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The right of access, the right to hear, and the right to speak: applying First Amendment theories to the network neutrality debate

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The right of access, the right to hear, and the right to speak: Applying First Amendment theories to the network neutrality debate

by

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A thesis submitted to the graduate faculty
in partial fulfillment of the requirements for the degree of
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ABSTRACT

The majority of scholarly work on the network neutrality debate has focused on the economic and technological arguments used to advocate or oppose regulation that would protect the open and democratic nature of the Internet. Out of a concern that congressional discussion over the matter will be similarly two-dimensional, this thesis examines the First Amendment concerns in the network neutrality issue. Following Moran Yemini's 2007 paper, a matrix of possible First Amendment rights—the right to speak, the right to receive information, and a right of access to the media—and the groups on the Internet that could claim them—broadband service providers (BSPs), Internet service providers (ISPs), content providers, application providers, and users—is created. Legal case analysis identifies which of these claims have been previously acknowledged by the Supreme Court. It is determined that the only potential First Amendment challenge to network neutrality regulation would be BSPs' claim that the regulation infringed on their editorial rights. Since network neutrality regulation is similar to the must-carry provisions in the *Turner v. Federal Communications Commission* cases in 1994 and 1997, the Supreme Court would most likely apply its intermediate scrutiny test as enunciated in *Turner*. In contrast to Yemini, this thesis concludes that network neutrality regulation would almost certainly satisfy the Court's *Turner* test, thus the minor infringement of BSPs' editorial rights would be accepted by the Court.

CHAPTER 1: INTRODUCTION

In the federal court's opinion in the case *ACLU v. Reno* (1996), Judge Stewart Dalzell declared that the Internet was the "most participatory form of mass speech yet developed" (p. 883). The case in question considered the constitutionality of the Communications Decency Act of 1996 (CDA), which was an attempt, among other things, to prevent minors from accessing indecent material on the Internet. After extensive findings of fact and careful consideration of the repercussions of the bill, the three-judge court struck down the CDA as a violation of content providers' First Amendment rights. As a rationale for this important decision, Judge Dalzell declared that the democratic nature of the Internet "deserves the highest protection from government intrusion" (p. 883). The Court, in this case and in other First Amendment-related Internet cases, has ruled strictly against censorship by the government. However, what action would the courts take if the Internet's democratic and participatory nature were to be threatened with censorship by private commercial entities?

Today, the Internet arguably faces such a crisis, which presents itself in the debate over whether to regulate Internet providers to protect "network neutrality." Network neutrality is essentially the idea that all legal Internet content, no matter the type or application (text, video, audio), the creator of the content, or the content itself, should be treated equally in the transfer process. Essentially, this means that when an Internet user navigates to a specific page or utilizes a specific application, the speed at which the information loads in his or her browser should not be significantly slower than other pages or applications. A Congressional Research Service report (2006) explained that most advocates for regulation to protect network neutrality believe that "owners of the networks that compose and provide access to the Internet should not control how consumers lawfully use

that network; and should not be able to discriminate against content provider access to that network” (p. 1).

This thesis focuses on one of the central tenets of network neutrality, the prevention of “access-tiering” or the idea that bandwidth priority will be given only to content from users willing or able to pay a fee. Journalist Bill Moyers compared access-tiering to a toll road:

For most large [broadband Internet] providers, this has come down to one general desire: They could establish a tiered system of content delivery in which companies with data-heavy content can pay a fee to the providers in return for ‘special treatment’ in transmission. An analogy: For those companies that pay the fee, their content would breeze through the fast-pass lane at the toll bridge, reaching users more quickly; those who don't pay will be stuck in the crowded, slow-moving line, and users will have to wait longer for their content to load. (2006a, ¶ 2)

By charging an extra fee to prioritize some content, companies and individual website creators who choose not to pay would effectively be relegated to the slow lane. On the Internet, slow page loading can be the death of even the most successful web pages that enjoy high traffic. Moyers asked: “Would consumers have the patience to wait it out, or would they jump ship for the faster loading competitor’s site? What would this new tiered system do to sites that don’t have the resources to play ball?” (2006b, ¶ 4). The current lack of legislation protecting net neutrality could have the unfortunate result of silencing a multitude of voices that either cannot or refuse to pay. Intentionally or unintentionally, broadband providers would therefore be acting as non-governmental censors of content.

Aside from apprehensions arising from access-tiering, there are also concerns that without regulation, broadband providers would discriminate against websites’ content. There have recently been examples of Internet providers blocking content they disagree with or find offensive and applications that compete with their own products and services. In 2004, North

Carolina Internet service provider Madison River barred its digital subscriber lines (DSL) customers from using a rival's Web-based phone service (Save the Internet, n.d.). In April of 2006, Time Warner's America on Line (AOL) allegedly blocked all emails that mentioned www.dearaol.com, the website of an advocacy campaign opposing the company's pay-to-send email scheme (Olsen, 2006). Finally, telecommunications company BellSouth also allegedly shut down its customers' access to the popular social network site MySpace in 2006 (Hachman, 2006).

This study agrees wholeheartedly with Judge Dalzell's proclamation that the democratic nature of the Internet deserves the strongest protection available. One benefit of the Internet's democratic nature is that it gives controversial, distasteful or otherwise fringe messages, normally ignored by the other mass media, access to a wide audience. This fosters the value of a pluralism of ideas—without access to the marketplace of ideas, minority-held beliefs could never compete with accepted beliefs. Thus, both democratic and pluralistic principles are protected by preventing access-tiering and content discrimination. Regardless of whether the Internet should be protected because of its democratic or pluralistic qualities, the goal of this thesis is to present an argument supporting network neutrality regulation. To do so, case law analysis is used to examine the Supreme Court's treatment of governmental regulation and First Amendment issues in mass media cases with the aim of applying that rationale to the network neutrality debate.

The network neutrality debate generally splits people into two opposing camps—one side supports regulation to protect network neutrality, while the other side resists regulation. Advocates of network neutrality generally believe that minimal regulation of telecommunications companies that provide cable or DSL broadband Internet access, called

“broadband service providers” (BSPs), is necessary to prevent those companies from discriminating against “content providers.” Content providers are any groups or persons who create websites and/or provide content for others to access, ranging in size from companies as large as Google or YouTube, to high-traffic political blogs like The DailyKos or Drudge Report, to small websites run by a single individual. Neutrality supporters include a diverse group of companies and individuals, including large content providers such as Amazon, eBay, Google, and Yahoo!; organizations such as the Christian Coalition and Gun Owners of America; and grassroots communities as evidenced by websites such as Free Press (Ganley & Algrove, 2006, p. 455). Academicians, among them Lawrence Lessig and Timothy Wu, have also added their support (Lessig, 2001, 2006; Wu, 2003, 2004, 2006; Wu & Lessig, 2003). Tim Berners-Lee, credited with inventing the Internet, has also voiced his support for network neutrality (“Web inventor,” 2007).

Many of these proponents of government intervention rely heavily on technological or economic arguments to support their call for regulation. They argue that building “economic toll booths” into the Internet will prevent small entrepreneurial start-up companies from growing or developing (Bachula, 2006, p. 2). Network neutrality regulation would enable an explosive growth in innovation that would keep the United States competitive internationally; without it, America’s broadband technology and Internet-based economy could lag further and further behind other developed nations (Cerf, 2006). Originally, the network’s “end-to-end” architectural design gave practically all of the control over the network to the end of the network—the user (Lessig, 2006, p. 3). The network itself, on the other hand, was intended to be as simple as possible. This should be distinguished from the structural and operational design of the press media. With

newspapers and broadcast and cable television, the media company exerts almost total control over the content printed on the pages or transmitted through radio waves or cable lines. BSPs, on the other hand, operate the physical aspect of the Internet medium (i.e. the cables or telephone lines), but have little or no control over the *content* flowing through. The resulting lack of control over the network by the providers allows for application innovation by users at the edges of the network. This means that “the innovation and explosive growth of the Internet is directly linked to its particular architectural design,” and without this neutral design, applications ranging from the World Wide Web to HTML-based email would historically have never been developed (Lessig, 2006, p. 4). Without some regulation, supporters argue, innovation and economic growth over the Internet will be drastically impaired, compromising America’s position as a global leader in the Information Age.

On the other side of the debate, criticism of network neutrality regulation comes mainly from the telecommunications industry. Telecommunications giants such as AT&T, Comcast, and Verizon have consistently been the “most vocal” on the issue (Ganley & Algrove, 2006, p. 455). Industry insiders, such as the president and CEO of the National Cable and Telecommunications Association (NCTA) Kyle McSlarrow, and scholars such as Christopher Yoo and Adam Thierer have spoken or written extensively in opposition to network neutrality regulation (Thierer, 2004; Yoo, 2005, 2006). The online advocacy website Hands Off The Internet, backed by AT&T and other members of the telecommunications industry, also champions the anti-regulation side of the debate (Birnbaum, 2006).

These opponents of network neutrality mandates mainly express economic concerns, maintaining that regulation would remove any incentive for the broadband providers to invest

in and innovate the network. McSlarrow (2006) echoes the industry's general sentiment that "leaving the Internet unregulated has been a resounding success" and that any regulation could prove harmful (p. 1). The industry argues that with such a competitive marketplace, companies that engage in behavior detrimental to consumer welfare would risk losing market share. The Federal Communications Commission (FCC) could also use its authority to clamp down on any anti-competitive behavior (Dixon, 2006). Constricting companies' ability to compete would reduce incentives to invest money into the network and to develop new innovative services that benefit consumers (Dixon, 2006). Without funds from access-tiering, individual consumers would be forced to "foot the bill" for the development of the next generation of networks (McCormick, 2006, p. 3). Finally, there is a strong consensus in the telecommunications industry that regulation would be a solution without a problem because access-tiering is not currently practiced and there is only anecdotal evidence of content discrimination (e.g. Dixon 2006; McSlarrow, 2006; Wolf, 2006).

The irony of network neutrality is that it advocates public regulation to prevent private regulation. If regulation is defined as placing controls or limitations on how the Internet naturally operates, the goal of network neutrality regulation would be to stop broadband service providers from controlling or directing a user's access to a particular website or application, an Internet service provider's access to the network, a content provider's access to an audience, or any other relationship that could be milked for a profit. Additionally, the opposition's supposition that the Internet has been unregulated in the past—and thus should remain free from regulation—is mistaken. Barrow and Blevins (2007) have noted that although the Internet itself has been untouched by regulatory agencies, telecommunications companies providing communications over computer networks have

been regulated in the past by the FCC's Computer Inquiries and by the Telecommunications Act of 1996. Thus, discriminatory behavior by companies with an anticompetitive advantage in the computer communications market was prevented, even though the Internet itself remained unregulated (Barrow & Blevins, 2007).

Despite the claims of many network neutrality opponents that regulation is premature, several broadband providers have stated outright that they wish to enact access-tiering practices. According to BellSouth CEO William Smith, broadband providers should be allowed "to charge Yahoo Inc. for the opportunity to have its search site load faster than that of Google Inc." (Krim, 2005, ¶ 2). Verizon CEO Ivan Seidenberg was quoted as saying in a *Wall Street Journal* story: "We have to make sure [large content providers such as Google] don't sit on our network and chew up our capacity" (Searcey & Schatz, 2006, ¶ 2).

Unfortunately, broadband providers are starting to follow through on these promises. In late 2007, telecommunications giant Comcast was accused of blocking user access to many peer-to-peer file sharing websites (Stone, 2007). Initially, Comcast "stubbornly" (Stone, 2007, ¶ 1) denied blocking user traffic, but a company executive speaking to the *New York Times* later amended the company's claim to say that they delayed or postponed file transfers using "data management technologies" (¶ 3). Clearly, the incentive and ability for broadband providers to enact discriminatory practices like access-tiering is a present danger to the heretofore open nature of the Internet.

Beginning in 2006, the network neutrality debate emerged in both houses of Congress. That summer, the Senate Commerce Committee failed to break through a stalemate to insert a Democrat-sponsored amendment mandating network neutrality into a massive telecommunications bill. Since that failure, both the Senate and the House of

Representatives have had network neutrality legislation in the works. It is therefore especially important at this time for the debate over net neutrality regulation to be as complete and multi-faceted as possible, thus ensuring that whatever decision Congress reaches on this issue will be an educated one.

As previously stated, this study is concerned that economic and technological frames are overwhelming the debate, both inside Congress and outside the legislative halls, especially in the academic and professional worlds. This narrow focus tends to overlook the social, philosophical, or legal elements of regulation debates, including the concepts of fairness, the public interest, and free speech. While attention to the relevant First Amendment issues is rising, there have been few articles to analyze the First Amendment implications of the network neutrality issue. Adding to that component allows for consideration for the constitutional rights of individuals, in addition to their economic welfare. This study expands on this concern. To do so, it uses legal case analysis to identify if there is a legal precedent to support First Amendment arguments in favor of network neutrality. By examining First Amendment cases involving the mass media, this thesis analyzes how the Supreme Court has treated specific First Amendment rights in the face of private and government censorship. Ideally, the results of this analysis could broaden the frames of the debate in Congress and allow for a more holistic view of user benefits and rights and help policymakers structure any potential bill so that speech rights are not violated with excessive regulation, or lack thereof. A multi-faceted and comprehensive debate will undoubtedly lead to the adoption of the best-possible policy for individual Internet users and all other groups on the Internet.

CHAPTER 2: THEORETICAL FRAMEWORK AND LITERATURE REVIEW

The previous chapter presented the two sides of the network neutrality debate, explaining the arguments and identifying the players involved. This chapter provides a general overview of previous literature on network neutrality and proposes a theoretical framework to guide the analysis. The first section outlines the numerous First Amendment rights present in the network neutrality debate and, following a suggestion by Yemini (2007), constructs a table of which individuals or groups on the Internet can claim which rights. The second section delves into the economic, technological, and legal frameworks previous studies have applied to the network neutrality debate.

First Amendment Theories

The First Amendment states that “Congress shall make no law...abridging the freedom of speech, or of the press.” This concise statement has inspired numerous studies that have examined the potential rights, justifications, and theories behind the free speech clause. Works by Chafee (1941), Meiklejohn (1960), Emerson (1970), and Schauer (1982) have been extremely influential on the development of First Amendment theory. However, the rise of the Internet has called into question the traditional First Amendment perception of a bilateral conflict between Speaker and Government (Yemini, 2007). Yemini argued that “[t]he challenge posed by the Internet...is how to reconcile the rights of all speakers in situations of conflict” (p. 50). Thus, the first three subsections of the theoretical framework examine three different First Amendment rights that could be violated should broadband providers engage in access-tiering or content discrimination. The fourth subsection examines *who on the Internet* can claim these First Amendment rights and presents a table of which

rights could potentially be claimed by which groups. This allows for the consideration of all the relevant First Amendment issues in the network neutrality debate, which in turn helps construct the strongest legal argument for network neutrality regulation.

The right to speak

In some mass media cases, the right to speak is claimed by both parties, or conflicting rights are implicated within the Court's decision. In these types of cases, the editorial or speech rights of the media company are often pitted against the rights of the people. Philip Napoli (2001), while not the first to identify this conflict (see also Ingber, 1990; Post, 1993), provided the best outline of the normative arguments involved. The debate centers on whether the application and interpretation of speech rights should be at the individual level, emphasizing individual rights, or at the collective level, focusing on the benefit of free speech to a community. Individualists claim that protecting the personal liberty, autonomy, and intellectual self-development of individuals is the greatest justification for a free speech right. As Chafee (1941) explained, it is important for individuals "to express their opinions on matters vital to them if life is to be worth living" (p. 33). Collectivists, on the other hand, place priority on the "social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way" (p. 33). It is the government's prerogative to create an environment "in which as many citizens as possible have the means to express their views and to have access to as many other viewpoints as possible" (Napoli, 2001, p. 47). This collectivist frame has the potential to infringe on the individual rights of media companies, because the public would always win in situations where the collective First Amendment rights are pitted against the speech or editorial rights

of the press. Collectivists accept that the speech rights of a few individuals might be sacrificed in order to expand the speech rights of the community, “given that the First Amendment’s primary responsibility is seen as being to the citizenry as a whole and its key purpose as promoting and maintaining an environment that best ensures a free flow of diverse ideas” (p. 48).

The conflict between the collective rights of the public at large and the mainly individualist rights of the mass media company is at the heart of this study. Often, these two approaches do not contradict each other; in fact, many individualists contend that speech rights based on individual liberty and autonomy naturally extend into the communal good of increased capability for self-governance (Post, 1993). The distinction, however, has become important in communications policy, as the Supreme Court has sometimes pitted the individual rights of a broadcaster or publisher against the collective rights of the public (e.g. *Red Lion v. FCC*, 1969; *Miami Herald v. Tornillo*, 1974). Napoli (2001) explained that

[p]romoting the First Amendment rights of the individual speaker can reduce the free speech rights of the broader public. Conversely, an emphasis on the First Amendment rights of the collective can infringe on the First Amendment rights of the individual speaker. (p. 30)

For example, in *Miami Herald* the Supreme Court was essentially forced to choose between the right of the people—represented in this case by the politician, Tornillo—to have a response to the newspaper’s personal attack printed in the newspaper and the individual right of the newspaper to have editorial control over its own pages. In the network neutrality debate, the conflict materialized in the form of the broadband service providers claiming First Amendment protection as editors of the material flowing through their networks.

Analogizing between BSPs and newspapers, however, is arguably inapt because newspapers

own the material they publish on their own pages. BSPs, on the other hand, do *not* own the majority of speech flowing through their physical network. However, the Court has not yet faced the issue of whether the Internet is part of the press, or whether BSPs have any First Amendment editorial rights over Internet content. This uncertainty is discussed further in Chapter 4.

The network neutrality debate also encompasses the converse of the collective public/individual media conflict. When the collective rights of the public are emphasized, the argument generally is based on the benefits to society as a whole. This focus overlooks the benefits of free speech for the single individual, such as personal fulfillment and intellectual development. Yemini's (2007) multilateral First Amendment theory covers both the collective public/individual media and the individual public/collective media approaches, allowing for the consideration of all parties' right to free speech.

The right to receive expression

An obvious but rarely recognized extension of a collectivist vision of the First Amendment includes recognizing a right to receive expression, which Thomas Emerson (1976) broke into two categories: "First, the right to read, to listen, to see, and to otherwise receive communications; and second, the right to obtain information as a basis for transmitting ideas or facts to others" (p. 2). Advocates claim the right to speak is meaningless without its mirror-image of the right to receive that speech, no matter if the goal for protecting speech is self-fulfillment, identifying the truth, maintaining a diversity of voices, or gaining the capacity for deliberative self-government (Steele, 1971; Lee 1987). As

early as the 1940s, the Supreme Court recognized the right to receive. In *Martin v. City of Struthers* (1943) the Court declared that

[t]he authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature and necessarily protects the right to receive it. (p. 143)

In *Stanley v. Georgia* (1969), the Court claimed that “[i]t is now well established that the Constitution protects the right to receive information and ideas. This right to receive information and ideas, regardless of their social worth, is fundamental to our free society” (p. 564). The Supreme Court in this case clearly and firmly recognized the right to receive as a natural and necessary extension of the literal right to speak in the First Amendment.

The right of access to the mass media

Jerome Barron (1967, 1973, & 2003) was among the first legal scholars to extract a right of access to the mass media from the First Amendment. In a seminal 1967 article, Barron explicated the theory that mass media engage in a form of private censorship that prevents some ideas from reaching the marketplace. While the law has taken steps to protect voices already in the marketplace, First Amendment jurisprudence has been fairly indifferent to creating opportunities for more voices to be heard in the media. As Barron (1967) argued:

To those who can obtain access to the media of mass communications, First Amendment case law furnishes considerable help. But what of those whose ideas are too unacceptable to secure access to the media? To them the mass communications industry replies: The First Amendment guarantees our freedom to do as we choose with our media. Thus the constitutional imperative of free expression becomes a rationale for repressing competing ideas. (p. 1641)

The judicial branch has granted most of the mass media the power to act as editors and freely choose which types of messages they wish to be associated with. Without network neutrality

laws, not only could broadband service providers restrict access to viewpoints they find unappealing, but they could also turn the Internet into a medium where only the wealthy could present their messages.

Benno Schmidt (1976), in an opposing viewpoint, defined a right of access as the idea that “private publications, such as newspapers, magazines, radio and television stations, and conceivably even books, should be obligated by law to present the viewpoint of some person or entity that the publisher would not present as a matter of editorial discretion” (p. 3). He argued that First Amendment jurisprudence does not support an access right due to a concern for governmental interference with the press. This exemplifies the conflict between the individualist and collectivist approaches as discussed by Napoli (2001). Ruling in favor of the mass media’s right to speak or act as editors would deny the people the opportunity present their ideas through the media. Conversely, as Schmidt (1976) pointed out, granting this opportunity could override any right of freedom of the press or speaker rights for the press.

Ingber (1984) further explicated the connection between media concentration and the restriction of access. Because access to the mass media is a requirement for the wide dissemination of a message, speakers who want to be heard need access to a medium. There are significant financial barriers to creating a new media company, so a few wealthy media owners of well-established companies decide which messages are transmitted to the public. Ingber expressed regret that “[m]edia owners and managers, rather than the individuals wishing to speak, thus determine which persons, facts, and ideas shall reach the public” (p. 39).

The Internet and the First Amendment

In a recent study, Yemini (2007) articulated a multi-speaker First Amendment theory that aims to acknowledge all relevant First Amendment rights and interests present on the Internet. This multilateralism, Yemini argued, allows for an “internal” balancing process between conflicting rights, with the normative goal of “accomodat[ing] both rights or, if that aim is not possible, ...determin[ing] between the conflicting rights” (p. 51). It is imperative for this legal analysis to acknowledge all of the First Amendment rights involved in the network neutrality debate, if only to make policymakers, legislators, and the judiciary aware of how complicated and overlapping this multi-speaker environment is.

To accomplish this goal, this thesis briefly outlines which individuals or groups on the Internet could likely claim First Amendment protection. Yemini argued that “[s]peakers on the Internet include content providers, application providers, ...[and] individual users; they also include ISPs and BSPs, whether as publishers of their own content or as editors (or potential editors)” (p. 49). These categories are potentially insufficient to accurately portray all the groups on the Internet. With more time, this analysis could have examined how or whether search engines, for example, fit into these five categories. That is unfortunately just beyond the scope of this thesis, which therefore incorporates the five groups listed by Yemini with the understanding that future research might reveal relevant distinctions. While this study does not necessarily adopt Yemini’s multilateral First Amendment theory, it does borrow heavily from the concept of a “constitutional matrix” to explicate the complex First Amendment issues that result from the Internet’s unique characteristics (Yemini, 2007, p. 51). By combining these five general types of users with the three rights discussed above,

this study constructs a hypothetical matrix of First Amendment claims that the Supreme Court might recognize:

Table 1

	BSPs	ISPs	Content providers	Application providers	Individual users
Speak	✓	✓	✓	✓	✓
Receive					✓
Access		?	✓	?	✓

As Table 1 illustrates, the Internet is truly a multi-speaker environment, often with users that can claim multiple First Amendment rights. Some of the categories are also overlapping. For example, individual users, ISPs, BSPs, and application providers who create a web page have speech rights with regard to their own content. While the lines separating the categories in this table are arguably murky, they will suffice for the purposes of this legal analysis. The cells for a First Amendment right of access for ISPs and application providers are marked with question marks, because it is unclear if business entities like ISPs and application providers would be able to claim First Amendment access rights. However, it seems possible that they could make that argument. The question marks in Table 1 will be reevaluated after the analysis of rights acknowledged by the Supreme Court in Chapter 4.

Network Neutrality

Unfortunately, to date there has been little attention to the First Amendment issues in the network neutrality debate. The majority of research for and against network neutrality uses economic or technological frameworks, though some works have analyzed network neutrality through legal or judicial lenses. The literature can be divided into two camps: those that support regulation and those that object to any government intervention. The first

two subsections below outline the scholarly work done by opponents and advocates of network neutrality regulation from economic, technological, and legal perspectives. A third subsection examines how a few scholars on both sides of the debate have used different First Amendment justifications to argue in favor of their particular position.

Opposition to regulation

Central to the majority of arguments against network neutrality is the fear that regulation would decrease broadband providers' incentive to invest and innovate in the network. Christopher Yoo (2005) looked at the potential effects of regulation on the network providers and examined whether neutrality mandates would produce economic harms to the industry that would outweigh any potential benefits. After analyzing arguments for regulation, Yoo concluded that regulation would impede the growing technological dynamism of the industry by "foreclosing [economic or business] practices that are ambiguous or about which there is too little information" (p. 67). Ford, Koutsky and Spiwak (2006) also examined the potential effects of network neutrality on industry competition. They argued that regulation would increase, rather than decrease, the market concentration of broadband providers by commoditizing the networks. Commoditized markets are markets in which "firms have nothing to compete over but price" (p. 8). Allowing broadband providers to differentiate, which some suggested mandates would oppose, would allow providers to cut costs and to "[create] better price-quality offerings and innovative new products and services" (p. 8). This, the authors claimed, "may make entry [into the market by new firms] more likely, thereby leading to a less concentrated industry structure" (p. 3).

Arguments driven by economic theory also focus on the potential effects of network

neutrality regulation on consumer welfare. Yoo (2006) analyzed whether vertical integration—something frequently discussed as a part of neutrality mandates—would increase or decrease consumer welfare. In the network neutrality debate, vertical integration occurs when a BSP integrates with a single Internet service provider [ISP] and denies independent ISPs access to the network. Yoo argued that vertical integration might actually be economically beneficial for consumers, saying that

[a]lthough exclusivity arrangements do place some limits on customer and producer freedom, those limits should not pose a threat to economic welfare so long as competition is sufficiently robust, since any frustrated customer would remain free to switch providers. (p. 61)

This claim that the broadband market is sufficiently competitive to inhibit BSPs from engaging in discriminatory practices is central to many regulation opponents' arguments against network neutrality.

Other scholars have presented a property rights argument in favor of broadband providers having control over the operation of their physical network. Property rights “[grant] the owner an exclusive legal power to force the world to negotiate with him before his control over the resource protected by the right is displaced” (Lessig, 2004, p. 38). Owen and Rosston (2003) concluded that “transactions costs are likely to be lower if access rights are assigned initially to platform owners [i.e. BSPs] rather than content providers,” that BSPs are “more efficient holders of these rights because they can internalize demand-side interactions among content products,” and that “failure to permit platform owners to control access threatens to result in inadequate incentives to invest in, to maintain, and to upgrade local broadband platforms” (p. 1). By stripping broadband providers of their rights to operate the network as they see fit, Owen and Rosston determined that those providers would have

less incentive to expand the reach of the network and invest in new technologies that would improve network operation and function.

Following this property rights approach, Thierer (2004) claimed that discrimination by service providers is often warranted so they can give their customers optimal service. He identified several “rational and legitimate” discriminatory practices (p. 8), including capping bandwidth usage by heavy users, using data or application management to ensure network security, and “experiment[ing] with a wide range of network access schemes and pricing methodologies” to recoup the significant cost of deploying broadband (p. 9). Thierer raised the question: “Even if a broadband provider did the unthinkable and started blocking access to very popular websites, would some grievous harm be inflicted upon its customers such that legal or regulatory remedies are in order?” (p. 7). While the lack of government action indicates that this is not censorship in the legal sense, blocking Internet users from accessing speech—especially whole categories of speech—is offensive to the First Amendment goal of free exchange of information for the purposes of discovering truth through debate and maintaining a well-informed citizenry. In contrast to Thierer’s view, it is difficult to imagine how blocking would *not* inflict a grievous harm upon customers.

Wolf (2006) observed that many items of legislation involving the Internet have been struck down in the past because of the Supreme Court’s fear of using the law as a “blunt instrument” (p. 3). He pointed out that the Supreme Court does not rule on issues that are not “ripe” for review, meaning that they are based on speculative harms that have not yet passed. If the current speculative harms regarding network neutrality do come to pass, Wolf claimed, unfair competition law and common law tort theories are already available as legal remedies. Because access-tiering is yet to be institutionalized and because many mandates for network

neutrality, as Wolf argued, are overly broad in scope, any neutrality regulation would be struck down by the Supreme Court. Hedge (2006) also argued that the FCC's jurisdiction to punish discriminatory and antitrust behavior under the Telecommunications Act makes any additional regulation unnecessary. In the Supreme Court case *NCTA v. Brand X* (2005), the Court "acknowledged that the FCC still retains the authority to make [antitrust] regulations under Title I ancillary jurisdiction," making any potential deregulatory harm to consumers minimal (Hedge, 2006, p. 451). Additionally, scholars like Hedge argue, should for some reason the FCC fail to punish antitrust activities, other antitrust authorities like the Federal Trade Commission and the Department of Justice have sufficient legal authority to be able to step in to regulate the broadband market (p. 452).

Support for regulation

The great majority of literature supporting neutrality advocates for preserving the original "end-to-end" architecture of the Internet. In his seminal book, Lessig (2001) argued that this architecture is absolutely essential to the creation of an innovation commons, a place where any user can develop applications and present them to a large market. With end-to-end architecture, the intelligent part of the network lies at the ends, where users put information or applications onto the network. This indicates that the "pipes" (i.e. the network) through which that information flows should be as basic and simple as possible (Lessig & Lemley, 2001, p. 6). The Internet's egalitarian or democratic label is a direct result of this architecture, which prevents gatekeeping forces from exerting control over the pipes. Essentially, Lessig and Lemley argued that allowing broadband providers to leverage control could decrease the development of user innovations, since the network provider

would have ultimate authority over what content or applications get through on their network. Additionally, Lessig and Lemley criticized the FCC for choosing a regulatory path that would, ironically, lead to more, rather than less, regulation:

The FCC's analysis to date does not consider [the end-to-end] principles of the Internet's design. ...Neither does the FCC's approach properly account for its role in creating the conditions that made the Internet possible. Under the banner of 'no regulation,' the FCC threatens to permit this network to calcify as earlier telecommunications networks did. Further, and ironically, the FCC's supposed 'hands off' approach will ultimately lead to more rather than less regulation. (2001, p. 928)

Allowing the BSPs to bundle a specific ISP with their network access, for example, would not only threaten future innovation, but would also destroy the current architectural design of the Internet by granting gatekeeper control to the BSPs.

A related but not entirely identical concept that neutrality proponents often support is the idea of open access. Open access, as Wu (2003) described, "generally refers to a structural requirement that would prevent broadband operators from bundling broadband service with Internet access from in-house Internet service providers" (p. 148). Open access regulation would be a means to reach some of the ends of network neutrality. Wu supported network neutrality, but he moderated his argument with criticisms against total "open access." In a 2004 paper, he laid out the fundamental positions of the openists, who favor open access, and the deregulationists, who prefer no regulation. The openists' argument, he claimed, is based on the principles of infrastructure, neutrality, and end-to-end architecture. Wu also boiled down the deregulationists' argument to issues of propertization, incentive, and deregulation (see p. 72-76). He generally supported legislation in favor of net neutrality but criticized openists' fear of vertical integration. By focusing on points where the two sides are in agreement, especially with regard to innovation, Wu proposed that both sides

should be supportive of network neutrality legislation that would focus on users' rights. Wu (2003) advanced this middle-of-the-road argument in an earlier paper, advocating legislation to protect users' rights but once again criticizing open access advocates for resisting vertical integration. He expanded on his broadband discrimination theory as a way to identify appropriate versus non-appropriate restrictions on user activity.

Scholars also use economic theories to support regulation for network neutrality. In an analysis of the potential costs and benefits of regulation, Van Schewick (2005) found that broadband providers would surely discriminate in the absence of regulation. The incentive to discriminate exists for BSPs not only in a monopoly, but also in a significantly concentrated market, because the "exclusion of rivals [in the information services market] may lead to gains that are significantly higher than in traditional markets" (p. 32). The potential costs normally associated with discriminatory behavior, like the loss of customers, are outweighed in this case by the potential gains, "making it more likely that exclusion is a profitable strategy" (p. 32). With this in mind, Van Schewick weighed the benefits of network neutrality mandates—namely, innovation in applications from Internet users—versus the costs imposed on broadband providers. She concluded that the potential development of technological applications for new types of Internet use would inherently provide a great benefit to society. Therefore, "increasing the amount of application-level innovation through network neutrality regulation is more important than the costs [to providers] associated with it" (p. 40).

Pro-regulation scholars have also critiqued the opposing side's invocation of broadband providers' property rights as an argument against neutrality mandates. Lessig (2004) criticized using property rights to reject regulation by examining under what

circumstances property rights should be applied. Lessig focused not on whether property rights should be assigned at all, but whether such assignment would create any gain or efficiency in network operation or innovation. He concluded that applying a property right to network owners would impose a cost on users, namely, that it would “fundamentally weaken the incentive of [users] to develop technologies that do not benefit network owners, even if they benefit network users” (p. 41). Crawford (2007) added to Lessig’s criticism of the broadband providers’ property rights argument, declaring that

protecting the property prerogatives too strongly may not be worth the limitations on overall social well-being...In other words, the regime these network providers seek is likely to harm society and will not necessarily lead to social benefits in the form of increased innovation or better broadband penetration. (p. 55)

This critique of the property rights argument advocated by Thierer (2004) and Owen and Rosston (2003) resonates with the collective interpretation of the First Amendment as set out in the first section of this chapter.

Network neutrality and the First Amendment

As demonstrated in the previous section, there has been little literature applying First Amendment theory to network neutrality. The few scholars on both sides of the debate who have done so have used different First Amendment interpretations to justify such an application. Opponents of regulation have included individualist First Amendment ideas arguing for providers’ speech rights, among others. May (2006) argued that broadband providers should be legally considered as speakers in the same way that magazines, newspapers, movie producers, and individuals are considered speakers under the First Amendment. By forcing broadband providers to disseminate a message they might not want

to pass along, network neutrality would effectually be impinging on their First Amendment rights in the same way that censorship of a message would impinge on speech rights. In this manner, May argued that broadband providers have a First Amendment right to discriminate among various content. Yoo (2006) approached the First Amendment from a different angle, claiming that broadband providers should be considered editors to maximize the diversity of viewpoints on the Internet. He argued that broadband providers should be allowed some measure of editorial control over Internet content because Internet users would benefit from “editorial filters” that would manage the “avalanche of content” and provide some guarantee of content quality and diversity (p. 1907).

On the other side of the debate, scholars favorable to network neutrality regulation have incorporated collective First Amendment arguments in their favor. Cherry (2006) considered the dangers to free speech as a result of the FCC’s policy of deregulation by applying an “essentiality of access” typology to the broadband debate. Essentiality of access is defined as “the historical alignment of access problems to legal principles” (p. 484). Cherry explained that “[d]iffering types of access objectives require reference to distinct legal principles that evolved in response to differing relationships among access recipients to the access providers—as end user customer, competitor, speaker, or audience member” (p. 484). The FCC has chosen to not to extend common carrier requirements to broadband service providers, which grants them the prerogative to refuse to carry a message. Because such providers can now produce and distribute their own content, free speech objectives like maintaining a diversity of voices and promoting the widespread dissemination of information are no longer sustainable. The First Amendment rights of individual users are essentially being “sacrificed to serve [the] economic interests of corporate owners of broadband

facilities” (p. 507). Cherry promoted a focus on the constitutional rights of individuals—as opposed to the rights of corporations—in determining future broadband access policy.

In a larger work devoted to the potential economic and social consequences of not enacting some type of neutrality policy, Herman (2007) discussed the problems with Yoo’s (2006) assertion that free speech on the Internet would be best protected if broadband providers were given editorial rights. Herman argued that free speech values are best protected when an emphasis is placed “not merely [on] content diversity, but [on] a diversity of stakeholders who have editorial control over that content” (p. 116). He reminded Yoo that the Communications Decency Act of 1996 does not consider broadband providers to be editors (p. 117 and note 58). Herman concluded that giving editorial control to Internet users, rather than the providers, best exemplifies the democratic goals inherent in the First Amendment and provides opportunities for citizens to engage in the deliberative democratic process.

However, these works make only “limited references, in scope as well as substance,” to the First Amendment implications in the debate, and in each case the author’s discussion of First Amendment rights is only a small part of a larger work (Yemini, 2007, p. 5). Yemini’s work (2007) has focused exclusively on the First Amendment issues in the network neutrality debate. To analyze if network neutrality principles are supported by Supreme Court jurisprudence, Yemini drew an analogy between neutrality laws and the must-carry provisions in the *Turner* cases (*Turner Broadcasting System, Inc. v. FCC I*, 1994 and *Turner Broadcasting System Inc. v. FCC II*, 1997). “Must-carry” provisions originated in the Cable Television Consumer Protection Act of 1992 and required cable companies to “devote a specific portion of their channels to the transmission of local commercial and public

broadcast stations (Yemini, 2007, p. 21). Both types of regulation involve a “substantial governmental interest” for the regulation, a bottleneck problem, and “a complex set of conflicting First Amendment rights and interests” (p. 22). The Court argued that *Turner*’s must-carry provisions were content neutral, indicating “the extent of interference of the provisions with the cable operators’ editorial discretion did not depend upon the content of the cable operators’ programming” (p. 26). Congress’ interest in regulating cable did not rest on the objective of privileging or punishing certain types of content. Therefore, the provisions were only subject to intermediate scrutiny, the middle level of scrutiny that the Court uses to analyze the constitutionality of laws that might interfere with the First Amendment but that do not target a particular type of content (p. 26). Yemini concluded that network neutrality regulation would likely not survive intermediate scrutiny under *Turner*’s requirement that the government present substantial evidence that “the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way” (*Turner I*, 1994, p. 664).

This overview of the literature on network neutrality identifies a hole in the current body of work. While some scholars have addressed the First Amendment problems in the network neutrality debate, few have analyzed how the Court’s jurisprudence could be used to support or oppose regulation. This thesis casts a wider net over Supreme Court decisions, with the aim of examining how the Supreme Court treats different First Amendment rights in relation to the type of mass media involved. With that in mind, this study asks the following questions:

RQ1: What First Amendment rights has the Supreme Court acknowledged in First Amendment-related Internet cases?

An analysis of the Court's acknowledgement or recognition of First Amendment rights on the Internet will help identify what groups on the Internet could legitimately claim which First Amendment rights before the Court.

RQ2: What First Amendment rights has the Supreme Court acknowledged in First Amendment-related mass media cases?

The rights acknowledged by the Court and the groups that can claim those rights in the mass media will be analogized to the Internet to identify which groups could potentially claim various First Amendment rights in the network neutrality debate.

RQ3: How can the rights acknowledged above and the rationale for acknowledging them be used to construct a legal argument in favor of network neutrality?

The potential First Amendment claims from the second research question will be combined with the claims from the first research question to analyze the balance of First Amendment rights in the network neutrality debate. An argument supporting network neutrality based on precedent will then be made.

CHAPTER 3: METHODOLOGY

The previous chapter outlined the various theoretical interpretations of the First Amendment and how they can be applied to the network neutrality debate. This chapter presents the methodology of this thesis. As the data is almost exclusively gathered from legal cases, legal research and analysis are employed. The first section of this chapter summarizes the basics of legal research and identifies how cases are located. The second section describes the process for legal case analysis and analogical reasoning. In the third section, the variables are defined conceptually and operationally.

Legal Research

Legal research often makes use of two different types of documents: primary and secondary sources. Primary sources “consist of *the law itself* [sic], as expressed in constitutions, statutes, court decisions, and administrative regulations and decisions” (Wren & Wren, 1986, p. 41). Supreme Court decisions comprise the bulk of primary sources in this analysis. Secondary sources, as Wren and Wren described, “are everything else” (p. 41). This study uses the law articles referenced in the previous section as initial starting points for gathering relevant cases; consultation with legal encyclopedias helps identify additional material. Relevant cases will be retrieved from the online legal database LexisNexis.

In addition to secondary literature, cases can also be located using the computerized search feature *Shepardize* on LexisNexis. Entering a case citation number into the *Shepardize* retrieves “a full treatment and history analysis as well as a complete listing of authorities that have cited your case” (LexisNexis, 2004, p. 25). The *Shepardize* feature is therefore a great resource for locating similar cases, a key service when analyzing a

particular issue based on preceding court decisions. The number and strength of the cases returned during a *Shepardize* search also speaks to the binding legal authority of the case, indicating how often and in what way the Court has relied on the particular case in subsequent decisions. This study does not take a complete census of all related cases but attempts to synthesize the most *relevant* cases to the issues surrounding network neutrality.

Legal Analysis

Although the specific holding a court makes is not usually difficult to determine, identifying the rule behind that decision and applying that reasoning to a separate fact set are more complicated. Romantz and Vinson (1998) explained that case-law analysis is a way for lawyers to build support for a particular case. This involves comparing the legal reasoning behind a court's decision and the critical facts of the case to the lawyer's current case. Critical facts are the facts "that the court used to reach a final determination of the matter" and are key when analogizing or distinguishing between a current case and precedent (p. 36). Case-law analysis is persuasive because it focuses not on a court's holding alone but also on these critical facts, which gives the court the opportunity to make nuanced decisions.

Legal reasoning most often relies on analogical reasoning, or reasoning by analogy. Sunstein (1993) described the process of analogical reasoning:

- (1) Some fact pattern A has a certain characteristic X, or characteristics X, Y, and Z;
- (2) fact pattern B differs from A in some respects but shares characteristics X, or characteristics X, Y, and Z;
- (3) the law treats A in a certain way;
- (4) because B shares certain characteristics with A, the law should treat B the same way. (p. 745)

Since reasoning by analogy "does not guarantee truth," good lawyers must be principled about how they analogize (p. 743). Sunstein argued that analogical reasoning requires four separate but overlapping features. First, judgments about similar cases, or cases with similar

issues, must be consistent with each other—this way, “some principle, harmonizing seemingly disparate outcomes, will be invoked to explain the cases” (p. 746). This is similar to the reliance on precedent, or *stare decisis*. *Stare decisis* is the legal principle that if an issue has already been decided on, the court is bound to follow that decision in subsequent cases. Following precedent ensures that

the law will not merely change erratically, but will develop in a principled and intelligible fashion. [The *stare decisis*] doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. (*Vasquez, Wardin v. Hillery*, 1986, p. 265)

The Supreme Court is thus very careful to consider precedent when evaluating arguments.

The second aspect of analogical reasoning is that it requires a “focus on [the] particulars” of a case, so that “ideas are developed from the details, rather than imposed on them from up above” (Sunstein, 1993, p. 746). This is not to say that analogical reasoning avoids all abstraction, however, for the process of making analogies requires some level of abstraction. As Sunstein made clear, “[t]he key point is that analogical reasoning involves a process in which principles are developed with constant reference to particular cases” (p. 746).

The third feature of analogical reasoning is that it functions without an overriding, large-scale theory. Sunstein explained that

[l]awyers might firmly believe, for example, that the Constitution does not create a right to welfare or that the state cannot regulate political speech without a showing of immediate and certain harm. But it is characteristic of reasoning by analogy, as I understand it here, that lawyers are not able to explain the basis for these beliefs in much depth or detail, or with full specification of the theory that accounts for those beliefs. (p. 747)

Finally, the fourth component of analogical reasoning is that “it produces principles that operate at a low or intermediate level of abstraction” (Sunstein, 1993, p. 747). The legal rule in Sunstein’s example of a state banning a Nazi march could be that the state cannot ban speech without proof that the speech would cause a clear and immediate danger (p. 747). This has a moderate degree of abstraction from the details of the case, but it does not “entail any high-level theory about the purposes of free speech guarantee or about the relation between the citizen and the state” (p. 747). It is clear from these four components that analogical reasoning “is not science, and it cannot be anchored in anything other than what human beings actually believe” (p. 780). That does not mean that it is a weak method of reasoning, for in fact it is capable of challenging “ordinary understandings of the rule of law” and resisting the codification of a legal system intended to be flexible and adaptable throughout time (p. 781).

Analogical reasoning can be divided into two distinct categories: narrow analogies and broad analogies. Romantz and Vinson (1998) describe narrow analogies as inferring that a specific fact or facts in the current case are directly similar to a fact or facts found in the precedent. Broad analogies, on the other hand, are made between cases that share certain characteristics: “a characteristic of a fact found in the case-at-bar is similar to a characteristic of a fact found in the precedent” (p. 34). This study will make use of broad analogy to identify potential “common denominators” in First Amendment jurisprudence that would provide support for network neutrality regulation (p. 40).

Variable Definitions

The essential components of the network neutrality debate for the purposes of this study include the following: (1) it is Internet-specific, and the Internet as a mass media is more democratic and more participatory than other media; (2) a private media or press entity is involved and claims their First Amendment rights are infringed; and (3) there are multiple, often conflicting, First Amendment rights held by multiple types of Internet users involved. Since many of the types of Internet users can claim multiple rights and some categories like ‘applications provider’ are unlikely to be found within the relevant Supreme Court cases, the three First Amendment variables are central to limiting the scope of the search. Thus, legal cases involving the three rights are described below. The involvement of a private corporation arguing for its own First Amendment protection is the second critical component of the network neutrality debate and is included in all three operational definitions. The fact that network neutrality is Internet-specific, however, poses some problems for a complete and thorough case analysis. Relative to the body of case law on the First Amendment, the Internet as a new technology has received relatively little attention as of yet. Therefore, this study includes all of the major mass media, including print, radio, and broadcast and cable television. The Supreme Court often uses medium-specific reasoning in granting speech rights and important distinctions between media will become evident if all media cases are examined. This helps provide an accurate picture of how the courts view the Internet in relation to other mass media.

Cases involving the right speak

The right to free speech is identified as an individual's right to say whatever he or she thinks, with a few exceptions that are not protected by the First Amendment. For the purposes of this study, a free speech case is defined as any Supreme Court case involving the mass media in which either party invokes their speech rights against governmental infringement.

Cases involving the right to receive

The right to receive information can be described as an individual's right to receive any legal information that he or she wishes. As with the free speech variable, a case involving the right to receive information is defined as a Supreme Court case involving the mass media that discusses the public's right to receive, access, or retrieve information or expression.

Cases involving the right of access

The right of access to the mass media, which is a more specific aspect of the right to speak, is described as the idea that individuals need access to the mass media so that they can speak to a mass audience. Cases related to this right are defined as Supreme Court cases that involve a party's right to access the mass media to disseminate a message.

Although this thesis will focus on First Amendment issues in mass media cases, it will by no means rely exclusively on cases that match the definitions above. Non-media cases that explicate a legal concept helpful to the understanding or success of a pro-network neutrality argument will be added to the analysis when needed.

Along with the First Amendment issues presented in the variable definitions, this study also makes comparisons among cases on additional themes or issues related to network neutrality. An especially interesting theme is how the Supreme Court allocates more or less First Amendment protection in relation to the medium involved. For example, in *Red Lion v. FCC* (1969), the Supreme Court was willing to intrude on a broadcaster's editorial discretion because the radio and television broadcasting spectrums constitute scarce resources to which only a few individuals have access. The rationale behind these determinations will help construct a supportive argument for network neutrality regulations.

While it is the goal of this study to present an argument in *support* of network neutrality, it is necessary to analyze cases that do not support the rights identified above. This not only provides more data, but also allows the researcher to highlight potential distinguishing facts between media. At an even more basic level, it is important to discover whether First Amendment jurisprudence supports network neutrality provisions at all. It is not this study's goal to analyze every applicable case that the Supreme Court has heard. Rather, this thesis aims to provide a complete yet focused review of what rationale the Supreme Court uses in its decisions on First Amendment cases involving the mass media and how this rationale might be applied to the network neutrality debate.

CHAPTER 4: LEGAL ANALYSIS

At the end of Chapter 2, a series of three research questions were posed: What First Amendment rights has the Supreme Court acknowledged in First Amendment-related Internet cases? What First Amendment rights has the Supreme Court acknowledged in First Amendment-related mass media cases? And how can the rights acknowledged above and the rationale for acknowledging them be used to construct a legal argument in favor of network neutrality? Chapter 4 answers these questions. To do so, this chapter will analyze the legal cases that fit the standards set in Chapter 3 to identify which claims in Table 1 have been recognized by the Supreme Court. In the first section, the First Amendment rights acknowledged in cases involving the Internet are described and analyzed. In the second section, the rights acknowledged in other mass media cases are similarly evaluated. In the final section, the rights identified in the first two sections are used to formulate an argument supporting network neutrality.

First Amendment Rights and the Internet

The limitations of analyzing First Amendment issues in Internet cases become apparent when looking at the dearth of cases directly involving the Internet, much less cases that also include First Amendment concerns. A search for relevant cases resulted in only four applicable Supreme Court cases involving both the Internet and significant First Amendment concerns: *Reno v. ACLU* (1997), *Ashcroft v. ACLU I* (2002, hereafter *Ashcroft I*), *Ashcroft v. ACLU II* (2004, hereafter *Ashcroft II*), and *United States v. American Library Association (ALA)* (2003). Another factual limitation of this small collection is that all four

cases deal exclusively with governmental attempts to protect minors from accessing indecent Internet content.

In *Reno* (1997), the ACLU and other groups challenged the constitutionality of the Communications Decency Act of 1996 (CDA), arguing that its attempt to criminalize transmission of indecent material to minors abridged freedom of speech on the Internet. The Supreme Court identified two relevant populations of individuals whose First Amendment rights would be repressed by the CDA, referring to web users as “readers” and content providers as “publishers:”

The Web is thus comparable, from the readers’ viewpoint, to...a vast library including millions of readily available and indexed publications...From the publishers’ point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can ‘publish’ information. (p. 853)

First, the Court identified the CDA as a “content-based blanket restriction on speech” that required “stringent review” (p. 868). The majority recognized that the vagueness of the CDA’s provisions presented “a greater threat of censoring speech that, in fact, falls outside the statute’s scope,” meaning that the wording of the law could allow for censorship of decent speech (p. 874). Coupled with the severity of the criminal sanctions, which would chill similarly decent speech by making the content providers fear prosecution, the Court determined that the CDA would violate content providers’ right to engage in decent speech. Finally, the Court reiterated that indecent speech was protected by the First Amendment. Referring to *Sable Communications of Cal., Inc. v. FCC* (1989) and *Carey v. Population Services Int’l.* (1977), the Court affirmed that the First Amendment protected adults’ right to

engage in sexually indecent expression, thus protecting the speech rights of the content producers whether or not the speech was decent or indecent (*Reno*, 1997, p. 874).

The Court also recognized in *Reno* that the CDA would restrict the right of adults to receive legally protected speech. The broadness and vagueness of the statute in question made it clear to the majority that “the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another” (p. 874). By recognizing the right to receive protected speech, the *Reno* court acknowledged the First Amendment rights of not only Internet speakers but also Internet users.

In *Ashcroft I* (2002) and *Ashcroft II* (2004), the welfare of children was once again the government’s primary concern as the Court judged the constitutionality of the Child Online Protection Act of 1998 (COPA), Congress’ answer to the defeat of the CDA in *Reno*. The Supreme Court mostly relied on its *Reno* opinion to determine whether the narrower COPA stood up to strict First Amendment scrutiny. Perhaps as a result of the extremely limited nature of the holding, the Court in *Ashcroft I* (2002) only made moderate reference to content producers’ speech rights and limited reference to adult users’ right to receive speech. The Court held only that COPA’s use of community standards to determine what speech is harmful to minors did not “*by itself* [sic] render the statute substantially overbroad for purposes of the First Amendment” (p. 585). Citing *Sable* (1989) and *Hamling v. United States* (1974), the Court found that since COPA’s coverage is narrowed to work without serious value that appeals to the prurient interest, using so-called community standards to determine if material is indecent for minors does not violate the First Amendment (*Ashcroft I*, 2002, p. 580). Thus, the Court in *Ashcroft I* recognized that content providers have speech rights, even though the ruling in the case was against their interests. The only explicit

recognition of Internet users' right to receive came in Justice Stevens' dissent, who argued that "COPA restricts access by adults as well as children to materials that are harmful to minors" (p. 603).

The Court's holding in *Ashcroft II* (2004) was similarly limited, finding only that "[t]he District Court did not abuse its discretion when it entered the preliminary injunction" to enjoin enforcement of COPA (p. 672). The Court agreed that "[a] statute that 'effectively suppresses a large amount of speech that adults have a constitutional right to receive and address to one another...is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve'" (*Ashcroft II*, 2004, p. 665; quoting *Reno*, 1997, p. 874). Forcing the government to employ the least restrictive alternative ensures that "speech is restricted no further than necessary...for it is important to ensure that legitimate speech is not chilled or punished" (*Ashcroft II*, 2004, p. 666). The Court found that filtering software is a less restrictive alternative to COPA in part because filters would restrict children's access to harmful material while protecting adults' access to "speech they have a right to see without having to identify themselves or provide their credit card information" (p. 667). Thus the Court in *Ashcroft II* ruled in favor of content providers' right to engage in speech that might not be appropriate for children and adult Internet users' right to receive that speech.

In *United States v. ALA* (2003), a plurality of the Court found that a law conditioning a public library's receipt of funding on the installation of filtering software to prevent children from accessing harmful material on the Internet did not violate adult library patrons' First Amendment rights. Chief Justice Rehnquist, speaking for the plurality, seemed to

dismiss any First Amendment problems the Children’s Internet Protection Act of 2000 (CIPA) caused for content providers by arguing that

[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for authors of books to speak. (p. 206)

The Court further asserted that since the law allowed adult users to request that the filtering software be disabled, there was no infringement on adult Internet users’ right to receive. Justice Stevens and Justice Souter, joined by Justice Ginsberg, issued vigorous dissents that recognized both the speech rights of content producers and adult Internet users’ right to receive. Souter claimed that CIPA would abridge “the interest of the authors of those works in reaching the widest possible audience” and create “a significant prior restraint on adult access to protected speech” (p. 225). Stevens similarly stated that the adult library patrons who comprise “the 10% of American Internet users whose access comes solely through library terminals” would suffer “real injury sufficient to support a suit” (p. 243). While the plurality found that the CIPA caused no infringement of the rights of content producers to speak or of library patrons to receive speech, the Court in *ALA* did acknowledge that these rights exist.

In summary, the Court has recognized the speech rights of content providers and the right to receive speech of users in this collection of cases on governmental censorship of the Internet. Due to the factually narrow aspect of these four cases, the Court has not had the opportunity to recognize the other potential rights listed in Table 1. However, some of these unacknowledged rights can be reasonably inferred from the rights the Court has acknowledged. For example, since ISPs, BSPs, and even application providers often have their own websites, they would be considered speakers with First Amendment protection for

the purposes of any restriction of that content. The precedent for Internet-related First Amendment issues is still slim, so an examination of the First Amendment rights in other mass media cases is necessary to gain an appreciation of what rights the Court might be willing to recognize in the network neutrality debate.

First Amendment Rights and the Mass Media

As opposed to the small number of First Amendment Internet cases, there is a multitude of diverse cases dealing with First Amendment rights in the mass media. The following cases are broken down into categories based on the type of media involved. The rights acknowledged in the following cases are analogized to the Internet to help formulate an argument in favor of network neutrality in the following and final section of this chapter.

Newspapers and print

The Supreme Court's First Amendment jurisprudence on newspapers suggests that the Court is primarily concerned with the speech and editorial rights of newspapers. In this part of the chapter, newspaper cases involving prior restraint of the press and a right-of-access provision highlight the Court's dedication to protecting newspapers from governmental interference and control. This section identifies the rights acknowledged in *Near v. Minnesota ex rel. Olson* (1931), *New York Times Co. v. United States* (1971), and *Miami Herald v. Tornillo* (1974).

As early as the 1930s, the Supreme Court affirmed the right of newspapers and magazines to publish material without governmental prior restraints on what they could or could not publish. In *Near* (1931), the Court invalidated a state statute that authorized the

enjoinment of newspapers or magazines that published defamatory, malicious, or scandalous material. The majority determined that the statute allowed

public authorities [to] bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter...and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship. (p. 713)

By rejecting the state's prior restraint on the press, the Court acknowledged the right of newspapers and magazines to speak and publish, even if the material is defamatory or malicious.

In *New York Times Co.* (1971), the Court in a per curiam opinion reiterated the general rule in *Near* that the government could not institute prior restraints on the press. In 1971, the *New York Times* and the *Washington Post* published sections of a top secret government study known as the Pentagon Papers, which had been leaked by a former Pentagon official to the two papers. The government issued restraining orders to prevent each paper from printing further material. Quoting *Bantam Books, Inc. v. Sullivan* (1963), the Supreme Court reaffirmed that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity” (*New York Times*, 1971, p. 714; quoting *Bantam*, 1963, p. 70). The Court found the government had not met its burden to justify the restraining orders against the two papers. In protecting the newspapers’ right to publish or speak, Justice Black firmly rejected the government’s argument, claiming that “[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or

prior restraints” (p. 717). Thus, in *New York Times*, the Court clearly acknowledged the right of newspapers to speak and ruled against the use of prior restraints on the press.

Finally, in *Miami Herald* (1974), the Court was faced with Florida’s right to reply statute that gave any political candidate the right to respond to a newspaper’s criticism. The newspaper, at the candidate’s demand, would have to print whatever response the candidate made, without charging the candidate for printing costs. Arguing for the political candidate Tornillo, Jerome Barron argued for upholding the statute, which essentially granted political candidates a right of access to newspapers. Barron claimed that the monopolistic state of local newspapers meant that “the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues” (p. 250). Since the government “has an obligation to ensure that a wide variety of views reach the public,” Barron argued that affirmative action by the government is needed to protect this interest.

The Supreme Court, however, rejected this argument and the claim for a First Amendment right of access to newspapers. The opinion explained that

beginning with *Associated Press*, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which “‘reason’ [sic] tells them should not be published’ is unconstitutional. A responsible press is undoubtedly a desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues cannot be legislated. (*Miami Herald*, 1974, p. 256; quoting *Associated Press*, 1945, p. 20 note 3)

Additionally, the Court found that the statute exacted a penalty from newspapers by forcing them to use space to print the reply that otherwise would have been used for other material. This would in turn act to chill the speech of newspapers, as “editors might well conclude that the safe course is to avoid controversy” (p. 257). The Supreme Court denied a right of access

to the press because such a governmentally mandated right abridged the editorial and speech rights of newspapers.

Looking at this selection of First Amendment newspaper cases, it is clear that while the Supreme Court easily recognizes the right of newspapers to speak, publish, and edit their own content, those rights are the limit of what the Court reads in the First Amendment. A citizen's right of access to publish in a newspaper was rejected by the Court in the *Miami Herald* case. There seems to be no mention of the rights of the readers to receive speech in the Court's newspaper precedent. The following section shows that the Court goes farther to recognize other First Amendment rights in broadcasting as compared to newspaper cases.

Broadcast radio and television

Broadcast radio and television, due to the scarcity of the electromagnetic spectrum across which they are transmitted, have been much more highly regulated by the government than newspapers. The Court has decided that spectrum scarcity activates a need for governmental intervention to make sure that broadcasters operate in the public interest. The Court therefore often has to balance the government's interest in regulating broadcasting with the broadcasters' First Amendment rights. The broadcasting cases examined in this section include *National Broadcasting Co. v. United States* (1943), *Red Lion Broadcasting Co. v. FCC* (1969), *Columbia Broadcasting System, Inc. v. Democratic National Committee* (1973), *Columbia Broadcasting System, Inc. v. FCC* (1981), and *Arkansas Educational Television Commission v. Forbes* (1998).

Although most of the Court's opinion in *NBC v. United States* (1943) was focused on what regulatory and statutory authority the FCC held over radio licensing, the Court also

examined the broadcasters' First Amendment claims. NBC argued that the FCC's Chain Broadcasting Regulations, which attempted to correct "eight network abuses" by denying broadcasting licenses to applicants who engaged in such abuses, abridged broadcasters' First Amendment right to speak (p. 198). Under that argument, the Court reasoned, "it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech" (p. 226). Because the broadcasting spectrum, as opposed to newspaper publishing, "inherently is not available to all...some who wish to use it must be denied" (p. 226). Accordingly, the Court found that the system authorizing the FCC to license stations in the public interest was an acceptable exercise of Congress' power to regulate commerce. "Denial of a station license on that ground," the Court determined, "is not a denial of free speech" (p. 227).

Prior to the Supreme Court's denial of a right of access to newspapers in *Miami Herald*, the Court heard a similar case arguing for a right of access to broadcasting facilities in *Red Lion v. FCC* (1969). Under the FCC's Fairness Doctrine, broadcasters who engaged in a personal attack were obliged to offer the attacked individual reply time over the broadcaster's facilities. An author was attacked in a 15-minute broadcast on Red Lion's WGCB radio station and was not afforded reply time, so he accordingly sued the broadcasting company. Following the reasoning in *NBC v. United States*, the Court reiterated that "broadcast frequencies constituted a scarce resource, ...[and] without government control, the medium would be of little use because of the cacophony of competing voices" (p. 376). Congress for that reason had granted the FCC expansive power to guarantee that broadcasters operate in the public interest. Though the Court acknowledged that the First Amendment does protect broadcasters' right to speak, it rejected the argument

that a right of access would infringe on that right: “There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others” (p. 389). The Court rationalized this right of access to broadcasting because it allows

the people as a whole [to] retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of broadcasters, which is paramount. (p. 390)

The Court placed the right of viewers to receive speech over the monopoly speech rights of broadcasters by affirming this statutory right of access to broadcasting facilities in limited circumstances.

In *CBS v. Democratic National Committee* (1973), the Court rejected a similar right-of-access argument for editorial commercials. CBS and other broadcasting companies at the time had a policy of refusing to sell time slots for editorial advertisements on public issues. The majority recognized that “the question before us is whether the various interests in free expression of the public, the broadcaster, and the individuals require broadcasters to sell commercial time to persons wishing to discuss controversial issues” (p. 122). The Court deferred to the policymaking discretion of Congress and the FCC and found that the negative effects of a right of access would outweigh any benefits. Prioritizing the right of broadcasters to act as editors, the opinion explained that “it would be anomalous 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” under a mandated right of access (p. 120). Despite this, the Court acknowledged that “[c]onceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable” (p. 131). The Court thus

primarily acknowledged the right of broadcasters to act as editors of transmitted speech. Though the Court claimed that “the interest of the public is our foremost concern,” the majority made only the barest reference to the right of the public to be informed (p. 122).

Another mandated right-of-access to broadcasting made its way before the Court in *CBS v. FCC* (1981). Part of the Federal Election Campaign Act of 1971 granted federal candidates access to purchase reasonable amounts of time on broadcasting stations. After denying a presidential candidate’s request to purchase one 30-minute block of time, three major television networks were charged with violating that provision. The Court began by recognizing that though the First Amendment grants journalistic and editorial freedom to broadcasters, “it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount” (*CBS*, 1981, p. 395; quoting *Red Lion*, 1969, p. 390). Section 312 (a)(7) “thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process” (*CBS*, 1981, p. 396). However, this right of access was limited, and it only applied to “legally qualified federal candidates...once a campaign has commenced” (p. 396). In *CBS v. FCC*, therefore, the Court recognized the right of broadcasters to act as editors and a limited statutory right of political candidates to have access to broadcasting systems.

The Court reaffirmed the editorial rights of broadcasters in *Forbes* (1998). The Arkansas Educational Television Commission (AETC), a state agency that oversaw a number of noncommercial television stations, excluded an independent political candidate from a televised debate. The candidate sued the AETC, arguing he was entitled to participate in the debate on First Amendment grounds. The Court disagreed, finding that the AETC’s

exclusion was a constitutionally permissible, viewpoint neutral exercise of editorial judgment. Acknowledging the editorial rights of broadcasters, the Court stated that

[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity... Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts. (p. 674)

The Court denied that the First Amendment mandated a right of access to public broadcasters' programming, claiming that "[i]n most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming" (p. 675). Thus, *Forbes* primarily affirmed the public broadcasters' First Amendment right to act as editors and denied a First Amendment right of third-party access to public broadcasters' facilities.

In conclusion, the Supreme Court's broadcasting precedent clearly shows that the Court has been willing to favor more First Amendment rights than just the right of broadcasters to speak and act as editors. The five cases above acknowledge the right of broadcasters (public or private) to speak and to act as editors, the right of the viewing or listening public to receive information, and a limited, statutory right of third party access to broadcasting facilities.

Cable

With the advent of cable television, the Court had to decide whether to treat cable more like the heavily regulated broadcast industry or more like the relatively unrestricted newspaper industry when evaluating First Amendment concerns. The Court ultimately chose to regard cable more like newspapers, because "cable television does not suffer from the inherent limitations that characterize the broadcast medium" (*Turner I*, 1994, p. 639). This

section analyzes *FCC v. Midwest Video Corporation* (1979), *Turner Broadcasting System v. FCC I* (1994), *Turner Broadcasting System v. FCC II* (1997), *Denver Area Telecommunications Consortium v. FCC* (1996), and *United States v. Playboy Entertainment Group* (2000).

In *Midwest Video* (1979), the Supreme Court made a narrow decision stating that the FCC's attempt to impose common carrier obligations on cable operators was outside that agency's statutory authority as delegated by Congress. This was because Congress had determined that cable was not a common carrier, yet the FCC was attempting to treat cable companies as common carriers. The FCC's 1976 rulemaking ordered large cable operators to set aside four channels, which would be allocated only to public, educational, local governmental, and leased-access users. "Under the rules," the majority determined, "[s]ystem operators are specifically enjoined from exercising any control over the content of access programming" (p. 693). The Court stated that "the regulations wrest a considerable degree of editorial control from the cable operator," acknowledging the editorial rights of cable operators (p. 700). As in many of the broadcasting cases, this particular statutory right of access was struck down, although the Court left open the possibility that "less intrusive" access rules might survive (p. 705, note 14).

In *Turner I* (1994) and *Turner II* (1997), the Turner Broadcasting System and other cable operators challenged the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. The challenged regulations required the operators to carry a certain number of local commercial and noncommercial channels. The Supreme Court in *Turner I* (1994) ruled only that these must-carry regulations required intermediate, not strict, scrutiny. The divided Court acknowledged that both the

cable operators who own the physical cable network and the cable programmers who produce and license material to the operators “engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment” (p. 636). The must-carry rules therefore regulated speech by “reduc[ing] the number of channels over which cable operators exercise unfettered control, and render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining” (p. 637). The Court made an important distinction here between the owners of the network and the producers of the content, granting both First Amendment speech rights. The Court denied “that must-carry will force cable operators to alter their own messages to respond to the broadcast programming they are required to carry” (p. 655). After remanding the case to the District Court with instructions to use intermediate scrutiny to evaluate the must-carry regulations, the case made its way back up to the Supreme Court in *Turner II*.

In *Turner II* (1997), a Court that was again heavily divided held that must-carry regulations satisfied intermediate scrutiny. Under the intermediate scrutiny test in *United States v. O’Brien* (1968), content-neutral regulations of speech are sustained if they

[further] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (p. 377)

Though the plurality recognized that cable operators do have speech and editorial rights, they found that must-carry regulations did not cause sufficient First Amendment harm to the cable operators or programmers because the broadcast stations being carried “were carried voluntarily before 1992 and...the vast majority of those channels would continue to be carried in the absence of any legal obligation to do so” (*Turner II*, 1997, p. 215). In his

concurring opinion, Justice Breyer acknowledged that the statute “extract[ed] a serious First Amendment price,” as

[i]t interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in absence, would have been their preferred set of programs. (p. 226)

Breyer also acknowledged the First Amendment interests on the other side, namely that “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment” (*Turner II*, 1997, p. 227; quoting *Turner I*, 1994, p. 663). The Court in both cases acknowledged the editorial and speech rights of cable operators and programmers, though it was determined that this particular statutory right of access did not violate the First Amendment.

In *Denver Area* (1996), a plurality of the Court struck down two provisions of the same Cable Television Consumer Protection and Competition Act that required cable operators to segregate and block patently offensive programming and prevent it from being broadcast over public access channels, but upheld one provision which permitted operators to prohibit such broadcasting over leased access channels. Justice Breyer, speaking for the plurality, first reiterated that “the editorial function itself is an aspect of speech” (p. 737). In invalidating the provision requiring cable operators to segregate all offensive programming on one channel and block it until the viewer requests otherwise, the Court argued that it had not in the past justified the government’s reducing the adult population to reading only what is fit for children in order to protect children from inappropriate material (p. 759). By preventing “programmers from broadcasting [this material] to viewers who select programs day by day” or who otherwise only occasionally watch such programs, the provision was

restricting both the speech rights of the cable programmers and the right of viewers to receive such programs (p. 754). Thus the plurality in *Denver Area* recognized the speech rights of cable programmers, the right of adult viewers to receive material inappropriate for children, and the right of cable operators to engage in editorial decisions with regards to indecent broadcasting.

Finally, in *Playboy* (2000), the Supreme Court struck down a section of the Telecommunications Act of 1996 that required cable operators to fully scramble or fully block channels dedicated to sexual programming or limit the hours of transmission to times when children would not be likely to be watching. The material transmitted over Playboy's channels "is not alleged to be obscene; adults have a constitutional right to view it; ...and Playboy has concomitant rights under the First Amendment to transmit it" (p. 811). Since nearly half of all adult programming was viewed outside of the selected limited transmission hours, the Court found that "[t]o prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners" (p. 812). The regulation failed to satisfy strict scrutiny because it would be less restrictive to have each individual home choose whether to block the channels. "Targeted blocking," the Court decided, "enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners" (p. 815).

The Supreme Court's First Amendment cable precedent shows that the Court is primarily concerned with the speech and editorial rights of the cable operators and programmers. The above cases that involved regulation of cable operators acknowledged those specific rights. The Court in *Playboy*, *Denver Area*, and the *Turner* cases also acknowledged the speech rights of cable programmers. The right of adult viewers to receive

material indecent for children was also affirmed in *Playboy* and *Denver Area*. Justice Breyer's concurring opinion in *Turner* also recognized the right of viewers to receive information. And while no constitutionally guaranteed right of access to the cable network has been affirmed, the Court in the cases above both struck down and confirmed various statutory rights of access.

The First Amendment-related mass media cases demonstrate that the Court has previously acknowledged some of the rights present in Table 1, although not all of them. For each medium the Court recognized the First Amendment rights of newspapers, broadcasting companies and stations, and cable operators and programmers, not only to speak but also to use their editorial discretion. The rights of the viewing public to receive information was acknowledged in both broadcasting and cable cases. Finally, the Court has shown that appropriate, limited, and statutorily created rights of access to the mass media can be consistent with the First Amendment. However, the Court has yet to acknowledge that there is a constitutionally mandated right for individuals or programmers to have access to newspapers, broadcast systems, or cable networks.

Comparing the rights acknowledged in the Internet and mass media cases to the rights listed in Table 1, it is clear that precedent would support most of the identified claims. First, all groups on the Internet can clearly claim traditional speech rights. Content providers on the Internet explicitly enjoy speech protection, as seen in the section above. To the extent that BSPs, ISPs, and application providers run their own website, they can be considered content producers with speech rights. Once individual users choose to speak on the Internet, they too gain First Amendment rights with regard to that speech.

It is also clear that Internet users could claim a right to receive speech over the Internet. Several of the Internet cases affirmed such a right, as did many of the cases in the broadcasting and cable sections above. Additionally, BSPs could at the very least attempt to claim some editorial rights under the First Amendment. Yemini (2007) criticized Herman (2007) and Wu and Lessig's (2003) argument that BSPs are simply conduits of speech and should not be considered editors as "flawed and inherently contradictory," especially, he argued, given the Court's decision in *Brand X* (Yemini, 2007, p. 23). Yemini explained:

Network Neutrality [sic] rules would put BSPs in a position of mere conduits for the speech of others; this is a similar position to the one in which BSPs would have been situated under Title II of the Communications Act had not *Brand X* been decided as it was. (p. 23)

"It would be difficult to explain why," he continued, "a BSP banning access to a website offering Nazi memorabilia would not be regarded as exercising editorial discretion or why such a ban would not be regarded as the conveyance of a message" (p. 24).

This study agrees with Yemini's general assertion that BSPs do have the *ability* to exercise editorial discretion and therefore theoretically could make a First Amendment claim that network neutrality regulations would infringe on their editorial rights. However, this study does not go so far as to state that BSPs are *in fact* editors. The holding in *Brand X*, which Yemini relied on, was limited to the fact that the FCC's determination to classify broadband Internet service as an information service rather than a telecommunications service—thus removing BSPs from mandatory Title II regulation under the Communications Act—was a lawful determination. The Court did not address, nor was asked to address, any First Amendment issue that would shed light on whether the Court would or did acknowledge the editorial rights of BSPs. Yemini glossed over the actual *Brand X* holding in

his haste to classify BSPs as editors and labeled arguments to the contrary as “wishful thinking” (p. 23). Yemeni is correct to say that a BSP banning user access to a controversial website could be considered an editorial act, but surely he would not agree that BSPs occupy the same position as a broadcast station owner, cable operator, or newspaper editor. Any BSP acting regularly as an editor of the material flowing through the network would be highly unusual. Additionally, newspapers and cable and broadcasting stations, for the most part, own or have legal rights to the content they are editing. BSPs do not own or have rights to the content on the network aside from any content on their own pages. It is quite possible that the Supreme Court would find this distinction relevant and reject a BSP’s First Amendment editorial claim. Despite the questionable solidity of Yemeni’s classification, this study continues on the assumption that whether or not the Court would agree that BSPs are editors, those companies could at the very least *attempt* to make such a claim.

The rights of access acknowledged by the Court in the above sections have been entirely statutory, meaning that Congress or the FCC created the rights through rules or regulations. It seems unlikely, therefore, that the Supreme Court would affirm a constitutionally mandated First Amendment right of access to the Internet. It is entirely possible, on the other hand, that the Court would validate a statutory right of access to the Internet, should one of those agencies create such a right. But analogizing a statutory right of access in cable or broadcasting to the concept of a right of access to the Internet is potentially difficult. This is because access to the Internet can have a different meaning for each category of Internet user. For Internet service providers, for example, the concept of access suggests access to the BSP’s physical network in order to provide access to the Internet to their subscribers. A similar concept would be in play for application providers. For content

providers such as websites, access to the Internet suggests that the speech on the website is disseminated to and received by the Internet users who request that information.

Analogously, for individual Internet users, a right of access would imply that they should have the ability to have their speech disseminated should they choose to speak. It could also be argued that individual users should have access to all of the legal material available on the Internet. Thus, a right of access for individual users overlaps with content providers' right of access and their own right to receive information.

But some of these access rights are unrelated to First Amendment issues and have no support from the precedent cited. It seems hardly likely that First Amendment ideals would protect an ISP's or application provider's access to the BSP's physical network, since those goals are exclusively identified as providing goods and services to subscribers rather than engaging in speech activities. Thus, it is doubtful that the Court would recognize a First Amendment-based access right for competing ISPs and application providers. Taking everything into consideration, the potential claims listed in Table 1 should be slightly revised. On the Internet, the following First Amendment claims would likely be recognized by the Court:

Table 2

	BSPs	ISPs	Content providers	Application providers	Individual users
Speak/edit	✓	✓	✓	✓	✓
Receive					✓
Access			✓		✓

The question marks initially placed in the cells for ISPs' and application providers' access rights in Table 1 have been removed in Table 2 due to the reasons stated in the paragraph above. The following and final section of this chapter applies these rights and the rationale

in the above cases to the network neutrality debate in order to create an argument in favor of neutrality provisions.

First Amendment Rights in the Network Neutrality Debate

The preponderance of First Amendment interests in the network neutrality debate listed in Table 2 undoubtedly falls in favor of network neutrality. By preventing broadband service providers from discriminating against websites or applications on either a content-based or content-neutral basis, network neutrality would preserve the widespread dissemination of information and a diversity of voices, some of which are normally excluded by the mass media from the marketplace of ideas. Network neutrality would protect speech opportunities for users, ISPs, BSPs, content providers, and application providers and users' access to all legal speech on the Internet. But by preventing BSPs from discriminating against various content, network neutrality laws would likely infringe on BSPs' editorial rights. Essentially, network neutrality regulation would leave BSPs' right to speak untouched, but would impede on their right to restrain others from speaking. Thus, the only First Amendment claim against network neutrality that BSPs could possibly make would be that such regulation infringes on their editorial rights.

In looking to the Supreme Court, there are essentially two ways in which the network neutrality debate could be resolved. The Court could rule directly on discriminatory behavior by the broadband service providers. For this type of case to even make it to the judicial system, however, it would first have to be shown that the media companies are state actors. An alternative to finding state action would be if the Court determined the Internet is a public forum, in which case the Court could rule directly on First Amendment violations. Assuming

that the Internet fails both of these tests, a judicial remedy could only occur if the government enacted legislation to preserve network neutrality and that legislation were challenged in court. This final section will examine how the Court might rule on each of these three options.

Broadband service providers as state actors

The First Amendment generally does not protect speakers from censorial action by private individuals or companies. However, there are certain circumstances in which the Court does extend such protection and rules that private actors have become state actors. State action was defined in *Evans v. Newton* (1966) as private action that becomes “so entwined with governmental policies or so impregnated with governmental character as to become subject to the constitutional limitations placed upon [governmental] action” (p. 299). One of the first cases to recognize state action was *Marsh v. Alabama* (1946). In *Marsh*, the Court found that a company town, in which the company privately owned the streets and sidewalks, violated the First Amendment when it prevented a woman from distributing religious literature in the town’s shopping district. The Court found that

whether a corporation or a municipality owns or possesses the town[,] the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free... [T]he town of Chickasaw does not function differently from any other town. The business block serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. (p. 507)

The Court argued that the town’s private nature did not allow that company to restrict the individual rights of the people: “The more an owner, for his [or her] advantage, opens up his [or her] property for use by the public in general, the more do his [or her] rights become circumscribed by the statutory and constitutional rights of those who use it” (p. 506).

The Court has been hesitant to extend this concept to situations not involving company-owned towns. In *Hudgens v. NLRB* (1976), the Court officially reversed their decision in *Amalgamated Food Employees Union v. Logan Valley Plaza* (1968), which found that private shopping centers could be considered state actors. The Court in *Logan Valley* determined that “[t]he shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*” (p. 318). But the Court’s *Hudgens* opinion declared that it has essentially overruled that holding in *Lloyd Corp. v. Tanner* (1972), in which the Court held that there was “no comparable assumption or exercise of municipal functions or power” in a private shopping center as compared to the private company town in *Marsh*. While the Court has not found state action in private shopping centers, it has extended state action to include financially symbiotic relationships between a state agency and a private company (*Burton v. Wilmington Parking Authority*, 1961). The Court has also rejected state action in situations where a private company is licensed to serve alcohol by the state (*Moose Lodge No. 107 v. Irvis*, 1972).

In *CBS v. Democratic National Committee* (1973), the Court decided that a broadcaster’s refusal to accept editorial advertisements did not constitute state action. The broadcasting licensing program, as overseen by the FCC, did not force or require CBS to make the choice to reject editorial advertisements; rather, the FCC “declined to command particular action because [the choice] fell within the area of journalistic discretion” (p. 117). The Court found that “it cannot be said that the Government is a ‘partner’ to the action of the broadcast licensee complained of here, nor is it engaged in a ‘symbiotic relationship’ with the licensee, profiting from the invidious discrimination of its proxy” (p. 119).

It would be difficult to claim broadband service providers should be considered state actors if the extensive regulatory and licensing program of broadcasting does not meet state action requirements. Broadband Internet access is currently less regulated than broadcasting, and *CBS v. DNC* and *Moose Lodge* show that even the existence of a governmental licensing program does not necessarily imply state action. Based on precedent, it would be difficult to make the argument that nonlicensed media could be state actors. While the BSPs have clearly opened their private property to the public use, *Hudgens* has shown that this argument is not enough in and of itself for the Court to find state action.

However, this is not to say that it would be impossible to argue that BSPs are state actors for the purposes of the First Amendment. The Court articulated in *CBS v. DNC* (1973) that state action in the media “cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority” (p. 115). The opinion then went through a historical analysis of the history of broadcasting and the choices Congress faced in deciding how and whether to regulate it. It is possible that the Court, after going through a similar analysis of broadband Internet, would find sufficient state action to rule directly on discriminatory behavior by the BSPs. For example, in *Turner I* (1994) the Court declared that

[c]able systems...rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers...The construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property. *As a result the cable medium may depend for its very existence upon express permission from local governing authorities.* (p.627, emphasis added)

Since cable television and cable Internet networks often use the same physical cables for transmission, or at least are constructed in an identical manner, cable Internet access could

also depend upon permission from local governing authorities for its very existence. And while it is unclear if this reliance by itself would satisfy state action requirements, the argument could be made with further evidence. That level of deep analysis is unfortunately beyond the scope of the current study, which therefore continues on the assumption that BSPs are not, for First Amendment purposes, state actors.

Internet as public forum

If the Court determined that the Internet was a public forum, then First Amendment rights could be protected directly by the judiciary. In *Cornelius v. NAACP* (1985), the Court described the three previously recognized categories of public fora: traditional public fora, designated public fora, and nonpublic fora. Traditional public fora, according to *Perry Education Association v. Perry Local Educator's Association* (1983), are public “places which [sic] by long tradition or by government fiat have been devoted to assembly and debate” (p. 954). Designated public fora, in contrast, are “public property which the State has opened for use by the public as a place for expressive activity” (p. 955). Finally, a nonpublic forum is “public property which is not by tradition or designation a forum for public communication” (p. 955).

Unfortunately, it seems out of the question to apply public forum status to the Internet under current public forum jurisprudence. Only government or public property can be considered public fora, no matter if it is traditional, designated, or nonpublic. The cable networks built by private broadband service providers are clearly not government property. Similarly, material on Internet could not be considered public property, as the government in no way owns the content created by private speakers. The Court’s public forum doctrine also

applies only to governmental infringement of speech rights on that governmental property. The network neutrality debate, in contrast, deals with private restriction of speech on private property. Finally, the Court has historically been reluctant to apply public forum rules to the mass media. In *Forbes* (1998), the Court “rejected the view that traditional public forum status extends beyond its historic confines” (p. 678). The Court reiterated this statement in *American Library Association* (2003) and refused to “import” public forum rules into the context of Internet access in public libraries (p. 207, note 3). This thesis proceeds on the assumption that the Internet could not be a public forum. Sperti (1997) supports the conclusion that “the network of networks is not a public forum in the traditional meaning” (section 4, ¶ 7). The only way for the Court to find the Internet as a whole a public forum, it seems, would be if the Court developed a new category for a public forum under private ownership.

It should be noted that there are some exceptions to the rule that the Supreme Court will not apply First Amendment mandates on private actors. For example, in *Associated Press* (1945) the Court, though relying mainly on antitrust law to affirm a governmental injunction against the Associated Press’s bylaws, argued that “[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests” (p. 20). Additionally, the Court in *Pruneyard Shopping Center v. Robins* (1980) found that the California state constitution protected speech in a privately owned shopping center. However, the Court has avoided using these exceptions to apply the First Amendment to private actions. *Pruneyard* is a narrow holding, limited by its reliance on the California state constitution’s broader speech rights. And the First Amendment rationale in *Associated Press* has not been used, by itself, to justify preventing a private actor

from restricting speech. Thus, the judicial system could only tackle the network neutrality debate if a challenge was brought against a congressional regulation.

Congressional regulation

If Congress chose to regulate the Internet by preventing BSPs from discriminating against various applications, content, and providers, such regulation would proscribe BSPs from access-tiering and blocking access to websites with legal content. Any network neutrality regulation would be content-neutral, as it would not regulate speech based on content. Thus, if network neutrality regulation came before the Court, it would have to satisfy intermediate scrutiny to survive.

Yemini (2007) posed a similar argument and claimed that neutrality regulation would be most similar to the must-carry provisions approved by the Court in the *Turner* cases. As stated above, the preponderance of First Amendment rights in this debate clearly falls in favor of neutrality. Network neutrality would foster the rights of all Internet participants—readers and speakers alike—to speak and to receive information and would maintain access to the network. The only possible First Amendment claim BSPs could make against network neutrality is that their right as editors would be infringed. Yemini analogized this conflict of First Amendment rights with the situation in the *Turner* cases, in which cable operators were required to reserve a few channels for local commercial and noncommercial broadcasting stations. *Turner I* established that the must-carry regulations were content-neutral and thus subject only to intermediate scrutiny, because the provisions “[did] not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of” strict scrutiny (1994, p. 661). The Court relied upon the test for

intermediate scrutiny in *United States v. O'Brien* (1968), under which regulations are constitutionally valid if they

[further] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (p. 377)

Additionally, the Court in *Turner I* required the government to provide “substantial evidence” that there is a concrete threat to the economic viability of broadcast television and that the must-carry regulations were needed to alleviate the problem (*Turner I*, 1994, p. 666).

Assuming that the Court would look to its opinion in *Turner I* to determine how to evaluate network neutrality regulation, such regulation would likely pass intermediate scrutiny. First, network neutrality regulations would easily satisfy the first two prongs of the *O'Brien* test as stated in *Turner I*. “[A]ssuring that the public has access to a multiplicity of information sources,” declared the Court, “is a governmental purpose of the highest order, for it promotes values central to the First Amendment” (1994, p. 663). In broadband Internet service, as with cable television, “the physical connection between the [computer] and the cable network gives the [broadband service provider] bottleneck, or gatekeeper, control” over all Internet content (p. 656). The Court agreed that

[t]he potential for abuse of this private power over a central avenue of communication cannot be overlooked... The First Amendment’s command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, though physical control of a critical pathway of communication, the free flow of information and ideas. (p. 657)

The threat of private physical control is no less serious in the network neutrality debate, and as Judge Dalzell in *ACLU v. Reno* (1996) argued, the Internet is the “most participatory form of mass speech yet developed” (p. 833). Congress could promote all but one of the First

Amendment claims listed in Table 2 by asserting its interest in protecting the medium's participatory, democratic, and pluralistic nature. Yemini legitimately criticized this "second-level reduction of First Amendment rights...into a component of [abstract] governmental interests" (2007, p. 42). But state action doctrine would seem to dictate that there is no First Amendment violation if a user's speech is abridged by a private party. This unfortunately suggests that the Court would be hesitant to consider constitutional rights that would be restricted by private action when evaluating governmental regulation of that action. Thus, this second-level reduction is the only way for the Court to take these rights into consideration, although in a less concrete manner. If promoting the widespread dissemination of ideas qualifies as a substantial governmental interest, there should be little doubt that protecting the participatory nature of the most democratic or pluralistic free flow of information from private restrictions would also qualify. Since this interest and the others listed above are clearly unrelated to the suppression of speech, network neutrality regulations would satisfy the first two prongs of the *Turner* test.

Network neutrality regulation would also satisfy the incidental restriction prong. In *Turner I*, the Court recognized that the must-carry regulations could interfere with speech by "reduc[ing] the number of channels over which cable operators exercise unfettered control" and by "render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining" (1994, p. 637). The Court in *Turner II*, examining the evidence on record, determined that these restrictions on cable operators' and cable programmers' speech were "modest" (1997, p. 214). The cable operators conceded that of the nearly 6,000 broadcast stations that were added under must-carry, "most...would be dropped in the absence" of any regulation (p. 215). The Court concluded that must-carry regulations were

narrowly tailored to the stated government objective, “[b]ecause the burden imposed by must-carry is congruent to the benefits it affords” (p. 215).

The burdens of network neutrality on the First Amendment rights of broadband service providers would also be congruent to the benefits of such regulation and therefore satisfy the third prong of the *Turner* test. Network neutrality laws would be limited to preventing broadband service providers from discriminating against websites or other communication either based on who paid the toll (using the access-tiering as toll road analogy) or on the content itself. Accomplishing this goal necessitates some incidental infringement of BSPs’ editorial discretion. It should be reiterated that BSPs’ use of their own editorial discretion is the exception, rather than the rule, of how they treat the information passing through the physical network. As Herman (2007) argued, there is an “utter lack of either a general expectation or industry-wide practice of editorial discretion on the part of [BSPs]” (p. 117). While Yemini (2007) seemed to dismiss this argument, surely the Court would find such a distinction from the expectations for press entities, such as newspapers or broadcasting stations, relevant. Even when BSPs block access to content they find offensive or dangerous, it seems inappropriate to analogize this editorial choice to the press media’s editorial discretion when choosing what information to collect, synthesize, edit, exclude, and disseminate.

Additionally, it is unlikely that a regulation preventing BSPs from splitting the Internet into a two-lane highway would in any way infringe on their editorial rights. As Yemini (2007) stated, it would be “difficult to explain why...a BSP banning access to a website offering Nazi memorabilia would not be regarded as exercising editorial discretion or why such a ban would not be regarded as the conveyance of a message” (p. 24). However,

how would the Court treat a BSP's choice to privilege those content producers who pay an extra fee and, consequently, disadvantage those who do not? Such a practice cannot be described in any way as an editorial choice to include or block information *based on what that information is*. With this in mind, the Court might not view access-tiering as an exercise of editorial discretion at all, and only the provision preventing content-discrimination would infringe on BSPs' editorial rights. Whatever the case may be, a law preventing access-tiering and content-based discrimination would not "burden substantially more speech than necessary to further the government's legitimate interests" (*Ward v. Rock Against Racism*, 1989, p. 799). If the government intends to preserve the Internet as the most democratic form of communication yet invented and achieve the widest possible dissemination of information from diverse and antagonistic sources, there could be no doubt that the incidental restriction on BSPs' right to discriminate against legal content or discriminate between content providers is congruent to that interest. Thus, network neutrality regulation would pass all three parts of the *Turner* test.

However, Yemini (2007) argued that network neutrality would fail *Turner's* substantial evidence requirement. The Court in *Turner I* required the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way" (1994, p. 664). In doing so, the government needed to show that it had "drawn reasonable inferences based on substantial evidence" in constructing the must-carry provisions (p. 666). Yemini (2007) doubted that network neutrality regulations would pass the substantial evidence test because a "clear and compelling body of empirical evidence that BSPs are unfairly blocking access to websites or online services" does not currently exist (p. 36). Without such a body of empirical evidence,

Yemini claimed it is not clear if network neutrality's restrictions on BSPs would be no greater than necessary to further the government's interests in the widespread dissemination of information from a variety of sources, the "promotion of fair competition," and the "[promotion] of technological innovation" (p. 34).

This thesis takes a more favorable view of the requirements for the Court's substantial evidence test. Yemini in part looked at a lower court's application of the *Turner* rules to delineate how difficult it is to pass the substantial evidence test (*Time Warner v. FCC*, 2001). The lower court found that though the government had drawn reasonable inferences from substantial evidence that collusion between companies in a concentrated cable market was harmful to diversity and competition, it had failed to "[show] a record that validates the [proposed] regulations" as they had been constructed (p. 1130). Indeed, the lower court determined that "the FCC has not presented the 'substantial evidence'...that such collusion has *in fact* occurred or *is likely* to occur" (p. 1130, emphasis added). Additionally, "Congress appear[s] to have made no judgment regarding collusion" and "[n]o reference to collusion appears in the Act's findings or policy, nor in the legislative history discussing the horizontal or vertical limits" (p. 1132). Thus, in *Time Warner* the government failed the substantial evidence test because it essentially had presented *no* evidence that its proposed regulation, as drawn up, was necessary to further the asserted governmental interest.

On the other hand, the evidentiary burden in the *Turner* cases was incredibly high due to the government's interest in protecting the economic viability of the local broadcasting industry (see *Turner II*, 1997, p. 190-191). Part of the government's burden was to prove that a *majority* of the local broadcasting industry might fail altogether without must-carry regulations. Such governmental interest would obviously require the significant statistics

seen in *Turner II*, and the Court found that the government had more than met the substantial evidence burden in this case. But a comparison of these two cases does not shed much light on the bare minimum that substantial evidence requires. Therefore, it is not completely unbelievable, as Yemini asserted, that so-called “anecdotal” evidence would not be regarded as sufficient to support the proposed regulations (2007, p. 36). The record before the Court in *Turner II* at the very least included “anecdotal evidence showing the cable industry was acting with restraint in dropping broadcast stations in an effort to discourage reregulation” (1997, p. 203). And while Yemini (2007) was convinced that anecdotes of discrimination—such as those mentioned in Chapter 1—might not be enough evidence of harm to fair competition, perhaps anecdotes would suffice as ample evidence to show that content discrimination is a significant harm to the speech rights of content providers and Internet users and the rights of Internet users to receive speech. Thus, it is not evident from these cases that a clear body of empirical evidence is the standard to be met for the substantial evidence test, nor that the government is required to provide three years’ worth of market statistics to satisfy the Court in every case. It is only obvious that the government must provide something more than no evidence. The Court in *Turner I* also suggested that empirical evidence was not an absolute requirement. Quoting a lower court, the opinion in *Turner I* reiterated that “[w]hen trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support *or at least sound reasoning* on behalf of its measures” (*Turner I*, 1994, p. 666; quoting *Century Communications Corp. v. FCC*, 1987, p. 304, emphasis added). If the government can provide some evidence or reasoning that the regulation proposed would actually satisfy the problem without burdening

more speech than necessary, such a regulation likely satisfy intermediate scrutiny as set out in the *Turner* cases.

This analysis shows that mandated network neutrality would indeed stand a chance of passing the *Turner* test for content-neutral regulations. The Court would clearly recognize the substantial governmental interests involved, including “assuring that the public has access to a multiplicity of information sources” (*Turner I*, 1994, p. 663), preventing “private interests [from] restrict[ing], through physical control of a critical pathway of communication, the free flow of information and ideas” (p. 657), and generally protecting the democratic and pluralistic nature of the most participatory mass media yet invented. Since these interests do not include an interest in restricting speech, neutrality regulation would likely satisfy the first two requirements of the *Turner* test. Such regulation would also satisfy the third requirement because the incidental restriction of BSPs’ editorial rights would likely be “congruent to the benefits” gained under network neutrality (*Turner II*, 1997, p. 215). Yemini’s (2007) doubt that network neutrality would meet the substantial evidence burden was based almost entirely on a comparison between *Turner II* (1997) and a lower court’s application of the standard as described in *Turner II* (*Time Warner*, 2001). However, Yemini’s (2007) discussion of these two cases and other lower court cases merely outlines on one hand what is unacceptable (no evidence) and on the other what is acceptable (3 years’ worth of market statistics). This window hardly pinpoints the minimum standard to be met. Thus, it is not out of the question that network neutrality regulations would pass the substantial evidence test. A wisely and carefully formulated regulation could easily be narrowly tailored to not burden any more of the BSPs’ speech rights than necessary to protect the democratic, pluralistic, and participatory nature of the Internet as it stands today.

CHAPTER 5: CONCLUSION

This examination of First Amendment jurisprudence proves that the Supreme Court has acknowledged the speech rights of content providers and the right to receive speech of Internet users. Additionally, to the extent that ISPs, BSPs, and even application providers act as content providers by operating their own website, they would also be considered speakers with First Amendment protection.

The Court also has acknowledged the First Amendment rights of newspapers, broadcasting companies and stations, and cable operators and programmers to speak and use their editorial discretion. The viewers' right to receive information was also acknowledged. And while the Court has approved of some limited statutory rights of access to the mass media, it has yet to go so far to acknowledge a constitutionally mandated right of access. Analogizing those rights to the network neutrality debate, this study found the following First Amendment claims: the speech rights of individual users, content providers, BSPs, ISPs, and application providers; the individual users' right to receive expression; the (statutory) right of access to the Internet for individual users and content providers; and the editorial rights of broadband service providers.

Finally, this author found that the Court would likely decline to view BSPs as state actors and the Internet as a public forum. Agreeing with Yemini (2007), the third section suggested that the Court, faced with judging the constitutionality of a congressional regulation mandating network neutrality, would turn to its intermediate scrutiny test in the *Turner* cases. But this work disagreed with Yemini's analysis and found that network neutrality regulations would undoubtedly pass the first three prongs of the *Turner* test. It is

also probable that neutrality regulation would pass *Turner*'s substantial evidence requirement.

This legal analysis of how network neutrality regulations might stand up to the *Turner* test uses the worst case scenario for neutrality advocates, in which the Court acknowledges that BSPs have full editorial rights equal to the other mass media. But would the Court follow this path or would it make a distinction between BSPs' editorial capabilities and First Amendment editorial rights of the press? These questions would impact not only on whether network neutrality regulations would pass the *Turner* test, but whether such regulations would even need to pass intermediate scrutiny. If BSPs had no editorial rights, there would be no governmental infringement of First Amendment rights and therefore no First Amendment issue to begin with. Congress could decide, for example, to treat BSPs like common carriers, thereby making sure that they treat all subscribers' content equally. This is not the situation in the current legal landscape, however, because the Court in *Brand X* held that the FCC had the authority to interpret the Telecommunications Act of 1996 as suggesting that BSPs should not be considered common carriers (see Barrow & Blevins, 2007).

And perhaps that would be the easiest solution to the network neutrality problem: rather than passing a specific network neutrality regulation that would have to face the Court's intermediate scrutiny, Congress instead could amend the Telecommunications Act to clarify how it wants to categorize BSPs. While it is certainly within Congress' power to make this change, further study might shed light as to whether there would be any judicial hurdles it would face to justify such a change.

This study has pointed to many other future avenues of research that scholars could pursue in the interest of supporting network neutrality. For example, has the Court previously accepted anecdotal statements—such as those from the CEO’s mentioned in Chapter 1—as substantial evidence of a particular problem? A survey focusing on whether content providers would agree to pay an access-tiering fee or whether Internet users would consider switching providers should their BSP engage in discriminatory practices might provide policymakers with a deeper understanding of how users’ Internet experience could change without regulation. Another topic that does not appear to have been addressed is whether the Supreme Court’s commercial speech doctrine might be relevant to the network neutrality debate. Cases such as *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976), *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980), and *44 Liquormart, Inc. v. Rhode Island* (1996) seem to apply only to product and service advertising or “expression related solely to the economic interests of the speaker and its audience” (*Central Hudson*, 1980, p. 561). But perhaps these cases provide some insight into the government’s power to regulate the speech *platforms* across which speech travels, such as the Internet’s physical network, as distinct from the speech itself. Finally, there has been little to no discussion of whether search engines, website hosts, and blog hosts would or should be subject to network neutrality. Such entities arguably occupy a gatekeeping role similar to BSPs—although to a lesser extent—as they are also in a position to deny access to or shut down websites with controversial, offensive, or dangerous speech. In 2001, Yahoo! shut down 21 of the estimated 115 pro-anorexia websites it hosted on its server (Reaves, 2001). A company spokeswoman explained to *Time Magazine* that when “[c]ontent with the sole purpose of creating harm or inciting hate is brought to our attention, we evaluate it, and

in extreme cases, remove it, as that is a violation of our terms of service” (§ 16). Would a host company’s suppression of speech, as seen in this example, be as threatening to democratic and pluralistic principles as content discrimination by BSPs? Further analysis of how well search engines fit into this study’s First Amendment matrix could also point out distinguishing characteristics from content providers that necessitate a new category. Future research in these and other areas is critical to the advancement of the debate over network neutrality.

The hypothetical nature of network neutrality regulation and the fact that access-tiering has not been implemented by BSPs allude to the limitation of this study. It is difficult to predict how the Court would treat regulations that have not been passed by Congress. This becomes even more difficult when Congress has barely debated such regulations. While several bills have been introduced in Congress since 2006, none have yet been made into law. Additionally, it is of course possible that the Supreme Court would decide not to use the test in *Turner* or to alter it somehow to fit better with its understanding of the Internet medium. But with only four Internet cases in which content-based governmental regulations did not satisfy strict scrutiny, *Turner* represents a path the Court might legitimately take to analyze content-neutral regulations meant to foster speech on the Internet.

With more time, this study might have been able to construct a sounder argument that neutrality regulation would pass *Turner*’s substantial evidence burden, incorporating solid evidence and relying on concrete findings. Congress took more than three years to gather the initial evidence to support the must-carry regulations in the *Turner* cases. It is unfortunately outside the scope of this thesis to make more than a generalized argument that neutrality

regulations would also pass such a test. A stronger, more fact-based argument would most definitely be an important aid to advocates of neutrality regulation.

This thesis hopes to encourage other legal researchers to use this analysis as a starting point to inquire into these and other questions in the network neutrality debate. Ideally, it would also influence the direction and focus of future legislative debates, opening up the floor to First Amendment issues as well as the already heavily debated technological and economic issues. The goal was to raise questions and formulate hypotheses as to how Court might treat network neutrality so that policymakers can use some degree of foresight in constructing network neutrality laws. Such foresight would hopefully reduce the chance of neutrality provisions getting stuck in judicial limbo and the construction of an inadequate piece of legislation that neglects to take First Amendment interests into account. Bringing more attention to the First Amendment issues in the network neutrality debate helps argue that a lack of regulation might not only cause harm to technological and economic development, but could result in a serious (but legal) disintegration of the democratic, participatory, and pluralistic nature of the Internet as it stands today. This study hopes to have brought attention to this threat and encouraged researchers and policymakers to engage in a more holistic debate that takes all social, legal, technological, and economic aspects into consideration.

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