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Net Neutrality Mandates: Neutering the First Amendment in the Digital Age

ABSTRACT: There is a raging debate over whether Congress should enact new laws mandating so-called net neutrality for broadband Internet service providers ("ISPs"). While there are several policy reasons why net neutrality mandates should not be adopted, one often overlooked and unappreciated reason is that net neutrality mandates may violate the First Amendment free speech rights of the ISPs. Net neutrality mandates generally are framed to prohibit ISPs from taking any action to "block, impair or degrade" subscribers from accessing any website, or from "discriminating" against an unaffiliated entity's content by refusing to post or send such content on or over the ISPs' infrastructure. ISPs are speakers for First Amendment purposes, and under traditional First Amendment jurisprudence, it is just as much an infringement of free speech to force a speaker to convey messages as it is to prohibit conveyance. This article discusses some of the leading First Amendment cases that address regulation of the media, including those involving speech restrictions placed on broadcasters, cable companies, and newspapers. It concludes that, in today's competitive digital broadband communications marketplace net neutrality mandates that dictate ISPs' choices concerning the dissemination of content are not likely to survive a challenge under the First Amendment.

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I. INTRODUCTION

There are many reasons why Congress should not adopt new laws mandating so-called net neutrality for broadband Internet service providers ("ISPs"). One often overlooked and underappreciated reason is that net neutrality requirements may violate the First Amendment free speech rights of ISPs such as AT&T and Comcast Corporation. In this instance, greater sensitivity to constitutional values, if not outright constitutional dictates, will lead to sounder communications policy than if such values are ignored.

The United States Senate and House of Representatives have recently reviewed several net neutrality proposals. All of the proposals share a common feature: in one way or another they restrict, or allow the Federal Communications Commission ("FCC") to restrict broadband ISPs from taking any action to "block, impair or degrade" consumers from accessing any website, or from "discriminating" against any unaffiliated entity's content. For example, one of the most fulsome of these proposals is a bill drafted by Democratic Senator Olympia Snowe of Maine and Republican Senator Byron Dorgan of North Dakota. Felicitously called the "Internet Freedom Preservation Act," the bill states that ISPs shall not "block, interfere with, discriminate against, impair, or degrade the ability of any person to use a broadband service to access, use, send, post, receive, or offer any lawful content . . . made available via the Internet."¹

Furthermore, one version of another bill, drafted in 2006 by the Senate Committee on Commerce, Science, and Transportation, contains similar language. The bill provides that every ISP shall allow each subscriber to "access and post any lawful content of that subscriber's choosing."² To put a finer point on the matter, the bill further states that "no Internet service provider engaged in interstate commerce may limit, restrict, ban, prohibit, or otherwise regulate content on the Internet because of the religious views, political views, or any other views expressed in such content unless specifically

¹ Internet Freedom Preservation Act, S. 2917, 109th Cong. § 12(a)(1) (2006) (introduced in Senate May 19, 2006). The identical bill was introduced by Senators Snowe and Dorgan in the 110th Congress. See Internet Freedom Preservation Act, S. 215, 110th Cong. (2007) (introduced in Senate January 9, 2007).

² Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. § 903(a)(1) (as reported in Senate, June 12, 2006).

authorized by law.”³ A bill passed by the House of Representatives in 2006 contains a provision authorizing the FCC to enforce the agency’s net neutrality principles, one of which states that “consumers are entitled to access the lawful Internet content of their choice.”⁴

II. THE POLICY BACKDROP: AN INCREASINGLY COMPETITIVE BROADBAND ISP MARKETPLACE

Except for a few isolated and quickly remedied incidents,⁵ neither the cable operators nor the telephone companies providing broadband Internet services have yet blocked, impaired, or otherwise restricted subscriber access to Internet applications or the content of unaffiliated entities. This should not be surprising given that the broadband Internet access market is rapidly becoming more competitive and many consumers have the choice to change ISPs if displeased with their provider’s restrictions.⁶

There are many early FCC statements on the competitiveness of the broadband ISP marketplace and the build-out of alternative infrastructures.⁷ The Agency most recently commented on the subject in July 2006 when it approved the applications for consent to the

³ *Id.* § 904(2).

⁴ H.R. 5252, “Consumer Opportunity, Promotion, and Enhancement Act of 2006,” as passed House, June 8, 2006, granting the FCC authority to enforce neutrality principles promulgated in a Policy Statement (FCC 05-151; CC Docket No. 02-33) released on September 23, 2005.

⁵ *See, e.g.*, In re Madison River Comm., 20 F.C.C.R. 4295 (Mar. 3, 2005) (consent decree under which the Madison River Telephone Company agreed to cease blocking ports used by Voice over Internet Protocol applications that competed with Madison River’s traditional local telephone service offerings).

⁶ *See* FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2005 (2006), Table 17, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266596A1.pdf. In the most recent of its regular reports tracking penetration of high-speed broadband services, the FCC found that as of December 31, 2005, on a nationwide basis at least 94% of the country’s zip codes had two or more broadband providers available. Indeed, approximately 83% of the nation’s zip codes had three or more broadband competitors available. This does not mean the competition was available ubiquitously throughout the zip code, but it is a good indication of the extent to which competition is proliferating. The figures are approximate because of rounding errors.

⁷ *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 67 Fed. Reg. 9232, ¶ 4 (Feb. 14, 2002) (“As we have noted in the past, broadband is evolving across multiple electronic platforms as traditional wireless, cable, satellite and wireline providers have expended substantial investments in broadband capable infrastructures”).

transfer of control of the Adelphia cable system licenses to Comcast Corporation and Time Warner Cable, Incorporated.⁸ Rejecting contentions that the proposed transactions would increase incentives for Comcast or Time Warner to engage in conduct harmful to either consumers or competition with respect to the delivery of Internet content, services, or applications, the FCC majority concluded that “competition among providers of broadband service is vigorous.”⁹ The FCC determined that broadband penetration was increasing “rapidly,” through “more vigorous competition.”¹⁰ Moreover, the FCC attributed the increase in the number of consumers with a choice of multiple broadband providers and the increasing number of subscribers to new broadband technologies such as cellular, WiFi, WiMax, and now Broadband over Powerline (“BPL”).¹¹ According to the FCC’s most recent data, the percentage of zip codes served by four or more different broadband ISPs increased from 43.7% in 2003 to 59.7% in 2005.¹²

⁸ See Applications for Consent to Assignment and/or Transfer of Control of Licenses, 21 F.C.C.R. 8203, (July 21, 2006) [hereinafter *Adelphia Order*].

⁹ *Id.* at 8296.

¹⁰ *Id.*

¹¹ *Id.* at 8297.

¹² *Id.* at 8297. Two commissioners dissented in the *Adelphia Order*, at least in part on the basis that they do not view the broadband market as vigorously competitive as the Commission majority. Both Commissioners Copps and Adelstein pointed out that cable operators and telephone companies currently have approximately 98% of the broadband subscribers. They apparently believe that the present largely duopolistic marketplace, even with cable and telephone companies competing vigorously against each other in many markets, does not constitute effective competition. And, they apparently discount the vigor of the potential competition from wireless, satellite, and power companies to which the Commission majority refers. See *id.* (Copps, Commissioner dissenting at 8366 and Adelstein, Commissioner approving in part and dissenting in part at 8370). My own view is close to the Commission’s *Adelphia Order* majority, in no small part due to the technological dynamism that characterizes the marketplace. Moreover, a close reading of the dissenting statements indicates, at least regarding net neutrality regulation, no amount of broadband competitiveness may alter their views. Thus, for example, Commissioner Copps states that: “Combining content and conduit is, after all, the classic strategy for monopoly and control by a privileged few.” *Id.* at 8366. But there is a widely shared view among scholars that consumer welfare is often (but not always) enhanced by efficiencies realized from integration of content and applications on the one hand, and conduit on the other, even in situations in which there is a platform monopolist (not generally the situation in the broadband market, as Commissioners Copps and Adelstein admit). See Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 97-104 (2003).

The FCC majority in the *Adelphia Order* characterized broadband competition as “vigorous.”¹³ Thus, it is unlikely that ISPs like Verizon and Comcast, or broadband providers using other technological platforms such as wireless or satellite,¹⁴ or emerging powerline systems,¹⁵ will take any action that results in significant consumer objection or resistance. If the providers do take such actions, consumers simply will switch providers. As a matter of policy, Congress should be very hesitant to enact net neutrality mandates in anticipation of conjectured harms that may never materialize.¹⁶ This is especially so in the technologically dynamic areas of communications and the Internet. As broadband network technologies and infrastructures and Internet business models continue to evolve, laws with open-ended and vague terms, such as “interfere with,” “impair,” and “degrade,” almost certainly will turn out to be unduly overreaching as applied to new, real-world applications and content.

This regulatory overextension inevitably would restrict or inhibit ISPs from entering into economically efficient business arrangements with applications or content providers, or from integrating their own applications and services in the most economically efficient manner. But for the net neutrality restrictions, these arrangements presumably would allow the ISPs to provide higher quality, lower cost services in forms preferred by consumers. Moreover, apart from practices that the ISPs would assume undoubtedly to fall within the prohibitory language, the inherent vagueness of the net neutrality restrictions would provide grist for the litigation mills for years to come. This too, would chill the development of new, more efficient, products and services that otherwise would be available to consumers.

¹³ *Adelphia Order*, *supra* note 8, at 8296.

¹⁴ *Id.* at 8297 (stating “[p]ress reports indicate that both DBS providers have signed distribution agreements with WildBlue Communications, Inc., a provider of satellite-based Internet service”).

¹⁵ See Caroline McCarthy, *Study: Promising Future for Power-Line Broadband*, CNET NEWS.COM, Sept. 11, 2006, http://news.com.com/Study+Promising+future+for+power-line+broadband/2100-1034_3-6114397.html (“The demand for using traditional electrical lines as a medium for broadband technology in the residential sector is rising worldwide and will continue to grow, according to a study by market research firm In-Stat.”).

¹⁶ Even in 1996 Congress embraced this presumptive deregulatory principle with respect to Internet services when it declared: “It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*” Telecommunications Act of 1996, 47 U.S.C. § 230(b)(2) (1998) (emphasis added).

III. NET NEUTRALITY: NEUTERING THE FIRST AMENDMENT

Even if net neutrality mandates made good policy sense, there is another, more fundamental reason why they should not be adopted. Because neutrality mandates invariably require ISPs to send or post content which the ISPs might prefer not to send or post, they are, in effect, speech restrictions that infringe the ISPs' constitutional rights. The First Amendment's language is plain: "Congress shall make no law . . . abridging the freedom of speech."¹⁷ Like newspapers, magazines, cable operators, movie and music producers, and even the man or woman preaching on a soapbox, ISPs such as Comcast and Verizon possess free speech rights. They are all "speakers" for First Amendment purposes, regardless of the medium or technology used to convey their speech. While the medium may impact the degree of First Amendment protection accorded--calling forth, at least at present, a more or less strict standard of review¹⁸--broadband ISPs nevertheless possess First Amendment rights as entities entitled to use their facilities to convey messages of their own choosing.¹⁹

Significantly, under traditional First Amendment jurisprudence, it is just as much a free speech infringement to *compel* a speaker to convey messages the speaker does not wish to convey as it is to *prevent* the speaker from conveying messages the speaker wishes to convey. As the United States Supreme Court proclaimed in *Pacific Gas & Electric*: "[c]ompelled access...both penalizes the expression of particular points of view and forces speakers to alter their speech to

¹⁷ U.S. CONST. amend. I.

¹⁸ The Supreme Court, for example, has afforded broadcasters a lesser degree of protection than cable television operators and cable operators a lesser degree of protection than newspaper publishers. Compare *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (broadcast model) with *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994) (cable model) with *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (print model). See generally Christopher S. Yoo, *The Rise and Demise of the Technologically-Specific Approach to the First Amendment*, 91 GEO. L. J. 245 (2003) (describing and critiquing the different models and standards of review employed by the Supreme Court in evaluating claims of First Amendment violations relating to different media using various technologies) [hereinafter, Yoo *The Rise and Demise*]. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (the Court stated: "We have long recognized that each medium of expression presents special First Amendment problems").

¹⁹ *Comcast Cablevision v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000).

conform with an agenda they do not set.”²⁰ The Court explained that the “essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”²¹

In perhaps the most notable compelled access case, *Miami Herald Publishing Company v. Tornillo*, the Supreme Court unanimously held that a Florida statute requiring a newspaper that published an editorial critical of a political candidate to print the candidate’s reply violated the First Amendment.²² In doing so, the Court acknowledged, but rejected, *Tornillo*’s argument that the Florida mandatory access statute does not amount to a restriction of the newspaper’s right to say whatever it pleases:

Appellee’s argument that the Florida statute does not amount to a restriction of appellant’s right to speak because “the statute in question here has not prevented the *Miami Herald* from saying anything it wished” begs the core question. Compelling editors or publishers to publish that which “‘reason’ tells them should not be published” is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.²³

Neutrality laws, such as those currently proposed²⁴ that require an ISP to “post,” or “send,” or allow “access” to any content of the

²⁰ *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1, 9 (1986) (electric utility could not be compelled, consistent with the First Amendment, to include a consumer group’s views with which it disagreed in its billing envelope).

²¹ *Id.* at 11 (quoting *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 559 (1985), quoting in turn *Estate of Hemingway v. Random House*, 244 N.E.2d 250, 255 (1968) (emphasis in original)).

²² *Tornillo*, 418 U.S. at 258.

²³ *Id.* at 256.

²⁴ See *supra* notes 1, 2, and accompanying text.

subscriber's choosing, are, for all practical purposes, compelled access mandates akin to the Florida right to access statute at issue in *Tornillo*. Even though these mandates do not literally "restrict" an ISP from publishing content of its own choosing, they would compel the ISP to convey or make available content that, in its editorial judgment, it would otherwise choose not to convey or make available.

Net neutrality advocates sometimes suggest that today's major broadband ISPs choose to be mere conduits, so that compelled neutrality would not eliminate any editorial function that the ISPs are now performing. ISPs like Verizon and Comcast do not function solely as conduits for access to other Internet sites. Rather, as their subscribers know, they exercise editorial discretion in programming the ever-changing content of their home and other specialty pages. When a subscriber logs on to Comcast's broadband service, for example, the subscriber, absent choosing another home page, is presented with a broad array of ISP-selected news, financial, entertainment, sports, and other content. Thus, it is inaccurate to suggest that ISPs are not presently functioning as "speakers" in the sense of those traditionally within the ambit of First Amendment protection.

Even in the digital age, computer storage capacity, data processing capabilities, and transmission capacity are not unlimited or costless resources. To the extent an ISP is required to carry more content and applications than it otherwise might choose if it could exercise its editorial discretion, there will likely be a financial impact on the ISP. Specifically, costs will rise due to the increased storage, processing, and transmission capacities necessary to meet new carriage requirements. Contrary to the apparent belief of some net neutrality proponents, ISP network resources are not "free" goods. By requiring an ISP to carry content it would prefer not to carry, net neutrality laws impose costs that may force the ISP to forego carrying other content it would prefer to make available.

Relying expressly on *Tornillo*, a federal court in Florida held that a county ordinance requiring a cable operator to allow competitors to access its cable system on terms at least as favorable as those on which it provides such access to itself was unconstitutional.²⁵ The court declared: "[u]nder the First Amendment, government should not interfere with the process by which preferences for information evolve. Not only the message, but also the messenger receives constitutional

²⁵ Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685 (S.D. Fla. 2000).

protection.”²⁶ In language directly pertinent to the current net neutrality debate, the court proclaimed: “[c]ompelled access like that ordered by the Broward County ordinance both penalizes expression and forces the cable operators to alter their content to conform to an agenda they do not set.”²⁷

In *Tornillo*, Chief Justice Burger painstakingly noted the claims made by proponents of the compelled access statute that newspapers, by virtue of the frequent lack of competing local papers and the cross-ownership of local newspapers and broadcast stations, had come to exercise monopolistic control over the dissemination of information in their communities. He characterized the proffered “concentration of control” justification for compelled access in the following manner:

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues.²⁸

The Court described the argument as “[t]he First Amendment interest of the public in being informed is said to be in peril because ‘the marketplace of ideas’ is today a monopoly controlled by the owners of the market.”²⁹

This “monopoly” argument did not sway the Court. For purposes of First Amendment protection, the Court said:

However much validity may be found in these [concentration of control] arguments, at each point the

²⁶ *Id.* at 693.

²⁷ *Id.* at 694.

²⁸ *Tornillo*, 418 U.S. at 250.

²⁹ *Id.* at 251.

implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.³⁰

Although the *Tornillo* Court emphasized that the result would have been the same even if the mandated right to reply was costless to the newspaper, it nevertheless pointed out that the Florida statute necessarily imposed penalties and burdens on the newspaper required to print a reply: “[t]he first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print.”³¹ Compelled access requirements that are central to all of the net neutrality proposals have this very same effect, and thus suffer the same defect. In effect, the costs of adding data processing and transmission capacity to accommodate a “carry-all indiscriminately” mandate is no different from the increase in printing cost and composing time exacted by the right of reply statute at issue in *Tornillo*.

Therefore, it is not at all surprising that in the *Broward County* case the Court observed that the equal access provision “distorts and disrupts the integrity of the information market by interfering with the ability of market participants to use different cost structures and economic approaches based on the inherent advantages and disadvantages of their respective technology.”³² Only in a world where network components and resources were costless would this not be so. In a world where real costs are associated with such components and resources, compelled access forces the ISP to make editorial decisions about the carrying of other content that the ISP otherwise would not have to make.

In its most stark, and albeit, least probable form, a mandate—all the net neutrality proposals contain them—that prevents an ISP from “blocking” access by its subscribers to any lawful website would mean that the ISP could not choose to restrict access to material that in its

³⁰ *Id.* at 254.

³¹ *Id.* at 256.

³² *Comcast Cablevision of Broward County*, 124 F. Supp. 2d at 694.

view, say, is "indecent" or "homophobic" or, say, "unpatriotic" simply because it did not wish to carry such content.³³ Indeed, recall the provision in the draft version of the Senate Commerce Committee bill stating that "no Internet service provider engaged in interstate commerce may limit, restrict, ban, prohibit, or otherwise regulate content on the Internet because of religious views, political views, or any other views expressed in such content unless specifically authorized by law."³⁴ The intent to restrict the ISP's freedom to exercise its editorial judgment based on content considerations could not be articulated more clearly.

Freedom of speech under the First Amendment is not absolute. As observed above,³⁵ different media are sometimes treated differently. For example, in 1994 in *Turner Broadcasting System v. FCC*,³⁶ the Supreme Court, in a five to four decision, rejected the argument that a law requiring cable operators to carry the signals of local broadcast stations could never pass muster under the First Amendment.³⁷ The Court readily acknowledged that such a carriage mandate implicated the cable operators' First Amendment rights, declaring, "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."³⁸

Nevertheless, relying heavily on Congress' judgment that local stations providing "free" over-the-air television deserved special economic protection, the *Turner* Court refused to invalidate the "must carry" law outright without further fact-finding on remand concerning

³³ Please understand that I am not suggesting that an ISP *should* adopt practices restricting access to any lawful content. And I am certainly not suggesting that such a restriction *would* be a successful business strategy. The examples simply illustrate the free speech interests at stake.

³⁴ See H.R. 5252, *supra* note 4.

³⁵ See *supra* note 18 and accompanying text.

³⁶ *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994).

³⁷ *Id.* at 664-68.

³⁸ *Id.* at 641. See also Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 699, 714 (2005) (as Christopher Yoo puts it, in addition to affirmative prohibitions on speech, "liberty-oriented theorists would find interference with individual speakers' editorial discretion to be a First Amendment harm, even in the absence of evidence that particular content was favored or disfavored. Access requirements are particularly problematic in this regard.").

the law's actual effect and effectiveness.³⁹ Significantly, net neutrality mandates are not claimed to be related to *Turner's* principal concern: economic protection of local broadcast stations. Additionally, the *Turner* Court assumed that cable operators possessed a bottleneck that allowed them to play a "gatekeeper" role by controlling the programming that entered subscribers' homes. In today's more competitive environment, it cannot be contended that cable operators have "bottleneck" control of the video content that enters consumers' homes, assuming, for the sake of argument that they ever did.

The proposed neutrality mandates are, in some ways, eerily reminiscent of the FCC's Fairness Doctrine, which the agency jettisoned two decades ago in light the doctrine's chilling effect on speech and the proliferation, even then, of new media outlets.⁴⁰ The Fairness Doctrine required that broadcasters present adequate, balanced coverage of public issues.⁴¹ The strictest form of proposed net neutrality mandates requires carriage of all Internet content on a nondiscriminatory basis, not merely a balanced presentation. Nevertheless, the dictate not to discriminate on the basis of content certainly contains Fairness Doctrine echoes. In 1969 when the Supreme Court in *Red Lion Broadcasting Co. v. FCC*, upheld the Fairness Doctrine's form of compelled access regulation against First Amendment challenge, it did so on the basis that broadcasters have less First Amendment protection than other speakers because they use the radio spectrum, which the court characterized as a "scarce public resource."⁴² Apart from whether the Court today would reach the same result regarding broadcasters' free speech rights,⁴³ it has refused

³⁹ 512 U.S. at 666-68.

⁴⁰ *In re Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 169, 188-190, 224 (1985).

⁴¹ For a description of the doctrine, its impact on broadcasters, and a history of its demise, see *In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C.Cir. 1989). See also *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987) (the FCC's commissioners' constitutional oath required them to consider the claim that the Fairness Doctrine was unconstitutional).

⁴² *Red Lion Broad. Co.*, 395 U.S. at 388 ("[B]ecause 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.").

⁴³ There has been considerable criticism of the "scarcity doctrine" for many decades, even before the Supreme Court employed the rationale in *Red Lion*. The most famous and persuasive early critique was that offered by Ronald Coase. R. H. Coase, *The Federal*

to extend such scarcity-based reasoning to other media.⁴⁴ It seems unwise to import Fairness Doctrine-type speech restrictions, based upon notions of scarcity of the broadcast spectrum, into the newly-competitive environment of broadband ISPs.

IV. CONCLUSION

In effect, the current crop of net-neutrality proposals seeks to reverse the Supreme Court's 2005 decision in *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*.⁴⁵ *Brand X* affirmed the FCC determination that broadband ISPs are not regulated common carriers subject to the requirement to carry all messages indifferently and to grant compelled access to all comers.⁴⁶ Net neutrality mandates, by prohibiting all "discrimination" against applications and content providers, would re-impose common carrier obligations on the broadband ISPs.⁴⁷

It may well be, as a matter of law, that Congress or the FCC has the authority, consistent with the Constitution, to re-impose common carrier or common carrier-like nondiscrimination obligations or rate regulations on the broadband ISPs. In today's increasingly competitive communications marketplace, however, this question is not entirely

Communications Commission, 2 J. L. & ECON. 1 (1959). For an excellent comprehensive discussion critiquing the "scarcity doctrine," including references to much of the academic work critiquing the doctrine and also to court decisions subsequent to *Red Lion* that have considered the doctrine's continuing vitality, see Yoo, *The Rise and Demise*, *supra* note 18, at 266-92.

⁴⁴ See, e.g., *Turner Broad. Sys.*, 512 U.S. at 637 ("But the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation."); *Reno v. ACLU*, 521 U.S. 844, 868 (1997) ("Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers . . . Those factors are not present in cyberspace.").

⁴⁵ *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Serv.*, 545 U.S. 967 (2005).

⁴⁶ *Id.*

⁴⁷ Nondiscrimination is one of the core obligations of common carriers. See 47 U.S.C. § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . ."); see also *Maislin Indust., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-131 (1990); *American Trucking Ass'n. v. FCC*, 377 F.2d 121, 130 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

free from doubt.⁴⁸ If broadband ISPs affirmatively were designated common carriers, assuming for the sake of argument that such designation is not an infringement of their property rights under the Fifth Amendment, then their free speech rights probably would not be implicated by net neutrality proposals. *Post-Brand X*, this has not happened.

The critical focus of this essay is on the unappreciated but nevertheless fundamental First Amendment interests that are at stake in the raging net-neutrality debate. In this age of media abundance or, some might even say media overabundance--an environment that was almost unimaginable even a couple of decades ago--it is baffling that the imposition of Fairness Doctrine-type neutrality restrictions is even being seriously considered. The *Broward County* Court put it well in 2000, when competition among broadband ISPs was not nearly as robust as today's: "It is ironic that a technology, which is permitting citizens greater ease of access to channels of communication than has existed at any time throughout history, is being subjected to the same arguments rejected by the Supreme Court in *Tornillo*."⁴⁹

This strange push for new compelled access mandates under the guise of "net neutrality" presents a clear case in which greater appreciation for the First Amendment's free speech values will lead to sounder communications policy. We should not allow net neutrality to neuter the First Amendment in the digital age.

⁴⁸ In *Turner Broadcasting* Justice Kennedy stated: "The First Amendment's command that the government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." 512 U.S. at 657. In dissent, Justice O'Connor stated: "Congress might also conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all with some sort of lottery system or timesharing arrangement. Setting aside any possible Takings Clause issues, it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies..." Id. at 684 (O'Connor, J. dissenting). The point here is simply to suggest that the Court might uphold involuntary imposition of common carrier obligations on broadband ISPs, the question is not entirely free from constitutional doubt. That is the import of Justice O'Connor's remark concerning possible Fifth Amendment Takings Clause issues. This essay is not intended to address the Takings Clause issue. Here I would only point out that Justice Kennedy's statement quoted above, as a matter of First Amendment jurisprudence, is somewhat at odds with the Court's unanimous rejection of the relevance of the "monopoly" control argument in *Tom/lo*.

⁴⁹ *Comcast Cablevision of Broward County*, 124 F. Supp. 2d at 694.