possibility that the exceptions recog-

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124 *Id.* at 673.

125 *Id.* at 673–74 (citation omitted) (quoting *CBS v. DNC*, 412 U.S. 94, 124, 125 (1973)).

126 FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984).

127 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974).

128 *See Forbes*, 523 U.S. at 673–74; *Tornillo*, 418 U.S. at 249–51, 253, 256; *id.* at 260 (White, J., concurring); *CBS v. DNC*, 412 U.S. at 124–25; *id.* at 152–53, 155 (Douglas, J., concurring in the judgment).

nized by the broadcast precedents might justify upholding restrictions on Internet providers' editorial discretion.

1. The Importance of Broadcasters' Editorial Discretion

The Supreme Court has long recognized that the editorial discretion exercised by broadcasters serves important free speech values that would be compromised if broadcasters were forced to make their networks available to all comers on a nondiscriminatory basis. The Court offered its first extensive elaboration of these principles in *CBS v. DNC*, in which the Court rejected claims that a broadcaster's refusal to sell time to editorial advertisements violated the federal communications laws or the First Amendment.[129]

The Court began its resolution of the statutory claim by examining the legislative history of the Radio Act of 1927,[130] which established the basic principles governing broadcast regulation. As the Court noted, when enacting the Radio Act of 1927, "Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues."[131] Instead, "in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee."[132]

Certain members of Congress argued that failure to place limits on broadcasters' editorial discretion would give them the power of "private censorship."[133] To combat that concern, the bill reported by the Senate Commerce Committee included a provision that would have limited broadcasters' editorial discretion by requiring them to carry all political speech on a nondiscriminatory basis.[134] Senator Dill, who was the principal architect of the Radio Act of 1927, pushed through an amendment deleting this provision, arguing that "'it seemed unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid.'"[135] Senator Dill also emphasized how difficult a right of nondiscriminatory access

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129 *CBS v. DNC*, 412 U.S. at 121.

130 Radio Act of 1927, ch. 169, 44 Stat. 1162 (codified at 47 U.S.C. § 315(a)).

131 *CBS v. DNC*, 412 U.S. at 105.

132 *Id.*

133 *Id.* (citing H.R. REP. NO. 69-404, at 18 (1927) (minority report); 67 CONG. REC. 5483, 5484 (1926) (statement of Rep. Davis)).

134 *Id.* at 105–06.

135 *Id.* at 106 (quoting 67 CONG. REC. 12,502 (1926) (statement of Sen. Dill)).

would be to administer.[136] Instead of creating a mandatory right of access to political speech, Congress enacted a more limited provision simply requiring that broadcasters who accept advertisements from a candidate give equal opportunities to other candidates for the same public office.[137]

Congress placed the same high value on broadcasters' exercise of editorial discretion when it replaced the Radio Act of 1927 with the Communications Act of 1934.[138] When reenacting the provision from the Radio Act of 1927 described above, Congress rejected a proposal that would have required any broadcaster permitting their station to be used for the presentation of views on a public issue to be voted upon at an upcoming election to afford equal opportunity for the presentation of opposing views on that public question.[139] According to the Court, enactment of that provision "would have imposed a limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain public issues."[140] Even more importantly, Congress enacted a provision specifically providing that "'a person engaged in radio broadcasting shall not . . . be deemed a common carrier.'"[141]

Congress's commitment to protecting broadcasters' editorial discretion was reinforced by statutory provisions prohibiting the FCC from exercising the power of censorship over broadcasters or from interfering with broadcasters' free speech rights.[142] The Court noted that, "[c]onsistent with that philosophy, the Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities. Congress has not yet seen fit to alter that policy . . . ."[143] The Court construed the Communications Act of 1934 as "evinc[ing] a legislative desire to preserve values of private journalism" and "to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations."[144] "Since it is physically impossible to provide time for all

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136 *Id.* at 106–07 (citing 67 CONG. REC. 12,504 (1926) (statement of Sen. Dill)).

137 *Id.* at 107 (citing Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162, 1170 (codified at 47 U.S.C. § 315(a)).

138 Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. § 153).

139 *CBS v. DNC*, 412 U.S. at 107–08 & n.4 (citing *Hearings on S. 2910 Before the S. Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 19 (1934)).

140 *Id.* (citing H.R. REP. NO. 73-1918, at 49 (1934) (Conf. Rep.)).

141 *Id.* at 108–09 (quoting Communications Act of 1934, § 3(h), 48 Stat. at 1066 (codified at 47 U.S.C. § 153(10)).

142 *Id.* at 110 (citing 47 U.S.C. § 326).

143 *Id.* at 113 (citations omitted).

144 *Id.* at 109–10.

viewpoints, . . . the right to exercise editorial judgment was granted to the broadcaster."[145] Although this editorial discretion raises the possibility that a "'single person or group [could] place themselves in [a] position where they can censor the material which shall be broadcasted to the public,'"[146] "Congress appears to have concluded . . . that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided."[147]

The Court further underscored the important free speech values served by broadcasters' exercises of editorial discretion when discussing the First Amendment claim. The Court rejected arguments that giving speakers unfettered access to broadcast networks would promote free speech values, overturning in the process "the Court of Appeals's view that every potential speaker is 'the best judge' of what the listening public ought to hear or indeed the best judge of the merits of his or her views."[148] The Court concluded:

> All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors . . . can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.[149]

The portion of the opinion that only represented a plurality of the Court sounded similar themes. The legislative history indicated "a desire to maintain for licensees . . . a traditional journalistic role."[150] By enacting the statutory provision prohibiting the government "from interfering with the exercise of free speech over the broadcasting frequencies[,] Congress pointedly refrained from divesting broadcasters

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145 *Id.* at 111.

146 *Id.* at 104 (quoting *Hearings on H.R. 7357 Before the H. Comm. on the Merchant Marine and Fisheries*, 68th Cong., 1st Sess. 8 (1924)).

147 *Id.* at 105.

148 *Id.* at 124.

149 *Id.* at 124–25.

150 *Id.* at 116 (plurality opinion).

of their control over the selection of voices."[151] These statutory provisions "clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee."[152] The plurality concluded:

> [I]t would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on Government.[153]

Justice Stewart concurred, pointing out that forcing broadcasters to develop a "nondiscriminatory system for controlling access . . . is precisely what Congress intended to avoid through § 3(h) of the Act."[154]

The Court reemphasized the importance of broadcasters' editorial discretion in *League of Women Voters*, in which it overturned a statute forbidding noncommercial educational television stations receiving grants from the Corporation for Public Broadcasting from "engag[ing] in editorializing."[155] In so holding, the Court rejected arguments that the interest in ensuring balanced coverage of public issues justified overriding broadcasters' editorial discretion.[156] The Court reasoned that "broadcasters are engaged in a vital and independent form of communicative activity. . . . Unlike common carriers, broadcasters are 'entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties].'"[157] The Court further concluded: "Indeed, if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters . . . ."[158] The Court later emphasized that "the press, of which the broadcasting industry is indisputably a part, carries out a historic, dual responsibility in our society of reporting informa-

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151 *Id.*

152 *Id.*

153 *Id.* at 120–21.

154 *Id.* at 140 n.9 (Stewart, J., concurring).

155 Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730.

156 FCC v. League of Women Voters of Cal., 468 U.S. 364, 378–80 (1984).

157 *Id.* at 378 (quoting CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981)).

158 *Id.*

tion and of bringing critical judgment to bear on public affairs."[159] Prohibiting public television stations from editorializing represented a "substantial abridgment of important journalistic freedoms which the First Amendment jealously protects."[160]

The Court similarly noted in *Turner I* that "our cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices."[161]

The Court echoed the same concerns in *Forbes*, when it upheld the decision by a state-owned public television station to exclude a marginal third-party candidate for Congress from a televised debate.[162] The key premise underlying the Court's analysis was that, "[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."[163] The importance of preserving this discretion justified upholding the broadcaster's decision to exclude the third-party candidate from the debate: "In the case of television broadcasting . . . broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations."[164] The Court elaborated:

> Congress has rejected the argument that "broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." Instead television broadcasters enjoy the "widest journalistic freedom" consistent with their public responsibilities. . . . Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming.[165]

The fact that broadcasters often simply serve as the conduit for the speech of others did not affect the analysis. The Court noted, "Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."[166]

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159 *Id.* at 382 (citation omitted).

160 *Id.* at 402.

161 Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 651 (1994).

162 Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998).

163 *Id.* at 674.

164 *Id.* at 673.

165 *Id.* (citations omitted) (quoting *CBS v. DNC*, 412 U.S. 94, 105, 110 (1973)).

166 *Id.* at 674.

The possibility that broadcasters might discriminate among different speakers did not justify regulatory intervention for the simple reason that "a broadcaster by its nature will facilitate the expression of some viewpoints instead of others."[167] The Court elaborated, invoking the authority of *CBS v. DNC*, that "broadcasters must often choose among speakers expressing different viewpoints. 'That editors—newspaper or broadcast—can and do abuse this power is beyond doubt,' but '[c]alculated risks of abuse are taken in order to preserve higher values.'"[168] Any involvement of the government in defining criteria for access "would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion."[169]

2. Red Lion*: Scarcity as a Justification for Limiting Editorial Discretion*

The Supreme Court's broadcast precedents recognize the important free speech values served by broadcasters' exercise of editorial discretion. These values are served even when broadcasters exercise their editorial discretion to favor a particular point of view or when they are simply serving as conduits for others' speech. If the Court had stopped here, any restrictions to broadcasters' abilities to serve as intermediaries would harm the free speech principles recognized by the Court and thus would have to be sharply restricted, if not prohibited altogether.

Despite the Court's strong endorsement of preserving broadcasters' editorial discretion, it has long upheld laws requiring that broadcasters serve as the conduit for the speech of others that presumably would have been invalidated had they been imposed on newspapers.[170] The Court usually justified these decisions by invoking the so-called scarcity doctrine first articulated by the Court in *NBC, Inc. v. United States*.[171] In most cases, speech is not a zero-sum game in which one person's speech crowds out another's. When that is the

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167 *Id.*

168 *Id.* at 673–74 (quoting *CBS v. DNC*, 412 U.S. at 124, 125).

169 *Id.* at 674.

170 *See* Red Lion Broad., Co. v. FCC, 395 U.S. 367 (1969) (upholding FCC rules imposing right-of-reply requirements on broadcasters that were remarkably similar to the rules later struck down in *Tornillo*); *see also* CBS, Inc. v. FCC, 453 U.S. 367 (1981) (upholding a statute requiring that broadcasters sell time to candidates for federal office). Indeed, the Court has noted that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); *accord* Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 637 (1994) ("It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media.").

171 NBC, Inc. v. United States, 319 U.S. 190 (1943).

case, people confronted with speech with which they disagree remain free to offer their own point of view. In short, the classic solution to bad speech is more speech.[172]

With respect to broadcasting, however, the Court found that "certain basic facts about radio as a means of communication" rendered this response insufficient.[173] As the Court noted, radio's "facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another."[174] It is thus inevitable that some will be able to broadcast while others will not, and the decision to permit any person to broadcast necessarily prevents others from doing so.

A series of lower court decisions foreclosing the Secretary of Commerce from assigning broadcasters to particular frequencies provided the Court with what it viewed as a natural experiment in unregulated use of the spectrum. "The result was confusion and chaos. With everybody on the air, nobody could be heard."[175] This led the Court to conclude that some form of government regulation of broadcasting must be tolerated if the spectrum was not to be wasted as a resource.[176] The Court reiterated these points when discussing the application of the First Amendment to broadcasting: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."[177]

The scarcity doctrine thus turned speech into a zero-sum game in which bad speech could not always be met with more speech and in which permitting one person to speak inevitably restricted another person's ability to do so. Framing speech in this manner left the Court on the horns of a dilemma. Sustaining governmental allocation of broadcast licenses inescapably meant sanctioning a restriction on some people's ability to engage in broadcast speech. The alternative meant that no one would be able to speak in this manner at all. Confronted with a choice between a world in which no one could speak

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172 For the classic statement of this principle, see Whitney v. California, 274 U.S. 357, 377 (1927) ("If there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence.").

173 *NBC*, 319 U.S. at 213.

174 *Id.*

175 *Id.* at 212.

176 *Id.* at 213, 216.

177 *Id.* at 226.

and one in which only some could speak, the Court concluded that the First Amendment supported choosing the latter. In short, permitting some speakers to take advantage of this new technology would better promote free speech values than would denying everyone the opportunity to do so.

The Court thus concluded that the First Amendment is not violated by the mere requirement that every broadcaster have a license before speaking.[178] This in turn raised the questions of how those licenses would be allocated and how the government should choose among those who wish to broadcast. The Court rejected the argument that the government was limited to the role of "traffic officer," interested only in overseeing the engineering and technical aspects of radio communication and making sure that stations did not interfere with one another.[179] Instead, the Court concluded that the Radio Act of 1927 places on the government the "burden of determining the composition of that traffic."[180] The fact that "[t]he facilities of radio are not large enough to accommodate all who wish to use them" meant that "[m]ethods must be devised for choosing from among the many who apply."[181] The government should do so based on which applicant would "'render the best practicable service to the community reached by his broadcasts.'"[182]

The rules at issue in *NBC* addressed the structure of the broadcasting industry (specifically the terms under which individual stations affiliated with broadcast networks). As such, the case did not provide an opportunity for the Court to address how the "burden of determining the composition of that traffic" would determine which applicant would provide the best possible service. The Federal Radio Commission ("FRC") and its successor, the FCC, based their licensing decisions in large part on the content being transmitted.[183] The Supreme Court gave this level of regulation its implicit imprimatur in *Red Lion Broadcasting, Co. v. FCC*,[184] which upheld the constitutionality of FCC decisions and rules requiring broadcasters to give a free right of reply any time a broadcaster politically endorsed a candidate for of-

178 *Id.* at 227.

179 *Id.* at 215, 217.

180 *Id.* at 216.

181 *Id.*

182 *Id.* (quoting FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940)).

183 Yoo, *supra* note 17, at 260–66.

184 Red Lion Broad., Co. v. FCC, 395 U.S. 367 (1969).

fice or transmitted a personal attack on a person's honesty, character, or integrity.[185]

The *Red Lion* Court recounted the history previously discussed in *NBC*[186] and drew the similar conclusion that with broadcasting, "only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had."[187] As a result, "because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few."[188] In other words, "only a few can be licensed and the rest must be barred from the airwaves."[189] Requiring all broadcasters to have a license before speaking thus did not violate the First Amendment. Any other conclusion would disserve free speech values by preventing anyone from engaging in broadcast speech. The Court observed: "It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible . . . by limiting the number of licenses so as not to overcrowd the spectrum."[190]

But the Court did not stop there, noting that "by the same token, as far as the First Amendment is concerned[,] those who are licensed stand no better than those to whom licenses are refused."[191] As a result, the fact that the First Amendment permits the government to deny one person a license and give it to another person implied that the First Amendment also permitted the government to require the person granted the license to share his frequency with those denied licenses. Additionally, this interpretation allowed the government to mandate that a licensee "conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[192] In other words, "[b]ecause of the scarcity of

185 *Id.* at 373.

186 *Id.* at 375–77, 388.

187 *Id.* at 388.

188 *Id.*

189 *Id.* at 389.

190 *Id.*

191 *Id.*

192 *Id.*; *accord id.* at 390–91 ("Rather than confer frequency monopolies on a relatively small number of licensees . . . the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. . . . As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an

radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[193]

Thus, scarcity inverts the usual priority of First Amendment values. When there is no physical limit on the number of people who can speak, as is the case with newspapers, it is the speakers' interests that are paramount even if those speakers have an economic monopoly, and the cure for any private censorship that may exist is more speech, not regulation. The situation is different when the opportunities to speak are scarce. The Court noted, "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."[194] When that is the case, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[195]

Interestingly, even the less protective standard announced by *Red Lion* did not mean that the free speech interests of would-be speakers necessarily prevailed over the free speech interests of the intermediaries. On the contrary, cases applying the scarcity doctrine, such as *CBS v. DNC*, emphasized that the tradeoff between the public's interest in balanced content and preserving the broadcasters' role as a "journalistic 'free agent'" necessitated a "delicate balancing of competing interests" and required regulators to "walk a 'tightrope'" between the competing free speech values.[196]

As a result, the Court's broadcasting cases consistently treated both of these considerations as important values that must be traded off against one another.[197] Although the Court's articulation of the

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unconditional monopoly of a scarce resource which the Government has denied others the right to use.").

193 *Id.* at 390.

194 *Id.* at 392.

195 *Id.* at 390; *accord id.* at 394 ("Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions.").

196 *CBS v. DNC*, 412 U.S. 94, 117 (1973); *see also id.* at 104 (noting that broadcaster regulation posed the "major dilemma" of "how to strike a proper balance between private and public control").

197 *See, e.g.*, FCC v. League of Women Voters of Cal., 468 U.S. 364, 380 (1984) (recognizing that the "freedom to advocate one's own positions without also presenting opposing viewpoints" must be balanced against the governmental interest in "ensuring adequate and balanced coverage of public issues"); CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981) (recognizing that broadcast regulation implicates "[t]he First Amendment interests of candidates and voters, *as well as broadcasters*" and that the Court "has never approved a *general* right of access to the media" and would at most uphold "a *limited* right to 'reasonable' access" (first emphasis added)).

appropriate constitutional standard has been less than clear,[198] all of the potential standards implicitly recognize that the editorial discretion exercised by intermediaries remained an important consideration in the free speech balance. It also bears noting that the consideration on the other side of the balance is not that of the would-be speaker who wishes to use the broadcast station as a platform conveying its speech, but rather that of the listener. Even this more limited First Amendment standard does not support the type of unfettered access to the conduit of the type sought by nonintermediation proponents.

Interestingly, *Red Lion* considered the possibility that improvements in the ability to use the spectrum more efficiently might eliminate scarcity.[199] Although the Court ultimately concluded that demands for frequencies had outstripped the pace of technological improvement so that the spectrum continued to be scarce,[200] the fact that it entertained the possibility seemed to suggest that this justification for deviating from the print paradigm, which prohibited any infringement on newspaper's editorial discretion, might collapse should scarcity ever cease to be a constraint on broadcast speech. Similarly, the *CBS v. DNC* Court seemed to suggest that the principles governing broadcast regulation might change when it observed that "the broadcast industry is dynamic in terms of technological change" and that "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[201] Justice Douglas's concurrence in the judgment similarly noted that "[s]carcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television."[202]

The Court made this point most explicitly in *League of Women Voters*. The Court began by recognizing that regulations designed to

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198 The Court has clearly indicated that the standard is less than strict scrutiny, but it has struggled to determine precisely what standard should apply. For example, *League of Women Voters* employed language reminiscent of intermediate scrutiny when it held that restrictions on broadcasters' editorial discretion must be "narrowly tailored to further a substantial government interest." *League of Women Voters*, 468 U.S. at 380. In another case, the Court used language more reminiscent of the rational basis standard. *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 802, 803 (1978) (upholding regulations as a "reasonable means of promoting the public interest" and as "a rational weighing of competing policies"); *id.* at 805, 808 n.29, 814, 815 (concluding that the FCC did not act irrationally).

199 *Red Lion*, 395 U.S. at 396–400.

200 *Id.* at 400–01.

201 *CBS v. DNC*, 412 U.S. at 102 (plurality opinion).

202 *Id.* at 158 n.8 (Douglas, J., concurring in the judgment).

ensure that "the public receives . . . a balanced presentation of information on issues of public importance" "[have] never been allowed with respect to the print media."[203] At the same time, "'differences in the characteristics of new media justify differences in the First Amendment standards applied to them.'"[204] With respect to broadcasting, the scarcity of the electromagnetic spectrum justified requiring broadcasters who receive licenses to "serve in a sense as fiduciaries for the public by presenting 'those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves.'"[205]

In other words, it was the limitation of opportunities to speak that justified placing restrictions on broadcasters' exercise of their own editorial discretion. Subsequent language in the Court's opinion essentially confirmed this interpretation when it recognized that it was the fact that "the broadcasting industry plainly operates under restraints not imposed upon other media" that justified denying broadcasters "the absolute freedom to advocate one's own positions without also presenting opposing viewpoints" enjoyed by newspapers.[206] The structure of this argument implied that broadcasters' editorial discretion would once again enjoy the same protection as newspapers' should scarcity ever cease to be an issue.

Indeed, the Court seemed to entertain just that possibility when it noted:

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete.[207]

However, the Court was "not prepared . . . to reconsider [its] longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[208] Ac-

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203 *League of Women Voters*, 468 U.S. at 377 (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974)).

204 *Id.* (quoting *Red Lion*, 395 U.S. at 386).

205 *Id.* (quoting *Red Lion*, 395 U.S. at 389).

206 *Id.* at 380.

207 *Id.* at 376 n.11 (citing Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221–26 (1982)).

208 *Id.* at 377 n.11. The FCC arguably provided just such a signal when it repealed the

cording to this reasoning, should technology ever reach the point where the broadcast spectrum ceased to be scarce, the print paradigm would once again apply. This reasoning also implied that restrictions on editorial discretion would not apply to any future technologies to the extent that they are not scarce.

I have reviewed the scarcity doctrine's analytical deficiencies at length elsewhere and need not repeat that critique here.[209] Whatever the scarcity doctrine's continuing validity with respect to broadcasting,[210] the Supreme Court's landmark decision in *Reno v. ACLU* firmly shut the door on extending the scarcity doctrine to the Internet.[211] The Court reasoned that because the Internet "provides relatively unlimited, low-cost capacity for communication of all kinds," it "can hardly be considered a 'scarce' expressive commodity."[212] As a result, the Court flatly concluded that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[213]

Following such a sweeping declaration of the inapplicability of the scarcity doctrine to the Internet, it is hard to see how it could serve as a justification for overriding Internet intermediaries' exercises of

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Fairness Doctrine in 1987. *See* Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, Memorandum Opinion and Order, 2 F.C.C.R. 5043 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989). Despite this fact, the Court nonetheless reaffirmed the scarcity doctrine when it next had the chance to review it, *see* Metro Broad., Inc. v. FCC, 497 U.S. 547, 566–67 (1990), an outcome best explained by the manner in which the Court's broadcast jurisprudence became tied up in the judicial politics surrounding affirmative action, *see* Yoo, *supra* note 17, at 286–88.

209 *See* Yoo, *supra* note 17, at 267–69.

210 *See* FCC v. Fox Television Stations, 129 S. Ct. 1800, 1820–22 (2009) (Thomas, J., concurring) (calling for the scarcity doctrine to be overruled); Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 638 (1994) (noting the critique of the scarcity doctrine with respect to broadcasting).

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

212 *Id.*

213 *Id.* Some scholars have attempted to reconstruct this rationale, shifting the focus from the scarcity of spectrum to the scarcity of attention. Drawing on Herbert Simon's insight that "a wealth of information creates a poverty of attention," Herbert Simon, Designing Organizations for an Information-Rich World, Speech at the Johns Hopkins University and Brookings Institution Symposium, *in* COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37, 40 (Martin Greenberger ed., 1971), these scholars argue that information overload becomes a justification for limiting search engines' abilities to intermediate speech, *see* Bracha & Pasquale, *supra* note 7, at 1158; Chandler, *supra* note 7, at 1104; Elkin-Koren, *supra* note 7, at 183–84. This argument is curious for a number of reasons. As an initial matter, in attempting to recast abundance as scarcity, it turns scarcity on its head. Moreover, a world of abundance increases, not decreases, the need for strong exercises of editorial discretion. Lastly, since attention is inherently limited, if accepted, such a rationale would admit of no limiting principle and would lead to endemic regulation of every aspect of an individual's online interactions.

editorial discretion. In the absence of such a scarcity justification, the default is the newspaper standard, in which the intermediaries' editorial discretion predominates.

3. Pacifica*: Invasiveness and Accessibility as a Justification for Limiting Editorial Discretion*

In *FCC v. Pacifica Foundation*,[214] the Court once again reaffirmed that the print paradigm represented the relevant baseline when it reiterated that "the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize."[215] Broadcasting, however, enjoyed no such protection.[216] Rather than invoking the scarcity doctrine, the Court proceeded to articulate two new rationales for extending a lesser degree of First Amendment protection to broadcasting: "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans" with the ability to "confront[ ] the citizen . . . in the privacy of the home."[217] "Second, broadcasting is uniquely accessible to children, even those too young to read."[218] It bears mentioning that, like the scarcity cases, *Pacifica* regards newspapers as a baseline.[219] Presumably, if *Pacifica*'s rationales fail, the primacy of editorial discretion associated with newspapers will govern.

I have described the analytical shortcomings of these rationales elsewhere.[220] Indeed, there are some indications that the Court may be ready to overturn *Pacifica*.[221] Regardless of its eventual survival with respect to broadcasting, the Court's decision in *Reno v. ACLU* squarely foreclosed any possibility that *Pacifica*'s rationales might be extended to the Internet. As the Court noted, "the Internet is not as 'invasive' as radio or television. The District Court specifically found that '[c]ommunications over the Internet do not invade an individual's home or appear on one's computer screen unbidden. Users seldom

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214 FCC v. Pacifica Found., 438 U.S. 726 (1978).

215 *Id.* at 748 (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

216 *Id.* (citing Red Lion Broad., Co. v. FCC, 395 U.S. 367, 377–78 (1969)).

217 *Id.* (citing Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736–37 (1970)).

218 *Id.* at 749.

219 *See id.* at 748.

220 Yoo, *supra* note 17, at 292–303.

221 *See* FCC v. Fox Television Stations, 129 S. Ct. 1800, 1819 (2009) (remanding to the court of appeals a challenge to the FCC's decision to abandon its "fleeting expletives" policy, while noting that the constitutionality of the indecency restrictions of the type upheld by *Pacifica* "will be determined soon enough, perhaps in this very case"); *id.* at 1819–22 (Thomas, J., concurring) (calling for *Pacifica* to be overruled).

encounter content by accident.'"[222] The Court further noted that it had rejected a similar argument in *Sable Communications of California, Inc. v. FCC*,[223] in which the government had invoked *Pacifica* to justify a statutory prohibition of indecent dial-a-porn messages.[224] The *Reno* Court observed that *Sable* had distinguished *Pacifica*'s "'empathically narrow holding'" by noting that "'the dial-it medium requires the listener to take affirmative steps to receive the communication'" and pointing out that objectionable content is generally preceded by warnings, which made it less likely that the recipient would be taken by surprise.[225]

The Court further concluded that, absent the applicability of the *Pacifica* rationales, any restrictions must be narrowly tailored to the harm if they are to survive constitutional scrutiny.[226] The existence of software allowing parents have the ability to screen out unwanted content vitiated any claim that the ban was narrowly tailored.[227] In such a world, concerns about invasiveness and accessibility seem singularly misplaced.

Following such a categorical rejection, it is hard to see how *Pacifica* can serve as a basis for subjecting the Internet to a lower level of First Amendment scrutiny. *Pacifica*'s reasoning suggests that the Internet will be governed by the baseline level of First Amendment protection associated with newspapers, under which the intermediary's editorial discretion takes primacy.

The broadcast precedents thus fail to provide any basis for overriding the editorial discretion exercised by Internet intermediaries. They do more than simply recognize that intermediaries' exercises of editorial discretion promote important free speech values that should be protected. Given that the Supreme Court has already held both lines of precedent applying the more relaxed First Amendment standard to broadcasting inapplicable to the Internet, the broadcast precedents imply that the exercises of editorial discretion by Internet intermediaries should receive the same level of protection as that of

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222 Reno v. ACLU, 521 U.S. 844, 869 (1997) (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

223 Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).

224 *Reno*, 521 U.S. at 869 (citing *Sable*, 492 U.S. at 126).

225 *Id.* at 870 (quoting *Sable*, 492 U.S. at 127–28).

226 *See id.* at 879, 882 (holding that the restrictions imposed by the Communications Decency Act of 1996 failed to pass constitutional muster because they were not narrowly tailored).

227 *Id.* at 877; *accord Sable*, 492 U.S. at 130–31 (noting that because the technological restrictions on dial-a-porn messages were adequate to prevent most young children from hearing them, an outright ban on obscene phone messages was not narrowly tailored).

newspapers. Consistent with this interpretation, subsequent Supreme Court decisions have evaluated restrictions on Internet speech on the presumption that the Internet is entitled to full First Amendment protection.[228] The Supreme Court's broadcast precedents are thus best read as providing a strong endorsement of the importance of preserving intermediaries' editorial discretion. Any restriction of that discretion would inhibit important free speech values.

C. The Importance of and Limits on Editorial Discretion Exercised by Cable Operators

The importance of preserving intermediaries' editorial discretion draws further support from the Supreme Court's decisions with respect to the other major medium of electronic communications: cable television. As was the case with the Court's newspaper and broadcast precedents, these decisions affirm and reaffirm that cable operators' decisions about what speech to carry represent an important exercise of free speech. This editorial discretion furthers important free speech values even if the cable operator is simply serving as a conduit for the speech of others or uses its discretion to favor a particular perspective. Indeed, the ability to favor particular points of view is the very essence of editorial discretion, and that ability cannot be regulated without inhibiting the free speech benefits that such exercises of editorial discretion provide.[229]

Turner I did hold that some restriction of a cable operator's editorial discretion might be justified if it exercised exclusive control over a critical physical bottleneck.[230] Judicial recognition of multiple options for receiving Internet service, however, renders it highly unlikely that this rationale would justify upholding similar restrictions on the Internet.

1. The Importance of Cable Operators' Editorial Discretion

The Supreme Court's decisions with respect to cable television have long emphasized the importance of preserving cable operators' editorial discretion. The Court first addressed the issue in *FCC v.*

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228 *See* Ashcroft v. ACLU, 542 U.S. 656, 666 (2004) (concluding that a regulation on Internet speech could stand only if it constitutes "the least restrictive means available"); Ashcroft v. ACLU, 535 U.S. 564, 580 (2002) (holding that Internet speech regulations must be "sufficiently narrowed" to survive First Amendment scrutiny).

229 For a contrary argument, see Mark S. Nadel, *Editorial Freedom: Editors, Retailers, and Access to the Mass Media*, 9 HASTINGS COMM. & ENT. L.J. 213 (1987).

230 Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 656–57 (1994).

Midwest Video Corp. (*Midwest Video II*),[231] in which the Court rejected the FCC's attempt to impose what amounted to a common-carriage requirement on cable operators.[232] The Court's primary basis for overturning the regulation was statutory. The absence of a statute explicitly giving the FCC jurisdiction over cable television meant that any regulatory authority that it possessed necessarily derived from cable's ancillary impact on broadcasting. Given that the FCC's jurisdiction over cable was completely derivative of its jurisdiction over broadcasting, any statutory limitations placed on its power to regulate broadcasting necessarily applied to its power to regulate cable as well.[233]

For purposes of the regulations at issue in *Midwest Video II*, the most important limitation on the FCC's jurisdiction over broadcasting was the statutory provision preventing it from treating broadcasters as common carriers, as indicated by the legislative history reviewed in *CBS v. DNC*.[234] Thus, in assessing the legality of the FCC's attempt to impose common carriage obligations on cable operators, the Court could not "ignore Congress' stern disapproval . . . of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike."[235] The fact that "Congress has restricted the Commission's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting" dictated that the FCC also lacked the authority to impose similar restrictions on the journalistic freedom of persons engaged in providing cable television service.[236]

The Court also invoked policy considerations, finding that the free speech considerations that justified protecting the editorial discretion of broadcasters also applied to cable operators. The Court concluded that Congress's refusal to restrict journalistic freedom by treating them as common carriers is not a limitation "having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions. Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include."[237] In so ruling, the Court rejected claims that the restriction on cable opera-

231 FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689 (1979).

232 *Id.* at 708–09.

233 *Id.* at 706–08.

234 *Id.* at 702–04 (citing *CBS v. DNC*, 412 U.S. 94, 105–09 (1973)).

235 *Id.* at 708.

236 *Id.* at 707.

237 *Id.*

tors' editorial discretion was not significant, although the Court reserved the question of whether "the discretion exercised by cable operators is of the same magnitude as that enjoyed by broadcasters."[238] Even if the restriction did not displace alternative programming, "compelling cable operators indiscriminately to accept access programming [would] interfere with their determinations regarding the total service offering to be extended to subscribers."[239] Because the Court was able to resolve the case on statutory grounds, it did not address the conclusion reached by the court below that the common-carriage restriction violated the First Amendment, "save to acknowledge that [the question] is not frivolous."[240]

The Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*[241] further acknowledged the importance of the editorial discretion exercised by cable operators. In that case, a cable operator argued that a city's refusal to grant it a cable television franchise violated its free speech rights.[242] The district court had dismissed the cable operator's First Amendment challenge for failure to state a claim, only to see that decision overturned by the Supreme Court.[243] The Court unequivocally held that "the activities in which [the cable operator] allegedly seeks to engage plainly implicate First Amendment interests."[244] In so holding, the Court quoted with approval the cable operator's assertion that

> [t]he business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content.[245]

Thus, the Court concluded that "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable operator] seeks to communicate messages on a wide variety of topics and a wide variety of formats."[246]

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238 *Id.* at 707 n.17.

239 *Id.*

240 *Id.* at 709 n.19.

241 City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488 (1986).

242 *Id.* at 491–92.

243 *Id.* at 492.

244 *Id.* at 494.

245 *Id.*

246 *Id.*

The Court also reaffirmed its recognition in *Midwest Video II* that "cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include.'"[247] The Court elaborated:

> Cable television partakes of some the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall with the ambit of the First Amendment . . . .[248]

Preferred Communications thus clearly established that speech by cable operators implicates the First Amendment. Moreover, the Court's acknowledgement that cable operators promote free speech not only when they produce original programming, but also when they "use a portion of their available space to reprint (or retransmit) the communications of others," confirms that they serve free speech values even when they are simply serving as the conduit for others' speech.[249]

The Court reaffirmed that cable operators' exercises of editorial discretion promote important free speech values in *Leathers v. Medlock*.[250] There, the Court stated that "[c]able television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'"[251]

The Court also endorsed this conclusion in *Turner I*.[252] In that case, the Court sweepingly proclaimed that "[t]here can be no disagreement" on the "initial premise" that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[253] Indeed, that is the case regardless of whether the cable operator is offering "original programming" or simply "'exercising editorial discretion over which stations or programs to include in its repertoire.'"[254] In so holding, the Court concluded that "the ratio-

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247 *Id.* (quoting FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979)).

248 *Id.* at 494–95.

249 *Id.* at 494.

250 Leathers v. Medlock, 499 U.S. 439, 444 (1991).

251 *Id.*

252 Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 636 (1994).

253 *Id.* (citing *Leathers*, 499 U.S. at 444).

254 *Id.* (quoting *Preferred Commc'ns*, 476 U.S. at 494).

nale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the case elaborating it, does not apply in the context of cable regulation."[255]

After noting the judicial and academic criticism of the scarcity doctrine,[256] the Court found that the fact that "cable television does not suffer from the inherent limitations that characterize the broadcast medium" and the lack of "any danger of physical interference between two cable speakers attempting to share the same channel" rendered the scarcity rationale inapposite.[257] As a result, the Court found that "application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation."[258]

The Court returned to the issue of the free speech values promoted by cable operators' editorial discretion in *Denver Area Educational Telecommunications Consortium v. FCC*.[259] Although the decision yielded a large number of badly fractured opinions, the Court unanimously reaffirmed the positive role that cable operators' editorial discretion plays in promoting free speech.

For example, the plurality opinion authored by Justice Breyer, in which Justices Stevens, O'Connor, and Souter joined in relevant part, began by noting that cable channels play a variety of roles, including serving as the conduit for the speech of others, providing original programming, and retransmitting over-the-air broadcast signals.[260] The plurality reiterated the Court's recognition in *Turner I* that "the editorial function itself is an aspect of 'speech,' and a court's decision that a private party, say, the station owner, is a 'censor,' could itself interfere with that private 'censor's' freedom to speak as an editor."[261] Any attempt to focus solely on the interests of those who would use cable as a conduit for their speech ignores the "legitimate role" played by "the expressive interests of cable operators."[262]

Justice Kennedy, joined by Justice Ginsburg, raised similar themes, noting that "[c]able operators have First Amendment rights, of course," and that "a cable operator's activities in originating programs or exercising editorial discretion over programs others provide

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255 *Id.* at 637.

256 *Id.* at 638.

257 *Id.* at 639.

258 *Id.*

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

260 *Id.* at 733–34 (plurality opinion).

261 *Id.* at 737–38 (citing *Turner I*, 512 U.S. at 636).

262 *Id.* at 747.

on its system . . . are protected."[263] Justice Kennedy distinguished between leased access, which regulates channels over which cable operators have historically exercised discretion, and public access, which regulates channels over which cable operators had never exercised control, concluding that laws that regulate the former are more problematic than laws that regulate the latter.[264] In drawing this distinction, Justice Kennedy reinforced the important role that editorial discretion plays in promoting free speech in those areas in which editorial discretion exists.

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, took an even more expansive view of cable operators' First Amendment Rights. As Justice Thomas noted, the Supreme Court's precedents have long recognized that cable operators engage in speech both when they originate programming and when they exercise editorial discretion over which stations to include.[265] Although considerable ambiguity existed as to whether cable operators' editorial discretion would be "entitled to the substantial First Amendment protections afforded the print media" or would be subject to the lesser protections extended to broadcasting, the Court clarified that "[o]ver time, . . . [it has] drawn closer to recognizing that cable operators should enjoy the same First Amendment rights as the nonbroadcast media."[266] Indeed, despite the disagreement in *Turner I* over whether the must-carry rules were content-based, Justice Thomas found that "there was agreement that cable operators are generally entitled to much the same First Amendment protection as the print media."[267]

Justice Thomas further reasoned that embracing the print paradigm meant extending the highest level of First Amendment protection to cable operators' exercises of editorial discretion. After *Turner I*, the *Red Lion* Court's statement that the interests of viewers and listeners are paramount "can no longer be given any credence in the cable context. It is the operator's right that is preeminent."[268] Under the print standard, "when there is a conflict, a programmer's asserted

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263 *Id.* at 792 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

264 *Id.* at 793, 796.

265 *Id.* at 814–15 (Thomas, J., concurring in the judgment in part and dissenting in part) (citing City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986); Leathers v. Medlock, 499 U.S. 439, 444 (1991)).

266 *Id.* at 813–14.

267 *Id.* at 815; *accord id.* at 816 (noting that *Turner I* "adopt[ed] much of the print paradigm" and "reject[ed] *Red Lion*" for cable).

268 *Id.* at 816.

right to transmit over an operator's cable system must give way to the operator's editorial discretion."[269] Indeed, *Turner I* implicated the First Amendment because must-carry rules "interfered with the operators' editorial discretion by forcing them to carry broadcast programming that they might not otherwise carry."[270] The Court "implicitly recognized in [*Turner I*] that the programmer's right to compete for channel space is derivative of, and subordinate to, the operator's editorial discretion" and that programmers "ha[ve] no freestanding First Amendment right to have [their] programming transmitted."[271] In reaching this conclusion, the Court in *Turner I* "recogniz[ed] the general primacy of the cable operator's editorial rights over the rights of programmers and viewers."[272] Thus, "it is the cable operator, not the access programmer, whose speech rights have been infringed."[273] As a result, Justice Thomas embraced a "constitutional presumption . . . run[ning] in favor of the operators' editorial discretion" and rejected a constitutional presumption in favor of any right of programmers to speak on access channels.[274]

The different positions adopted by the various opinions in *Denver* are not susceptible to easy synthesis. Although the Justices disagreed on the appropriate level of scrutiny to be applied to and the constitutionality of various provisions, the Court was unanimous in concluding that the editorial discretion exercised by cable operators promotes important free speech values. These values are implicated even if cable operators are simply serving as the conduit for the speech of others. The fact that cable operators may favor certain speech over others is not a potential problem to be remediated. On the contrary, such favoritism is inherent in any exercise of editorial discretion. Thus, any regulatory limits placed on cable operators' editorial discretion would prevent these important free speech values from being realized.

2. Turner I*: Gatekeeper Control as a Justification for Limiting Editorial Discretion*

The Supreme Court's cable cases thus recognized that cable operators' exercises of editorial discretion promote important free speech values. In addition, *Turner I* squarely foreclosed any possibility that

269 *Id.*
270 *Id.*
271 *Id.* at 816–17.
272 *Id.* at 817.
273 *Id.* at 824.
274 *Id.* at 822.

the scarcity doctrine used to justify restrictions on broadcasters' editorial discretion would be applied to cable.[275]

At the same time, *Turner I* offered three reasons for declining to apply the print standard articulated in *Tornillo* to cable. The first two reasons were general principles that would apply to all forms of speech and thus could not serve to distinguish communications transmitted via cable television from other forms of communication.[276] The third reason focused on "an important technological difference between newspapers and cable television."[277] Specifically, the Court noted that, "[a]lthough a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium."[278] Even if a newspaper is a natural monopoly, it "does not possess the power to obstruct readers' access to other competing publications" and cannot "prevent other newspapers from being distributed to willing recipients in the same locale."[279]

The Court concluded, however, that "[t]he same is not true with cable."[280] Instead, "[w]hen 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 channeled into the subscriber's home."[281] Cable operators' "ownership of the essential pathway for cable speech" thus gives them the power to "silence the voice of competing speakers with a mere flick of the switch."[282] This "physical control of a critical pathway of communication" creates a "potential for abuse of . . . private power over a central avenue of communication" sufficient to justify a greater intrusion on cable operators' editorial discretion than would be permitted with respect to newspapers.[283]

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275 *See supra* notes 255–58 and accompanying text.

276 The first reason was that the restrictions at issue "are not activated by any particular message spoken by cable operators and thus exact no content-based penalty." Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 655 (1994). The second reason was that the Court did not think that the regulation would "force cable operators to alter their own messages to respond to the broadcast programming they are required to carry." *Id.*

277 *Id.* at 656.

278 *Id.*

279 *Id.*

280 *Id.*

281 *Id.* (emphasis added).

282 *Id.* at 656.

283 *Id.* at 657.

Several aspects of the Court's decision bear emphasizing. First, it is instructive that the Court took the print paradigm as the relevant baseline. This implies that, unless some justification for deviating from that standard is shown, cable and other media should enjoy the same First Amendment protection as newspapers. Second, the Court specifically rejected the argument that the fact that a particular technology may be an economic monopoly justified according it a lesser degree of First Amendment protection. Instead, it was only the cable operators' control of an exclusive physical connection that gave rise to the concerns about private censorship sufficient to justify overriding the cable operators' exercises of editorial discretion. Otherwise, *Tornillo* would have been wrongly decided, and the government would be able to impose access requirements on any player possessing a dominant economic position without violating the First Amendment.

Whatever the continuing validity of the bottleneck rationale with respect to cable television,[284] it almost certainly has no applicability to the Internet.[285] Over the past decade, cable and telephone companies have engaged in spirited competition to deploy cable modem and Digital Subscriber Line ("DSL") technologies. Although cable modem providers established and maintained an early lead on DSL, more recently, telephone companies have begun deploying more advanced technologies, such as Verizon's fiber-based FiOS network and AT&T's VDSL-based U-verse network, that have made it possible for them to deliver bandwidth speeds that surpass those permitted by the current cable modem architecture.[286] The resulting competition has in turn forced the cable industry to upgrade its infrastructure by deploying a new technology known as DOCSIS 3.0, which is capable of supporting even higher speeds.[287]

But perhaps the most important and often overlooked change in the competitive landscape over the past few years is the advent of

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284 *See* Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 722 (2005) (discussing how the functional similarity between cable and direct-broadcast satellite ("DBS") is undercutting the rationale for technology-based distinctions under the First Amendment); Yoo, *supra* note 12, at 207–08, 228–29 (describing the growing competition between cable and DBS).

285 *See* Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1765 (1995) ("*Turner* is quite different from imaginable future cases involving new information technologies, including the Internet, which includes no bottleneck problem.").

286 *See* Daniel F. Spulber & Christopher S. Yoo, *Rethinking Broadband Internet Access*, 22 HARV. J.L. & TECH. 1, 7–9 (2008).

287 Vishesh Kumar, *Cable Prepares an Answer to FiOS*, WALL ST. J., Feb. 14, 2008, at B3.

mobile wireless. Mobile wireless services have enjoyed spectacular growth over the past few years. Measured in terms of "advanced service lines" (defined as service capable of supporting over 200 kbps in both directions), mobile wireless has gone from having no subscribers as of the beginning of 2005 to having over 14.5 million subscribers and roughly 17% of the market by the end of 2008.[288] The success of wireless broadband becomes even more dramatic if measured in terms of "high speed lines" (defined as service capable of supporting over 200 kbps in at least one direction). Over the same time period, mobile wireless has now captured nearly 25 million subscribers, which represents over 24% of the market.[289] At the same time, a consortium of companies led by Sprint is preparing to deploy a new wireless network based on the WiMax technology.[290] The eventual deployment of services based on spectrum allocated through the 700 MHz auction promises to intensify competition still further.

The presence of such vibrant competition has led courts and regulators repeatedly to reject arguments that the market for last-mile Internet service is sufficiently concentrated to justify the imposition of a mandatory access requirement. For example, in *Comcast Cablevision of Broward County, Inc. v. Broward County*,[291] the court held that the emerging competition between DSL and cable modem providers rendered the bottleneck rationale of *Turner I* inapposite to cable modem service.[292] Relying on an FCC report projecting that the broadband industry did not appear to be a natural monopoly and would instead be characterized by vibrant intermodal competition once consumers had migrated from dial-up to broadband services, the court found that the bottleneck rationale announced in *Turner I* did not justify subjecting the Internet to a lower standard of First Amendment scrutiny than newspapers.[293]

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288 FED. COMMC'NS COMM'N, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2008, at 10 tbl.2 (Feb. 2010), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0212/DOC-296239A1.pdf.

289 *Id.* at 9 tbl.1.

290 Saul Hansell, *Sprint Banks on WiMax to Win Back Market Share*, N.Y. TIMES, Sept. 28, 2009, at B1.

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

292 *Id.* at 696.

293 *Id.* (citing 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, Report, 14 F.C.C.R. 2398, 2423 ¶ 48 (1999)).

This conclusion is reinforced by subsequent judicial and regulatory decisions recognizing the competitiveness of the broadband market. For example, in *United States Telecom Ass'n v. FCC*,[294] the D.C. Circuit overturned an FCC decision ruling that the Telecommunications Act of 1996 ("1996 Act") required local telephone companies to share the high-frequency portion of its loops with other DSL providers largely because of "the robust competition . . . in the broadband market" between DSL, cable modems, wireless broadband, and other technologies.[295] The FCC's 2005 *Wireline Broadband Access Order* similarly ruled that because the market for last-mile broadband service had already become quite competitive and was likely to become more so in the years to come, DSL-related elements should be removed from the list of network elements to which incumbent local telephone companies must provide unbundled access under the 1996 Act.[296] Most recently, the Supreme Court specifically invoked this finding in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*,[297] in which it noted that "the market for high-speed Internet service is now quite competitive" and that "DSL providers face stiff competition from cable companies and wireless and satellite providers."[298]

These pronouncements make it difficult to see how any court could invoke the bottleneck rationale articulated in *Turner I* to justify greater intrusions into Internet providers' editorial discretion than would be permissible with respect to newspapers.[299] In the absence of such a justification, the print model dictates that Internet providers'

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294 U.S. Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

295 *Id.* at 428–29.

296 Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14,853, 14,883–87 ¶¶ 55–64 (2005), *petition for review denied sub nom.* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).

297 Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109 (2009).

298 *Id.* at 1118 n.2.

299 Some commentators have argued that search engines have sufficient "'control of a critical pathway of communication'" to justify bringing them within the ambit of the exception recognized by *Turner I*. *See* Bracha & Pasquale, *supra* note 7, at 1191 (quoting Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 657 (1994)); Chandler, *supra* note 7, at 1126–27 (same). This contention ignores *Turner I*'s explicit rejection of the argument that a dominant market share, by itself, justified upholding a restriction on cable operators' editorial discretion. Instead, the Court's decision turned on cable operators' controls over exclusive physical connections. Because search engines do not own any of the physical infrastructure connecting end users to the Internet, unlike cable operators, they cannot block any end user from accessing any particular content. Indeed, any end user unhappy with the services provided by a particular search engine can easily switch to another search engine with just a few keystrokes and clicks of a mouse.

editorial discretion represents a major, if not the dominant, consideration in the free speech calculus.

3. Denver*: The Failed Analogy to* Pacifica *and the History of Regulation*

The Supreme Court's decision in *Denver*[300] also experimented with alternative rationales for subjecting cable operators to a lower level of First Amendment scrutiny. The badly fragmented opinions in that case are not easily synthesized. The primary controversy was over the constitutionality of statutory provisions authorizing cable operators to refuse to carry indecent programming on their leased access and public access cable channels.[301] The plurality concluded that "the changes taking place in the law, the technology, and the industrial structure related to telecommunications" rendered "it unwise and unnecessary definitively to pick one analogy or one specific set of words now,"[302] an aspect of the decision that drew sharp rebukes from the other five members of the Court.[303] Instead, the plurality cited a laundry list of considerations, the most important of which were the similarity of the restrictions under review to those at issue in *Pacifica*,[304] the fact that the statute regulated "channels over which cable operators have not historically exercised editorial control,"[305] and the fact that programming on public access channels is generally subject to review by an access channel manager who can exercise editorial discretion in the cable operator's stead.[306]

The viability of each of these rationales with respect to cable is open to question,[307] particularly in the aftermath of the Court's subse-

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300 Denver Area Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

301 *Id.* at 732–33.

302 *Id.* at 742 (plurality opinion); *accord id.* at 768 (Stevens, J., concurring); *id.* at 775–77 (Souter, J., concurring); *id.* at 779–80 (O'Connor, J., concurring in part and dissenting in part).

303 *See id.* at 780–87 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 813, 817–18 (Thomas, J., concurring in the judgment in part and dissenting in part).

304 *See id.* at 744–45 (plurality opinion); *id.* at 779–80 (O'Connor, J., concurring in part and dissenting in part).

305 *Id.* at 761 (plurality opinion); *see also id.* at 793, 800 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

306 *See id.* at 761–64 (plurality opinion).

307 Courts have long recognized that technological differences (particularly cable's ability to block unwanted channels on a household-by-household basis) render *Pacifica* inapplicable to cable. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 815 (2000); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 n.31 (D.C. Cir. 1985); Cruz v. Ferre, 755 F.2d 1415, 1420 (11th Cir. 1985); Cmty. Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1167–68 (D. Utah 1982). In addition, allowing previous regulation that had long deprived cable operators of edito-

quent decision in *United States v. Playboy Entertainment Group, Inc.*[308] Whatever the continuing viability of these justifications for cable, they appear to have no applicability whatsoever to the Internet. As noted earlier, the Court's landmark decision in *Reno v. ACLU* held *Pacifica* squarely inapplicable to the Internet.[309] In addition, unlike cable operators, Internet providers have never been deprived of editorial discretion over any of their transmission capacity.[310]

In short, the Supreme Court's cable precedents provide no support for interfering with Internet intermediaries' editorial discretion. On the contrary, these cases are replete with statements acknowledging that cable operators' exercises of editorial discretion promote free speech values. Even those decisions that extended a lesser degree of First Amendment protection to cable operators recognize that, while audiences have an interest in access to speech, that interest must be balanced against the impairment of the free speech interests represented by the editorial discretion exercised by cable operators.[311] Thus, at a minimum, these cases recognize that cable operators' exercises of editorial discretion serve important free speech values. The inapplicability of the rationales invoked to justify extending a lower level of First Amendment protection to cable suggests that the interest in preserving editorial discretion should predominate.

D. Recognition of the Importance of Telephone Companies' Editorial Discretion

Determining the level of First Amendment protection enjoyed by common carriers has long remained something of a puzzle. Commentators have been struck by the paucity of judicial decisions discussing

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rial discretion and the presence of an "access channel manager" who can exercise editorial discretion to justify limitations on a cable operator's free speech rights is tantamount to allowing past regulation to serve as a constitutional justification for more regulation. Yoo, *supra* note 17, at 270–71.

308 United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000). *Playboy* appeared to do away with all of the various lower levels of First Amendment scrutiny put forward by the *Denver* plurality and instead subjected the regulation in question to strict scrutiny. *Id.* at 813–15. The most telling sign is the fact that Justice Breyer's dissent agreed that strict scrutiny was the appropriate standard. *Id.* at 836 (Breyer, J., dissenting). Indeed, Justice Breyer seemed to chide the majority for suggesting that he might have thought otherwise. *Id.* at 836. In the aftermath of a decision unanimously recognizing that restrictions of indecency on cable television are subject to strict scrutiny, it is hard to see how any of the justifications articulated by the *Denver* plurality for subjecting cable television to a lesser First Amendment standard remain good law.

309 *See supra* notes 222–25 and accompanying text.

310 Reno v. ACLU, 521 U.S. 844, 868–69 (1997) (noting that the Internet has never been subject to intrusive regulation).

311 *Denver*, 518 U.S. at 743 (plurality opinion).

the relationship between common carriage regulation and the First Amendment.[312] Indeed, aside from a few brief mentions noting that common carriers receive even less First Amendment protection than broadcasters,[313] courts have hardly commented on the issue at all. Commentators who have tried to synthesize the doctrine have found a tripartite First Amendment, in which print receives the highest level of protection, broadcasting receives somewhat less, and common carriers receive the least.[314] Others have suggested that, because the content is entirely in the control of the subscriber, the only First Amendment interests at stake are those of the subscribers, and the free speech interests of the carrier are not implicated at all.[315]

Since the late 1980s, decisions by lower federal courts have begun to recognize that editorial discretion serves free speech values even when exercised by common carriers.[316] The discussion that follows focuses primarily on two lines of cases. The first upheld local telephone companies' rights to refuse to carry dial-a-porn. The second recognized local telephone companies' rights to transmit cable television

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312 *See, e.g.*, ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 102–06 (1983); Susan Dente Ross, *First Amendment Trump?: The Uncertain Constitutionality of Structural Regulation Separating Telephone and Video*, 50 FED. COMM. L.J. 281, 299 (1998).

313 *See Denver*, 518 U.S. at 739 (plurality opinion); FCC v. League of Women Voters of Cal., 468 U.S. 364, 378 (1984). For example, the Supreme Court offered the tangential observation in *League of Women Voters* that, "[u]nlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom possible consistent with their public [duties]." *League of Women Voters*, 468 U.S. at 378 (quoting CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981)). Although this brief statement clearly implies that common carriers' First Amendment rights to editorial discretion are narrower than those of broadcasters, this statement simply makes a relative comparison that offers no clear statement about the First Amendment standard to be applied to common carriers. Similarly, in rejecting a First Amendment challenge to a provision of the consent decree that broke up AT&T, which prevented the newly formed local telephone companies from entering into electronic publishing, the court asserted that "common carriers are quite properly treated differently for First Amendment purposes than traditional news media." United States v. W. Elec. Co., 673 F. Supp. 525, 586 n.273 (D.D.C. 1987). The court made this assertion without analysis.

314 *See, e.g.*, PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW § 14.6.1, at 1279 (2d ed. 1999); POOL, *supra* note 312, at 2; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12–25, at 1003–04 (2d ed. 1988); ZUCKMAN ET AL., *supra* note 19, § 2.3(A)(iii), at 185–89.

315 *See* Baker, *supra* note 19, at 42 n.144; Jerome A. Barron, *The Telco, the Common Carrier Model and the First Amendment—The "Dial-a-Porn" Precedent*, 19 RUTGERS COMPUTER & TECH. L.J. 371, 382 (1993); Ross, *supra* note 312, at 295; *see also Denver*, 518 U.S. at 796 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (concluding that, to the extent that the cable operator is not exercising its own discretion, "the cable operator's rights [do not] inform this analysis").

316 *See infra* Part II.D.1–2.

programming. Together, these decisions suggest ways that even common carriers are important sources of intermediation.

1. Dial-a-Porn

Although there were historical antecedents upholding common carriers' rights to refuse to transmit content that is profane, indecent, or rude,[317] the issue came to a head with the emergence of dial-a-porn. Dial-a-porn marked a sea change in telephony. Instead of connecting two people speaking to each other, dial-a-porn more resembled a broadcast technology that permitted a single, one-way message to reach thousands of callers.[318] As telephone companies began to carry mass-media content, two consequences followed. First, governments began to want to exercise discretion over the content being carried on the telephone networks in much the way they did over broadcast content. Second, telephone carriers began to want to exercise editorial discretion over that content as well.

The first issue reached the Supreme Court in *Sable*, in which the Court struck down a federal statute banning indecent interstate telephone messages.[319] *Sable* is important for several reasons. First, that the Court employed strict scrutiny to strike down a restriction on telephone-based speech belies any suggestion that telephone communication is subject only to the "most limited First Amendment protection."[320] Second, the majority opinion focused almost entirely on the First Amendment rights of subscribers connected to the network; it did not address the second issue—the rights of telephone companies to refuse to carry indecent speech—at all.[321] Discussion of this issue was left to Justice Scalia's concurrence, in which he observed that, "while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it."[322] Justice Scalia's statement implicitly recognized the possibility that telephone companies may possess the editorial discretion to refuse to carry particular calls notwithstanding their status as common carriers.

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317 *See* HUBER ET AL., *supra* note 314, § 14.6, at 1275–76 (discussing an 1883 Ohio case upholding a local telephone company's right to refuse to serve a customer who had used profanity).

318 *See* Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1294 (9th Cir. 1987).

319 Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).

320 FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

321 *Sable*, 492 U.S. at 126–28.

322 *Id.* at 133 (Scalia, J., concurring).

Justice Scalia's admonition agreed with a line of lower court decisions upholding local telephone companies' rights not to carry dial-a-porn if they so chose.[323] Some cases held that the First Amendment did not apply because telephone companies are not state actors,[324] reasoning later endorsed by Justice Thomas.[325] In so holding, these courts recognize common carriers as private speakers with the right to choose the speech that they carry.[326]

More importantly, other courts have held that common carriage regulation does not foreclose telephone companies from exercising their business judgment to refuse to carry certain classes of service.[327] As one noted commentator has observed, upholding telephone companies' rights to exercise their business judgment is essentially the same thing as upholding their rights to exercise their own editorial discretion.[328]

2. Ban on Telephone Companies' Provision of Cable Television Services

The other line of authority recognizing common carriers' rights to exercise editorial discretion arose from a series of First Amendment challenges to laws prohibiting local telephone companies from offering cable television service.[329] Courts consistently held that this restriction impermissibly impaired the telephone companies' abilities to

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323 *See Mountain States*, 827 F.2d at 1293–95; Carlin Commc'n, Inc. v. S. Bell Tel. & Tel. Co., 802 F.2d 1352, 1361 (11th Cir. 1986); Network Commc'ns v. Mich. Bell Tel. Co., 703 F. Supp. 1267, 1275 (E.D. Mich. 1989); *see also* Info. Providers' Coal. for Def. of First Amendment v. FCC, 928 F.2d 866, 877 (9th Cir. 1991) (noting that "a carrier is free under the Constitution to terminate service to dial-a-porn operators altogether").

324 *See Info. Providers' Coal.*, 928 F.2d at 877; *Mountain States*, 827 F.2d at 1297; *S. Bell*, 802 F.2d at 1357–62; *Network Commc'ns*, 703 F. Supp. at 1274–77.

325 Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part) ("Common carriers are private entities and may, consistent with the First Amendment, exercise editorial discretion in the absence of a statutory prohibition.").

326 Allen S. Hammond, *Regulating the Multi-Media Chimera: Electronic Speech Rights in the United States*, 21 RUTGERS COMPUTER & TECH. L.J. 1, 11 (1995).

327 *See Mountain States*, 827 F.2d at 1294; *see also Network Commc'ns*, 703 F. Supp. at 1276 (relying on the telephone company's exercise of business judgment to hold that its refusal to carry dial-a-porn did not constitute state action).

328 Barron, *supra* note 315, at 386.

329 This restriction was first instituted by FCC rule. *See* Application of Telephone Cos. for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, Final Report and Order, 21 F.C.C.2d 307, 325 ¶ 49 (1970), *aff'd sub nom.* Gen. Tel. Co. of Sw. v. United States, 449 F.2d 846 (5th Cir. 1971). It was later codified by Congress. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2785 (previously codified at 47 U.S.C. § 533(b) (1994)).

engage in a form of protected speech.[330] The most complete analysis was offered by the Fourth Circuit in *Chesapeake & Potomac Telephone Co. of Virginia v. United States*.[331] In a statement somewhat in tension with the dial-a-porn precedents, the court recognized that the statute prohibiting local telephone companies from exercising editorial control over telephone calls meant that they are not "members of 'the press'" with respect to telephone service.[332] Even so, to the extent that a statute restricts them from "joining the press by operating . . . cable systems" complete "with editorial control," that statute implicates the First Amendment.[333]

Thus, even if local telephone companies were serving as common carriers with respect to voice communications, to the extent that they wished to begin providing video service, the First Amendment protected their rights to exercise editorial discretion over the content of that service. The fact that a firm may be providing common carriage for a service over which it exercises little or no editorial control does not prevent it from offering another service over which it can exercise editorial control. This provided a nice counterpoint to the recognition in *CBS v. DNC*, *Midwest Video II*, and *Denver* that firms that are already providing media content cannot be forced to become common carriers.[334]

Together, these cases establish some basic principles that apply to the Internet. First, a provider that is currently exercising editorial discretion over the content it is carrying cannot, consistent with accepted free speech principles, be forced to become a common carrier. Indeed, the district court in *Broward County* applied just such a principle when it rejected the argument that a cable modem provider that was exercising editorial discretion over its content could be forced to set aside part of its service for common carriage.[335] Although some

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330 *See* US West, Inc. v. United States, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated and remanded for consideration of mootness*, 516 U.S. 1155 (1996); Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181, 190 (4th Cir. 1994), *vacated and remanded for consideration of mootness*, 516 U.S. 415 (1996); S. New England Tel. Co. v. United States, 886 F. Supp. 211, 217 (D. Conn. 1995); NYNEX Corp. v. United States, No. Civ. 93-323-P-C, 1994 WL 779761, at *2 (D. Me. Dec. 8, 1994); Ameritech Corp. v. United States, 867 F. Supp. 721, 728 (N.D. Ill. 1994); BellSouth Corp. v. United States, 868 F. Supp. 1335, 1339 (N.D. Ala. 1994); US West, Inc. v. United States, 855 F. Supp. 1184, 1190 (W.D. Wash. 1994).

331 Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181 (4th Cir. 1994).

332 *Id.* at 196.

333 *Id.*

334 *See supra* notes 135, 137, 141, 232–36, 240 and accompanying text.

335 Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000).

commentators have questioned whether Internet providers' services are worthy of First Amendment protection,[336] most commentators recognize that these services promote important free speech values.[337]

That Internet providers exercise some degree of editorial discretion is reinforced by the history of defamation liability for ISPs. Carriers that have no editorial discretion would be immune from liability for defamation.[338] Thus, the fact that courts issuing decisions prior to the enactment of the Communications Decency Act have held ISPs potentially liable for defamation[339] implicitly recognizes that ISPs exercise some degree of editorial discretion. Congress subsequently included a provision in the Communications Decency Act effectively granting ISPs immunity from defamation.[340] In fact, the conference report indicates that Congress included this provision specifically to overrule the cases finding liability for defamation.[341] If the ISP had no editorial discretion, such statutory immunity would have been unnecessary. Moreover, a subsequent section of the same statute grants immunity for good Samaritan blocking and screening of material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[342] In so doing, the statute implicitly recognizes the benefits flowing from ISPs' exercises of editorial discretion. Indeed, courts have consistently held that ISPs may exercise such discretion without raising First Amendment concerns.[343]

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336 *See* Bracha & Pasquale, *supra* note 7, at 1190–92 (search engines); Herman, *supra* note 13, at 112–13 (last-mile broadband providers).

337 *See supra* note 23 and accompanying text. Those who remain skeptical should bear in mind that movies and entertainment programming were once seen as falling outside the ambit of the First Amendment. *See* Mut. Film Corp. v. Indus. Comm'n, 236 U.S. 230, 243–44 (1915) (movies); Decision of Aug. 29, 1928, 2 F.R.C. Ann. Rep. 159, 161 (1928) (entertainment programming). These cases are part of a long tradition in which new technologies are born in First Amendment captivity. *See* ZUCKMAN ET AL., *supra* note 19, § 2.2, at 165–73.

338 *See* HUBER ET AL., *supra* note 314, § 14.6.7, at 1308; *see also* Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 526–27, 535 (1959) (holding a broadcaster immune from defamation liability for political advertisement that the broadcaster was obligated to carry and over which the broadcaster was prohibited from exercising editorial discretion).

339 *See, e.g.*, Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 94-031063, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (concluding that the ISP's "conscious choice to gain the benefits of editorial control . . . opened itself up to greater liability," thus allowing the ISP to be potentially liable for defamation).

340 47 U.S.C. § 230(c)(1) (2006).

341 H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 10, 207–08.

342 47 U.S.C. § 230(c)(2).

343 *See* Green v. Am. Online (AOL), 318 F.3d 465, 472 (3d Cir. 2003); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630–31 (D. Del. 2007).

Second, a firm that is a common carrier certainly has the right to offer alternative services over which it does exercise editorial control. Thus, even if an Internet provider has not historically exercised editorial control over certain services, the government cannot, without violating the First Amendment, stop it from initiating a new service over which it does exercise editorial discretion.

E. Implications

Together, these various lines of jurisprudence recognized that the exercise of editorial discretion by intermediaries facilitating electronic communication serves important free speech values. The Court has consistently recognized that restriction on their editorial discretion is inappropriate even if these intermediaries wield market power, simply serve as conduits for the speech of others, or exercise their discretion in what others feel is a biased manner.[344]

At a minimum, intermediaries' rights as speakers represent an important countervailing consideration that any free speech calculus must weigh in the balance.[345] A fair reading of the cases would go even further: given that none of the rationales previously used to justify restricting the free speech rights of broadcasters and cable operators applies to the Internet, these precedents indicate that Internet intermediaries, like newspaper publishers, possess "the absolute freedom to advocate [their] own positions without also presenting opposing viewpoints."[346]

The real possibility that intermediation can yield significant benefits poses a significant analytical problem for those who seek to place limits on Internet providers' freedoms to play this intermediating role as they see fit. The recognized benefits of editorial discretion undercut categorical arguments in favor of mandating complete nonintermediation and force proponents of nonintermediation to provide some basis for distinguishing between forms of intermediation that are permissible and those that are not. As we shall see, the history of previous efforts to draw such a distinction raises serious doubts as to the likely success of any such enterprise.

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344 *See supra* Parts II.B and C.

345 *See* Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 226–27 (1997) (Breyer, J., concurring in part).

346 FCC v. League of Women Voters of Cal., 468 U.S. 364, 380 (1984).

III. Lessons from Past Attempts to Regulate Editorial Discretion

As noted earlier, the Supreme Court has long recognized that the Radio Act of 1927 and the Communications Act of 1934 embraced the important role that broadcasters' exercises of editorial discretion play in promoting free speech values.[347] Nonetheless, both the FCC and its predecessor, the FRC, have exhibited considerable ambivalence toward permitting broadcasters to exercise their editorial discretion in an unfettered manner. On the one hand, the rules against time brokering have attempted to prevent broadcasters from exercising *too little* editorial control by limiting their ability to cede control over broadcast content to third parties. On the other hand, the FRC's historical hostility toward "propaganda stations" and the Fairness Doctrine (and its antecedents) have attempted to prevent them from exercising *too much* editorial control.

As the subsequent history reveals, neither effort proved successful. In both cases, the agencies were unable to develop standards for distinguishing between proper and improper exercises of editorial discretion. The ambiguity had the unfortunate impact of chilling broadcast speech and making it more orthodox. Even worse, political operatives were able to use the rules to create systematic campaigns to deter the speech of the opposition.

A. Time Brokerage: Regulating Too Little Editorial Discretion

The FRC and FCC have a long history of attempting to ensure that broadcasters do not exercise too little editorial discretion. Interestingly, beginning in 1921 and prior to selling its stations to RCA in 1926, AT&T adopted the type of pure-conduit approach that the proponents of nonintermediation favor by offering to carry the programming of anyone willing to pay a posted slate of toll rates.[348] Then–Secretary of Commerce Herbert Hoover criticized the practice, primarily because of the amount of direct advertising that AT&T's stations carried, but demurred from intervening and left it to the industry to work out how much advertising would be permissible.[349]

Policymakers soon began to express greater skepticism about such an unintermediated approach to broadcasting. In its 1929 denial

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347 *See supra* notes 130–54 and accompanying text.

348 Howard A. Shelanski, *The Bending Line Between Conventional "Broadcast" and Wireless "Carriage*,*"* 97 COLUM. L. REV. 1048, 1052–53 (1997).

349 *Id.* at 1053 (citing 1 ERIK BARNOUW, A HISTORY OF BROADCASTING IN THE UNITED STATES: A TOWER IN BABEL 34, 177–78 (1966)); *see also* HUBER ET AL., *supra* note 314, § 1.2.4, at 11; POOL, *supra* note 312, at 35, 136–38.

of a request by three broadcasters to increase the amount of broadcasting time permitted by their licenses, the FRC rejected extending the rules governing telephony and telegraphy to broadcasting, under which "a broadcasting station would have to accept and transmit for all persons on an equal basis without discrimination in charge."[350] Doing so would deprive the public of the editorial discretion exercised by the broadcasters, described as "the self-imposed censorship exercised by the program directors of broadcasting stations who, for the sake of the popularity and standing of their stations, will select entertainment and educational features according to the needs and desires of their invisible audiences."[351] The FRC recognized the benefits that intermediation provides to audiences when it reasoned that preventing broadcasters from exercising their editorial discretion would "emphasize the right of the sender of messages to the detriment of the listening public."[352] Commentators regard the FRC's emphasis on the importance of broadcasters' editorial discretion as foreclosing the type of unintermediated toll broadcasting system operated by AT&T during the 1920s,[353] although the FCC has sometimes praised licensees for serving as a conduit for others' speech.[354]

In subsequent decades, the FCC's primary tool for ensuring that broadcasters exercise some degree of editorial discretion has been its policy against "time brokerage," which occurs when a station sells blocks of broadcast time to a third party.[355] The FCC was quite critical of time brokerage during its early years. For example, in 1940, the existence of a contract designating NBC as the sole supplier of programming for four radio stations owned by Westinghouse led the FCC to threaten not to renew those stations until Westinghouse replaced that contract with a more conventional network affiliation agreement, under which Westinghouse bore ultimate responsibility for the pro-

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350 Great Lakes Broad. Co., 3 F.R.C. Ann. Rep. 32, 32 (1929), *aff'd*, 37 F.2d 993 (D.C. Cir. 1930).

351 *Id.* at 32–33.

352 *Id.* at 33.

353 Shelanski, *supra* note 348, at 1055.

354 *See* Adelaide Lillian Carrell, Proposed Findings of Fact and Conclusions of the Commission, 7 F.C.C. 219, 221–22 ¶ 10 (1939) (proposed findings of fact and conclusions).

355 47 C.F.R. § 73.3555 note 2(j) (2007). For the history of time-brokerage regulation, see Michael E. Lewyn, *When Is Time Brokerage a Transfer of Control? The FCC's Regulation of Local Marketing Agreements and the Need for Rulemaking*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 9–45 (1995); Stephen F. Sewell, *The Federal Communications Commission and Time Brokerage: A Regulatory Change of Course*, 3 COMMLAW CONSPECTUS 89, 90–98 (1995).

gramming broadcast by its stations.[356] In its 1941 *Metropolitan Broadcasting Corp.* decision,[357] the FCC denied the current licensee's request for renewal in part because he had regularly delegated nearly half of the station's operating schedule to time brokers.[358] In 1963, the FCC revoked a license held by Carol Music, Inc., in part because it had entered into a time-brokerage agreement covering twelve hours a day for six days a week.[359] In 1965 and 1966, the FCC fined broadcasters for entering into time-brokerage agreements.[360] Even more notable was the FCC's 1976 decision in *Cosmopolitan Broadcasting Corp.*,[361] in which the FCC refused to renew the license of a radio station that sold "virtually every available minute" to time brokers.[362]

A de facto rule emerged that time brokerage was permissible so long as it did not become so "extensive" as to violate the broadcasters' obligations to retain control over program content at all times.[363] In short, broadcasters were permitted to serve as a mere conduit up to a point, but no further. Interestingly, this approach would condemn the kind of unintermediated, dumb-conduit approach favored by proponents of regulation, and it clearly envisions editorial discretion as a good that must be preserved rather than condemned. More importantly, the FCC was somewhat vague about precisely how much time brokerage was permissible. As a procedural matter, the FCC initially required broadcasters to submit all time-brokerage contracts to the FCC,[364] although a later amendment relaxed that requirement and in-

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356 Westinghouse Elec. & Mfg. Co., Opinion and Order on Petition to Reconsider and Grant Without Hearing, 8 F.C.C. 195, 195–96 (1940).

357 Metro. Broad. Corp., Findings of Fact and Conclusions, 8 F.C.C. 558 (1941).

358 *Id.* at 563 ¶¶ 20–21, 575.

359 Revocation of License and Subsidiary Communications Authorization of Carol Music, Inc., for FM Broadcast Station WCLJ, Preliminary Statement, 37 F.C.C. 385, 389–91 ¶¶ 10–13, 400–01 (1963).

360 WGOK, Inc., Memorandum Opinion and Order, 2 F.C.C.2d 245, 246 ¶¶ 6–9 (1965); United Broad. Co., of N.Y., Inc., Memorandum Opinion and Order, 40 F.C.C. 224, 229 ¶¶ 21–23 (1965).

361 Cosmopolitan Broad. Corp., Decision, 59 F.C.C.2d 558 (1976), *remanded on other grounds*, 581 F.2d 917 (D.C. Cir. 1978).

362 *Id.* at 560 ¶ 5, 561 ¶ 7. The D.C. Circuit characterized the scope of the time-brokerage agreement somewhat differently, noting that over seventy-five percent of the station's time was sold to time brokers, with approximately twenty percent of the remaining time sold or given to others for religious broadcasts. *Cosmopolitan Broad.*, 581 F.2d at 919.

363 *See Cosmopolitan Broad.*, 59 F.C.C.2d at 560–61 ¶ 6; *see also* Welcome Radio, Inc., Memorandum Opinion and Order, 20 F.C.C.2d 582, 583 ¶ 4 (1969).

364 Financial Ownership and Other Reports of Broadcast Licensees, 10 Fed. Reg. 9718, 9718–19 (Aug. 7, 1945) (requiring submission of contracts for "bulk time sales" of two hours or more).

stead allowed stations to retain such contracts at the station for FCC inspection.[365]

The ambiguities about what degree of delegation of editorial discretion was too extensive soon began to pose problems. In certain cases, the FCC applied its policies to brokerage arrangements that covered as little as ten minutes a week.[366] The FCC also initially applied its time-brokerage rules to barter arrangements, such as when a syndicated programmer sells spot advertising contained within a block of time that it has purchased,[367] only to back away from them a few years later.[368] Even so, the FCC continued to warn that extensive use of time-brokerage arrangements could violate the station's responsibility to maintain editorial control over its programming.[369]

A 1980 policy statement marked a sea change in the FCC's views of time brokerage. Rather than expressing hostility toward time brokerage, the FCC adopted a policy of "foster[ing] time brokerage arrangements" as a way to "encourage minority group involvement in broadcasting."[370] Additionally, the FCC hoped that changing its stance on time brokerage would promote programming targeted at "specialized audiences whose tastes continue to go unmet because they are too small to support an entire weekly schedule of such programming," such as foreign-language programming.[371] That said, the FCC disavowed any "inten[t] to transform the radio service into a common carrier,"[372] and it continued to emphasize that each broadcaster bore ultimate responsibility for the programming transmitted by its facility.[373] The FCC rejected ex ante review of time-brokerage agreements out of concern that such review might stifle the practice, instead preferring to "deal with such problems when they occur."[374] It

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365 Re-regulation of Radio and Television Broadcasting, 25 Rad. Reg. 2d (P & F) 1719, 1722 ¶ 5(g) (Nov. 2, 1972).

366 *See* Eller Telecasting Co., Memorandum Opinion and Order, 19 F.C.C.2d 913, 913–14 ¶ 4 (1969) (applying the time-brokerage regulations to a ten-minute weekly newscast targeted at Hispanic audiences); WGOK, Inc., Memorandum Opinion and Order, 2 F.C.C.2d 245, 245 ¶ 2 (1965) (applying the time-brokerage requirements to fifteen-minute Sunday programs sold to amateur singers).

367 *See* Rand Broad. Co., 22 Rad. Reg. 2d (P & F) 155, 155–56 (June 9, 1971).

368 Clarifying Paragraph (c) of Section 1.613, Concerning the Filing of Agreements Involving the Sale of Broadcast Time for Resale, Order, 33 F.C.C.2d 653, 654 ¶¶ 4–7 (1972).

369 *Id.* at 653–54 ¶ 3.

370 Petition for Issuance of Policy Statement or Notice Inquiry on Part-Time Programming, Policy Statement, 82 F.C.C.2d 107, 107–09 ¶¶ 1–4 & n.8, 120 ¶ 31 (1980).

371 *Id.* at 120 ¶ 31.

372 *Id.* at 114 ¶ 17.

373 *Id.* at 109 ¶ 5, 113 ¶ 15.

374 *Id.* at 112–13 ¶¶ 13–14, 114 ¶ 17.

implicitly rejected establishing any clear numerical guidelines, concluding that "the amount of time brokerage is not really the issue. Instead it is the degree to which the licensee abdicated its responsibility to the time brokers."[375] The FCC also refused to issue clearer rules for the benefit of inexperienced independent producers largely on the grounds that the existing case-by-case approach had not proven too onerous and that broadcasters were in a position to provide these independent producers with clear guidance.[376] Finally, the FCC rejected calls for preventing broadcasters from engaging in censorship, ruling instead that the public interest would be better served by continuing to hold the broadcaster responsible for its editorial decisions.[377]

As deregulation facilitated entry by new radio stations throughout the 1980s, radio stations began to use time brokerage for more than just specialized programming, often expanding it to cover all of the available broadcast time.[378] In 1989, the FCC further liberalized its time-brokerage policy by permitting one station to broker time for another station operating in the same market.[379] Beginning with the FCC's landmark *Russo* decision,[380] the FCC explicitly condoned many of these more extensive time-brokerage agreements,[381] eventually codifying this broader embrace of time brokerage in its rules.[382] Even so, the FCC stopped short of a full embrace of nonintermediation, emphasizing broadcasters' continuing responsibilities to exercise editorial control over all programming transmitted[383] and rejecting certain brokerage agreements when station owners abdicated this responsibility.[384]

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375 *Id.* at 114 ¶ 17.

376 *Id.* at 114 ¶ 18.

377 *Id.* at 118–19 ¶¶ 28–29.

378 Lewyn, *supra* note 355, at 11–12.

379 Reexamination of the Commission's Cross-Interest Policy, Policy Statement, 4 F.C.C.R. 2208, 2214 ¶¶ 37–39 (1989).

380 Roy R. Russo, Esq., Letter, 5 F.C.C.R. 7586, 7587 (1990).

381 *See* Lewyn, *supra* note 355, at 4 & n.12; Sewell, *supra* note 355, at 98.

382 Revision of Radio Rules & Policies, Report and Order, 7 F.C.C.R. 2755, 2787 ¶ 63 (1992), *reconsidered*, 7 F.C.C.R. 6387 (1992) (*First Reconsideration Order*), *reconsidered*, 9 F.C.C.R. 7183 (1994) (*Second Reconsideration Order*). The rules did prohibit stations operating in the same market from using time brokerage to duplicate more than twenty-five percent of their programming. *Id.* at 2789 ¶ 66. Time brokerage of more than fifteen percent of the time of another station would constitute co-ownership for purposes of the local and national ownership rules. *Id.* at 2788–89 ¶ 65.

383 *Revision of Radio Rules & Policies*, 7 F.C.C.R. at 2787 ¶ 63; *accord First Reconsideration Order*, 7 F.C.C.R. at 6401 ¶ 63 ("[W]e emphasize that the licensee is ultimately responsible for all programming aired on its station, regardless of its source.").

384 *See* Lewyn, *supra* note 355, at 5–6 n.13.

More importantly, the FCC continued to be unable to articulate a clear standard for what represented an acceptable degree of nonintermediation, instead adhering to a case-by-case approach.[385] Some commentators have criticized the FCC's new time-brokerage policies as too permissive and argued that they lessened program diversity.[386] Moreover, others have struggled to determine the basis on which some time-brokerage agreements were approved or rejected, and these scholars argue that the case-by-case approach has produced a regulatory muddle that provides no meaningful guidance.[387] The FCC has consistently refused to heed calls to provide clearer standards on the grounds that the case-by-case approach preserves broadcaster flexibility.[388]

B. The Fairness Doctrine: Regulating Too Much Editorial Discretion

At the same time that the FRC and FCC have struggled to delineate when broadcasters are exercising too little editorial control, they have struggled even more controversially with standards for determining when broadcasters have exercised too much.[389] Again, the early days of the radio industry are instructive. Some stations developed distinctive editorial voices for particular points of view. For example, WEVD, based in New York City, served as "the mouthpiece of the Socialist Party."[390] WIBA, based in Madison, Wisconsin, spoke for the Progressive movement of Robert LaFollette.[391] WCFL in Chicago offered programming of interest to organized labor.[392]

During its second year of existence, the FRC was somewhat tolerant of these stations. In fact, the FRC declared in August 1928 that that it would "not draw the line on any station . . . [that] is the mouth-

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385 *Second Reconsideration Order*, 9 F.C.C.R. at 7192 ¶ 54; *First Reconsideration Order*, 7 F.C.C.R. at 6401 ¶ 63; *see also Revision of Radio Rules & Policies*, 7 F.C.C.R. at 2789 ¶ 67 (opting for overseeing time-brokerage contracts through a complaint-and-compliance process rather than advance rules).

386 Sewell, *supra* note 355, at 99–100.

387 Lewyn, *supra* note 355, at 45–48, 56–57; *see also* Brooke Commc'ns, Inc., Memorandum Opinion and Forfeiture Order, 14 F.C.C.R. 6247, 6249 ¶ 7 (1999).

388 *See Second Reconsideration Order*, 9 F.C.C.R. at 7192 ¶ 54.

389 The discussion that follows draws heavily on the excellent critique of the Fairness Doctrine by Thomas Krattenmaker and Lucas Powe. KRATTENMAKER & POWE, *supra* note 28, at 61–65, 237–75.

390 C.A. Cummins, 2 F.R.C. Ann. Rep. 159, 160 (Aug. 29, 1928).

391 *Id.*

392 Chi. Fed'n of Labor v. FRC, 3 F.R.C. Ann. Rep. 36, 36 (1929).

piece of a substantial political or religious minority" so long as the station programmed "with due regard for the opinions of others."[393]

By 1929, however, the FRC had grown more skeptical of stations with such distinctive editorial voices. Its *Great Lakes Broadcasting* decision[394] raised concerns that such editorial discretion might be applied too vigorously, such as when a broadcaster transmits programs that are "interesting or valuable to[ ] only a small portion of the public" or serve "the private interests of individuals or groups."[395] The FRC condemned such stations as "propaganda stations," a term that the FRC feebly attempted to soften by claiming that it was "used for the sake of convenience and not in a derogatory sense."[396] The FRC justified its criticism by invoking the now-discredited scarcity doctrine. Because "[t]here is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether," each broadcaster was obligated to offer a "well-rounded program" that met "the tastes, needs, and desires of all substantial groups among the listening public . . . in some fair proportion."[397] Indeed, the FRC would not have licensed such propaganda stations at all had they not already been established, and the Commission indicated that it would favor applicants offering more general service if given the opportunity.[398]

In the decision immediately following *Great Lakes Broadcasting*, the FRC denied a request by WCFL (operated by the Chicago Federation of Labor) for an increase in the power and number of hours that it could transmit on the grounds that "there is no place for a station catering to any group, but that all stations should cater to the general public and serve public interest as against group or class interest."[399]

But perhaps the most salient stand against editorial discretion was the FRC's termination of the radio station operated by "Fighting Bob" Shuler, a minister who used both his pulpit and his enormously popular radio station to criticize Los Angeles's mayor, police chief,

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393 Michael T. Rafferty, 2 F.R.C. Ann. Rep. 154, 155 (Aug. 22, 1928); *see also C.A. Cummins*, 2 F.R.C. Ann. Rep. at 160 ("Wherever the evidence is shown that a particular station is serving as a mouthpiece for a substantial religious or political minority, no matter how much the individual members of the commission may disagree with the views of that minority, the commission has taken action favorable to the station.").

394 Great Lakes Broad. Co., 3 F.R.C. Ann. Rep. 32 (1929), *aff'd*, 37 F.2d 993 (D.C. Cir. 1930).

395 *Id.* at 34.

396 *Id.*

397 *Id.*

398 *Id.* at 35.

399 Chi. Fed'n of Labor v. FRC, 3 F.R.C. Ann. Rep. 36, 36 (1929).

district attorney, city prosecutor, and bar association for corruption and ties to organized crime.[400] Needless to say, the programming Shuler offered represented precisely the type of important political speech that citizens needed. Despite the presence of significant and often uncontested evidence that most of Shuler's accusations were true, as well as a decision by the chief hearing examiner in Shuler's favor,[401] the full FRC ruled against Shuler, in part because it deemed his programs to be sensational rather than instructive.[402] The D.C. Circuit affirmed the FRC's decision, and the Supreme Court declined to review the case.[403]

Similarly, in its 1940 *Mayflower Broadcasting Corp.* decision,[404] the FCC heavily criticized the Yankee Network's policy of broadcasting editorials supporting particular political candidates or political issues, renewing its license only after the Yankee Network promised not to editorialize further.[405] In so doing, the FCC categorically declared that a licensee's programming "cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate."[406]

Nine years later, the FCC abruptly reversed course and ruled instead that broadcasters have the obligation to editorialize on public issues of concerns to their audiences.[407] At the same time, the FCC ruled that broadcasters "must operate on a basis of overall fairness" by "afford[ing] a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time."[408] Initially, compliance with the Fairness Doctrine was simply a consideration taken into account at renewal time, which meant that enforcement amounted to little more than pious admonitions.[409] The FCC began giving the doctrine real bite in 1962, when it

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400 *See* Charley Orbison, *"Fighting Bob" Shuler: Early Radio Crusader*, 21 J. BROADCASTING 459, 463–64 (1977); *see also* KRATTENMAKER & POWE, *supra* note 28, at 24–25, 27–28.

401 Orbison, *supra* note 400, at 463–64, 466.

402 *Id.* at 466; *see also* Trinity Methodist Church, S. v. FRC, 62 F.2d 850, 851 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933).

403 *Trinity Methodist Church*, 62 F.2d at 854.

404 Mayflower Broad. Corp., Proposed Findings of Fact and Conclusions, 8 F.C.C. 333 (1940).

405 *Id.* at 339–41.

406 *Id.* at 340.

407 Editorializing by Broadcast Licensees, Report of the Commission, 13 F.C.C. 1246, 1249–50 ¶¶ 6–7 (1949).

408 *Id.* at 1250 ¶ 7.

409 *See* Jerome A. Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1, 9 (1961).

started to act on fairness complaints as they arose.[410] In its 1969 decision in *Red Lion*, the Supreme Court gave the doctrine its imprimatur based largely on the now-discredited scarcity doctrine.[411] Congress subsequently attempted to pass a statute prohibiting public broadcasters from editorializing,[412] only to see this ban overturned by the Supreme Court in *League of Women Voters*.[413] The FCC eventually abolished the Fairness Doctrine in 1987.[414]

As was the case with the FCC's attempt to restrict time brokerage, both proponents and critics of the Fairness Doctrine acknowledge that the FCC struggled to develop coherent criteria for resolving Fairness Doctrine complaints.[415] Moreover, the Fairness Doctrine soon gave rise to a number of difficult implementation issues. For example, a group supporting the proposed Nuclear Test Ban Treaty successfully argued that the Fairness Doctrine required that a station broadcasting a sponsored program opposing the treaty had to provide air time for the opposing point of view even if the group advocating the opposing view was unable to pay for it.[416]

Subsequent FCC decisions extended the Fairness Doctrine to commercial advertising. Future law professor John Banzhaf successfully argued that a CBS affiliate's broadcast of advertisements depicting smoking as socially acceptable entitled him to free airtime for programming depicting smoking's potential harms.[417] Despite the

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410 KRATTENMAKER & POWE, *supra* note 28, at 62–63. The first instance appears to be Complaint Under "Fairness Doctrine" Requirements, 40 F.C.C. 508 (1962). For the FCC's rationale for the change in policy, see "Fairness Doctrine" Implementation, 40 F.C.C. 582, 583–85 (1963).

411 Red Lion Broad., Co. v. FCC, 395 U.S. 367, 400–01 (1969).

412 Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, sec. 1229, § 399, 95 Stat. 357, 730.

413 FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984).

414 Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, Memorandum Opinion and Order, 2 F.C.C.R. 5043, 5043 ¶ 2 (1987), *petition for review denied*, 867 F.2d 654 (D.C. Cir. 1989) (upholding the Commission's decision based on a public interest rationale, without reaching the constitutional issue).

415 *See* KRATTENMAKER & POWE, *supra* note 28, at 261–70 (characterizing the Fairness Doctrine as "an incoherent legal principle"); FORD ROWAN, BROADCAST FAIRNESS 51 (1984) (noting that "[c]onfusion abounds" on the subject); Barron, *supra* note 409, at 18 (citing "the absence of any system of criteria" for resolving fairness complaints).

416 Responsibility Under the Fairness Doctrine, 40 F.C.C. 576 (1963).

417 Complaint Directed to Station WCBS-TV, New York, N.Y., Concerning Fairness Doctrine, 8 F.C.C.2d 381, 382, *reconsideration granted in part*, 9 F.C.C.2d 921 (1967), *clarified sub nom.* Applicability of the Fairness Doctrine to Cigarette Advertising, 10 F.C.C.2d 16 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968).

FCC's attempts to restrict its ruling to cigarettes,[418] subsequent decisions granted the Fairness Doctrine complaints with respect to advertising by luxury car manufacturers[419] and oil companies,[420] while rejecting claims that ads for trash compactors were a commentary on recycling[421] and that ads for Crest toothpaste represented commentary on fluoridation of drinking water,[422] just to cite a few examples. Broadcasters became reluctant to sell advertising to organizations such as oil companies or groups opposing a recycling referendum out of fear of having to provide free airtime to those holding the opposing point of view.[423] The FCC subsequently reconsidered its position, issuing a new report overruling *Banzhaf v. FCC*[424] and instead concluding that standard product commercials do not address controversial issues of public importance sufficient to implicate the Fairness Doctrine.[425] Subsequent challenges were resolved more easily.[426]

More importantly, in practice, the Fairness Doctrine tended to chill the type of speech that it was ostensibly created to promote. The FCC has recognized that the doctrine's first prong, obligating broadcasters to cover controversial issues of interest to the communities they serve, is essentially unenforceable. Indeed, the FCC admitted, "[W]e have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community."[427] As a re-

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418 Television Station WCBS-TV, New York, N.Y., Memorandum Opinion and Order, 9 F.C.C.2d 921, 942–43 ¶ 44 (1967).

419 *See* Complaint by Friends of the Earth Concerning Fairness Doctrine Re Station WBNB-TV, New York, NY, 24 F.C.C.2d 743, 750 (1970) (concluding that "the broadcaster does have an obligation to inform the public . . . on [the] important issue[ ]" of air pollution caused by automobiles), *remanded sub nom.* Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971).

420 Complaint by Wilderness Society and Friends of the Earth Concerning Fairness Doctrine Re National Broadcasting Co., 30 F.C.C.2d 643, 646, *reconsidered*, 31 F.C.C.2d 729 (1971).

421 Complaint by John S. MacInnis, Consumers Arise Now, San Francisco, Cal. Concerning Fairness Doctrine Re Station KGO-TV, 32 F.C.C.2d 837, 838 (1971).

422 Complaint by National Health Federation, Delaware, Ohio, Concerning Fairness Doctrine, 58 F.C.C.2d 314, 316 (1976).

423 Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Report, 102 F.C.C.2d 142, 175–78 ¶¶ 48–52 (1985) (*1985 Fairness Report*).

424 Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968).

425 Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Fairness Report, 48 F.C.C.2d 1, 24–26 ¶¶ 66–70 (1974) (*1974 Fairness Report*).

426 Complaint by Peter C. Herbst et al. Concerning Fairness Doctrine Re Station WMTW-TV, 40 F.C.C.2d 115, 118 (1973) (rejecting Fairness Doctrine claim based on snowmobile advertisements), *aff'd sub nom.* Pub. Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975).

427 *1974 Fairness Report*, 48 F.C.C.2d at 10 ¶ 25.

sult, a broadcaster's decisions with respect to the first prong of the Fairness Doctrine were entitled to a "presumption of compliance"[428] and would violate the doctrine "[o]nly in rare instances."[429] As the D.C. Circuit indicated, this obligation imposed by the first prong was "not extensive and [can be] met by presenting a minimum of controversial subject matter."[430] Indeed, on only one occasion did the FCC sanction a station for its failure to cover a controversial issue, and that case hardly arose under circumstances that reflected usual demands by the listening audience.[431] Broadcasters faced more significant risks under the second prong if they failed to present the issues in a manner that the FCC regards as sufficiently fair. Thus, the best way for broadcasters to avoid liability was simply to avoid covering controversial issues altogether. The effect was a net reduction in the amount of speech that the Fairness Doctrine was designed to promote. Moreover, the fact that broadcasters only needed to include "major" or "significant" opinions had the inevitable effect of ensuring that what little speech was presented was resolutely orthodox.[432] Indeed, the broad-

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428 Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Memorandum Opinion and Order, 89 F.C.C.2d 916, 925 ¶ 23 (1982).

429 Complaint of Brent Buell, Memorandum Opinion and Order, 97 F.C.C.2d 55, 57 ¶ 8 (1984).

430 Am. Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 444 n.16 (D.C. Cir. 1979).

431 This case arose when a Representative of Congress from Hawaii, who was the principal sponsor of legislation to limit strip mining, asked a West Virginia radio station to air an eleven-minute tape advocating her position during the time the legislation was being considered by Congress and presented to the President for his signature. Complaint of Representative Patsy Mink et al. Against Radio Station WHAR, Clarksburg, W. Va., Memorandum Opinion and Order, 59 F.C.C.2d 987, 987 ¶ 2 (1976). When the station refused, the Representative successfully brought her Fairness Doctrine complaint. *Id*. at 997 ¶ 30. Somewhat curiously, one of the principal bases for granting her claim was the fact that the local newspaper had covered the story on its front page on nine days during the key eleven-day period when the legislation was being debated and subjected to a presidential veto. *Id.* at 995 ¶ 24. As Thomas Krattenmaker and Lucas Powe point out, this rationale has the somewhat puzzling effect of allowing the fact that an issue is already being covered extensively in other media to oblige broadcasters to provide duplicate coverage. *See* KRATTENMAKER & POWE, *supra* note 28, at 247.

432 *See* Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Report, 102 F.C.C.2d 142, 188–90 ¶¶ 69–71 (*1985 Fairness Report*); *see also CBS v. DNC*, 412 U.S. 94, 187–88 (1973) (Brennan, J., dissenting) ("[U]nder the Fairness Doctrine, broadcasters generally tend to permit only established—or at least moderated—views to enter the broadcast world's 'marketplace of ideas.'"); Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 78 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) ("[C]ontroversial viewpoint[s] [are] being screened out in favor of the dreary blandness of a more acceptable opinion."); KRATTENMAKER & POWE, *supra* note 28, at 248; Barron, *supra* note 409, at 14 ("On those issues which are unquestionably controversial, however, it is obvious that little or no editorializing is done.").

casters for whom the Fairness Doctrine posed the most trouble were those who devoted the most time to controversial issues and offered the most distinctive points of view.[433]

The Supreme Court relied on the danger that requirements of fair coverage might chill political speech in invalidating a right of reply for newspapers.[434] The Court dismissed as "speculative" claims that the Fairness Doctrine would have the same impact on broadcasting and explained that, "if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."[435]

Better empirical information is now available. The FCC amassed an impressive array of anecdotes indicating that the Fairness Doctrine had the net effect of suppressing political speech.[436] The fact that the Fairness Doctrine was promulgated in 1949 (after a long period in which all editorializing by broadcasters was prohibited) and subsequently abolished in 1987 provides a basis for a natural experiment as to its likely impact. Although detailed data regarding the 1949 change is not available, the consensus is that imposing the Fairness Doctrine did not lead to an increase in political speech.[437] More detailed information is available concerning the effect of the 1987 repeal. Empirical studies indicate that the total amount of informational programming carried by broadcasters has skyrocketed since 1987, primarily in the form of talk radio.[438] Although many long for an idealized conception of reasoned discourse associated with Founding-era works such as *The Federalist* and *Common Sense*, the actual media discourse of that time bears a distinct kinship to the political speech on today's airwaves, in

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433 *See 1985 Fairness Report*, 102 F.C.C.2d at 189–90 ¶ 71 & nn.168–69.

434 *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974) ("Faced with the penalties [of the challenged statute] . . . editors might well conclude that the safe course is to avoid controversy. Therefore, . . . political and electoral coverage would be blunted or reduced.").

435 Red Lion Broad., Co. v. FCC, 395 U.S. 367, 393 (1969); *see also* FCC v. League of Women Voters of Cal., 468 U.S. 364, 378 n.12 (1984) (noting that "were it to be shown by the Commission that the fairness doctrine '[has] the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*]").

436 *1985 Fairness Report*, 102 F.C.C.2d at 164–88 ¶¶ 34–68.

437 *See, e.g.*, Irving E. Fang & John W. Whelan, Jr., *Survey of Television Editorials and Ombudsman Segments*, 17 J. BROADCASTING 363, 363–70 (1973); *see also* Barron, *supra* note 409, at 12 ("Although the *Mayflower* ban was removed more than a decade ago, editorializing by broadcast licensees has by no means become a prevalent practice." (footnote omitted)).

438 Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 290–301 (1997).

that both are characterized by passionate advocacy of partisan positions.[439] Moreover, it is far from clear that such dissensus should be regretted or discouraged. Quite the contrary, dissensus is often the sign of a healthy pluralistic society.[440]

Perhaps most troublesome is the ease with which political operatives were able to use the Fairness Doctrine as a means to silence political opposition. *Mayflower Broadcasting* had been prompted by the Yankee Network's criticism of President Franklin D. Roosevelt.[441] Perhaps most ironically, contemporary observers have now chronicled that *Red Lion*, the touchstone for efforts to cabin media speakers' editorial discretion, was the product of a systematic (and quite successful) campaign by the Kennedy and Johnson Administrations to discourage broadcasters from carrying programming sympathetic to the opposition.[442] As one of President Kennedy's Assistant Secretaries of Commerce admitted: "Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters in the hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue."[443] Nor was such conduct the exclusive province of the Democratic Party. Richard Nixon adopted similar tactics as part of his campaign against what he characterized as the East Coast elitist media.[444] In short, as Justice Douglas so aptly observed, the Fairness Doctrine "puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends."[445]

This underscores how government intervention can have an adverse effect on free speech. Even if undertaken for benign reasons, the intervention may skew speech in unexpected and unintended ways.[446] Even worse, any system can be gamed, and actors inevitably

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439 *See* Yoo, *supra* note 17, at 336–37 (citing L.A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 183 (1987)).

440 *See id.* at 321 (quoting Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373, 385 (1993)).

441 *See* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 109–10 (1987).

442 *See* FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING 33–42 (1975).

443 *Id.* at 39.

444 *See* Thomas W. Hazlett & David W. Sosa, *"Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. & TECH. L. REV. 35, 47–50 (1998).

445 *CBS v. DNC*, 412 U.S. 94, 154 (1973) (Douglas, J., concurring in the judgment).

446 *See generally* Yoo, *supra* note 284, at 675–713 (analyzing the problematic effects that structural FCC regulations may have on media content).

have strong incentives to use the rules to their maximum advantage. Perhaps most problematic is the manner in which regulations designed to temper extreme exercises of editorial discretion are vulnerable to governmental abuse.[447] Indeed, intermediaries are likely to be particularly susceptible to such manipulation.[448] Although some commentators have expressed confidence that courts possess the doctrinal tools to curb such abuses,[449] I am less optimistic.[450]

Conclusion

In recent months, the newspapers have been filled with complaints about how some Internet provider is discriminating against a particular content or application provider. Whether it is Comcast's policy toward the peer-to-peer client BitTorrent, Google's decisions about how to implement its search algorithm, Facebook's decision not to carry particular content, or Apple's refusal to incorporate Google's voice apps into the iPhone,[451] such actions have prompted cries that Internet providers are harming free speech and must have their discretion restricted.

In advancing these arguments, these advocates overlook the longstanding and important free speech tradition embodied in the Supreme Court's mass-media jurisprudence that recognizes how intermediaries' exercises of editorial discretion can promote rather than inhibit free speech values. At a minimum, this tradition raises an important countervailing consideration that any proponent of disintermediating Internet content must take into account. A fair reading of these cases suggests that, given the inapplicability of the considerations invoked to create exceptions for other electronic media, these intermediaries' editorial discretion should be regarded as inviolable.

In addition, any attempt to regulate the manner in which these intermediaries sift through and present Internet content is likely to affect speech markets in ways that can be quite problematic. As I have noted in my other work, no protocol is optimized for every appli-

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447 Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Report, 102 F.C.C.2d 142, 192–94 ¶¶ 74–76 (1985) (*1985 Fairness Report*); *accord* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 78 n.62 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) ("[T]he potential to subject the 'fairness' theory to political abuse is inherent in the operation of the doctrine.").

448 *See* Kreimer, *supra* note 10, at 27–33.

449 *See id.* at 46–79.

450 *See* Yoo, *supra* note 284, at 713–25.

451 *See supra* notes 5–11 and accompanying text.

cation; every Internet protocol inevitably favors some applications and disfavors others.[452] There is thus no principled basis for identifying an approach to intermediation that is truly neutral. Instead, regulating intermediation inevitably places the government in the position of picking technological winners and losers. The history of past efforts to regulate electronic intermediaries' editorial discretion is not comforting. Not only were policymakers unable to devise coherent criteria for separating permissible exercises of editorial discretion from impermissible ones, but the regulatory regime also had the unfortunate side effect of skewing the debate and reducing the total amount of speech.

In addition, this tradition reminds us of one of the First Amendment's central lessons: that government intervention poses a greater threat to free speech than private action. This is not to say that private actors cannot skew the speech environment. Clearly they can. But our free speech principles are based on the conviction that "of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided."[453] In short, when choosing between government regulations to ensure that each intermediary is everything to everyone, on the one hand, and allowing audiences to choose from among intermediaries each exercising their own voice, on the other, free speech principles clearly regard the latter as the lesser of the two evils.

This central insight gives new meaning to Lawrence Lessig's observation that "code is law."[454] While some have taken the fact that code represents an alternative form of governance as a justification for government regulation, I take the opposite view. The fact that code affects speech means that we should exercise great caution before permitting the government to regulate code. Although many scholars have advanced powerful arguments for transforming the First Amendment from a negative restriction on the government into an affirmative obligation on the government to promote a particular vision of free speech, to date this vision has not found widespread acceptance.[455]

But even those embracing this alternative, more affirmative vision of free speech cannot simply give absolute priority to the interests

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452 *See* Yoo, *supra* note 51, at 25.

453 *CBS v. DNC*, 412 U.S. 94, 105 (1973).

454 Lessig, *supra* note 15, at 6.

455 *See supra* notes 15–17 and accompanying text.

of those who wish to speak via the Internet. Instead, they must still take into account the important free speech values that intermediaries promote. Moreover, they should be careful not to be unduly swayed by claims by particular parties that a particular intermediary's decisions have made it more difficult for them to speak. Every exercise of editorial discretion inevitably favors some speech over others. Indeed, that is the entire point, and undue limitations on intermediaries' abilities to exercise their editorial discretion would prevent them from making their own unique contributions to free speech.