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Ill Telecommunications: How Internet Infrastructure Providers Lose First Amendment Protection

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ILL TELECOMMUNICATIONS: HOW INTERNET INFRASTRUCTURE PROVIDERS LOSE FIRST AMENDMENT PROTECTION

*Nicholas Bramble**

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INTRODUCTION	68
I. HISTORICAL CONTEXT FOR OPEN INTERNET RULES	70
II. TECHNOLOGICAL ARCHITECTURE OF THE INTERNET AS A BASIS FOR FIRST AMENDMENT EVALUATION	74
A. <i>Routing or Transporting Information from One Party to Another Does Not Implicate an Internet Connectivity Provider in the Speech or Expression of Those Parties</i>	76
1. A Brief Primer on the Network Infrastructure of Internet-Based Communications	77
2. Analogies to Other Media.....	79
B. <i>Because Internet Access Providers Are Not Speaking or Engaging in Organization of Speech When They Transport the Lawful Content and Applications of Others, Regulation of This Activity Cannot Represent Compelled Speech</i>	81
III. USER PERCEPTIONS AND CONSUMER EXPECTATIONS REGARDING THE CONDUCT OF INTERNET ACCESS PROVIDERS.....	86
IV. SEPARATING OUT THE SPEECH OF INTERNET ACCESS PROVIDERS FROM THE SPEECH OF CONTENT, APPLICATION, AND SERVICE PROVIDERS	91
A. <i>Internet Access Providers Have the Ability and Numerous Practical Opportunities to Disclaim Affiliation with the Speech of Third-Party Content and Application Providers</i>	92
B. <i>Internet Access Providers' Role as a Transportation Conduit Through Which Users Gain Access to the Larger World of Third-Party Content and Applications on the Open Internet Is Easily Distinguishable from Situations in Which Internet Providers are Originators of Content</i>	94

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1. Actions as Content and Application Providers Are Separately Regulable from Provision of a Basic Telecommunications Conduit to Subscribers.....	94
2. Existing Legal Distinctions Between Content Providers and Intermediaries.....	99
V. THE PAST AND FUTURE OF THE INTERNET	102
CONCLUSION	108

INTRODUCTION

The Federal Communications Commission (FCC) recently proposed an Internet nondiscrimination rule: “Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.”¹ Among other requests, the FCC sought comment on whether the proposed nondiscrimination rule would “promote free speech, civic participation, and democratic engagement,” and whether it would “impose any burdens on access providers’ speech that would be cognizable for purposes of the First Amendment.”²

The purpose of this Article is to suggest that a wide range of responses to these First Amendment questions, offered by telecommunications providers and civil society groups alike, have glossed over a fundamental question: whether the activities of broadband Internet providers are sufficiently imbued with speech or expressive conduct to warrant protection under the First Amendment in the first place. Interestingly, it is not only those who argue against governmental regulation who make this threshold mistake. Those who argue for the *importance* of imposing nondiscrimination and common carriage rules upon telecommunications providers also, in their eagerness to open up a conversation about the values of free speech in the age of the Internet, pay little attention to this preliminary question. Yet if this question is not resolved, any subsequent analysis of those who facilitate Internet-based telecommunications will necessarily rest on an incoherent and insufficiently considered definition of the “speech” that is at the heart of First Amendment concerns.

1. Preserving the Open Internet; Broadband Industry Practices, 24 FCC Rcd. 13064, 13104 para. 104 (2009) [hereinafter *Open Internet NPRM*] (notice of proposed rulemaking). The FCC later sought comments on a proposed “third way” framework in which it would classify broadband Internet service as a “telecommunications service” under Title II of the Communications Act of 1934, 47 U.S.C. §§ 201–276 (2006), but commit to regulatory forbearance from several key provisions. See Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010) [hereinafter *Broadband Framework NOI*] (notice of inquiry).

2. *Open Internet NPRM*, *supra* note 2, at 13107 para. 116.

This Article analyzes the FCC's proposed nondiscrimination rule with an eye towards whether the rule affects the speech or expressive conduct of broadband providers in a manner that is cognizable for First Amendment purposes. Discussion of the values, free speech theories, policies, investment incentives, and economic and governmental interests underlying the resolution of this claim—values emphasized by the vast majority of parties engaged in the network neutrality debate, at significant cost to the clarity of constitutional elements—are deferred pending the evaluation of this threshold question.

Part I contextualizes the currently proposed open Internet and non-discrimination rules within the history of a series of congressional and FCC distinctions between networks and the content and applications being carried on those networks.

To determine whether the activities of Internet connectivity providers are sufficiently imbued with speech to merit protection under the First Amendment, Part II explores the technological architecture of the Internet as a communications system. Given a layers-based description of this architecture and the transmission function fulfilled by lower layers of this architecture, it is clear that broadband providers cannot and do not, as a matter of course, exercise meaningful editorial discretion and control over the content and applications transmitted by third parties over their networks.

In the wake of two Supreme Court cases, *PruneYard Shopping Center v. Robins*³ and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,⁴ another crucial element of a “compelled speech” claim under the First Amendment focuses on the matter of user and observer understandings and expectations: would a reasonable observer understand the complaining party to be engaging in speech or expressive conduct? Part III accordingly takes up the question of whether Internet users perceive their broadband providers to be “speaking” with respect to the third-party content and applications that users create, share, and download on the Internet. Because users do not recognize their Internet access providers to be responsible for the speech of the third-party information services these providers happen to transport, the Supreme Court's user-expectations doctrine is a major obstacle to providers' free speech objections to the FCC's proposed nondiscrimination rule.

The compelled speech doctrine also requires an examination of whether the owner of a platform on which others are speaking has the opportunity to expressly disavow connection with the speech and ideas of these third-party content providers. Part IV enumerates the

3. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

4. *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47 (2006).

mechanisms used by Internet access providers for this purpose, and distinguishes contexts in which Internet providers engage in speech or content partnerships from the separate role of such providers as a transportation conduit through which users gain access to the larger world of third-party content and applications on the open Internet.

Perhaps these objections to the relevance of First Amendment scrutiny are premised on an antiquated doctrinal preservation of governmental regulation in the areas of pervasive media or scarce spectrum? Or perhaps the Internet is so essential to the promotion of free speech that all elements of its infrastructure should be walled off from regulation and governmental interference? Part V responds to the claim that broadband providers should be entitled to a heightened degree of First Amendment protection based on the fact that their transmission of content and applications takes place on the medium of the Internet, as opposed to some other communicative medium where a lower degree of scrutiny might be appropriate. While the concerns underlying such a principle may apply to Internet *content and applications* (as per *Reno v. ACLU*),⁵ these concerns are found to be orthogonal—and in some situations diametrically opposed—to the interest in ensuring the openness and predictability of Internet *access and connectivity*.

The FCC's proposed nondiscrimination rule is an attempt to ensure that when access providers route "lawful content, applications, and services" to users on behalf of *some* third-party information providers, they are also obligated to route lawful content, applications, and services to users from all other information providers.⁶ Based on this understanding of the FCC's nondiscrimination rule as a form of the equal access rule upheld in *Rumsfeld*, the Article concludes that the nondiscrimination rule does not affect the speech and association rights of access providers. Internet access providers do not accrue the speech rights associated with the third-party content, applications, and other communications that they transport to users through their networks.

I. HISTORICAL CONTEXT FOR OPEN INTERNET RULES

The Internet today plays an undeniably central role in mass communications, but this role depends upon a distinction between those

5. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (focusing on Internet content, applications, and services such as audio, video, images, chat rooms, web pages, listservs, and newsgroups—rather than lower-layer infrastructure and broadband access services—prior to articulating standard of strict First Amendment scrutiny of regulations targeting Internet content).

6. *Open Internet NPRM*, *supra* note 1, at 13068.

elements of the network that consist of content, applications, and services, and those underlying elements of the network that serve to transport bits of content, applications, and services from one node or user to another.

Historically, policymakers and regulators have implemented this distinction by treating transmission networks differently from the content and applications that flow through networks. For instance, prior to the Telecommunications Act of 1996,⁷ the FCC differentiated its treatment of networks from its treatment of content by employing a distinction between “basic” and “enhanced” services. In the *Second Computer Inquiry*, basic services were associated with the provision of “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.”⁸ By contrast, enhanced services were those that employed “computer processing applications . . . to act on the content, code, protocol, and other aspects of the subscriber’s information,” provided “additional, different, or restructured information,” or simply involved “subscriber interaction with stored information.”⁹

This distinction between networks and the content/applications/information being carried over networks, or between basic and enhanced services, persisted through the next iterations of the FCC’s inquiries. In 1986, the FCC found that “[d]ata processing, computer memory or storage, and switching techniques can be components of a basic service if they are used *solely to facilitate the movement of information.*”¹⁰ The distinction between basic and enhanced services was also retained by Congress in the Telecommunications Act of 1996.¹¹ The Act set forth a distinction between “telecommunications” and “information services.” Congress defined “telecommunications” as “the transmission . . . of

7. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

8. *Second Computer Inquiry*, 77 F.C.C.2d 384, 420 para. 96, *modified on recon.*, 84 F.C.C.2d 50, *modified on further recon.*, 84 F.C.C.2d 512 (1980), *aff’d sub nom. Computer & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *aff’d on second further recon.*, 56 Rad. Reg. 2d (P & F) 301, 1984 FCC Lexis 2809 (May 4, 1984).

9. *Id.* at 420–21 para. 97; *accord* 47 C.F.R. § 64.702(a) (2010).

10. *Third Computer Inquiry*, 104 F.C.C.2d 958, 967–68 para. 10 (1986) (emphasis added), *recon.*, 2 FCC Rcd. 3035 (1987), *further recon.*, 3 FCC Rcd. 1135 (1988), *second further recon.*, 4 FCC Rcd. 5927 (1989), *vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *see also* *Indep. Data Commc’ns Mfrs. Ass’n*, 10 FCC Rcd. 13717 (1995) (characterizing AT&T’s frame relay service as a basic rather than enhanced service because “[r]egardless of changes made to the frame header, the customer’s data contained within the frame are not modified in any way as they travel through the network and arrive intact”).

11. *See* Fed.-State Joint Bd. on Universal Serv., 22 FCC Rcd. 11811, 11814 para. 9 & n.27 (2007) (citing *Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905, 21958 para. 107 (1997)) (“The Commission has previously found that Congress preserved the Commission’s pre-1996 Act treatment of ‘adjunct-to-basic’ services as telecommunications services, rather than information services.”).

information of the user's choosing, without change in the form or content of the information as sent and received."¹² By contrast, an "information service" was defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"¹³

It is in the context of this long-running distinction that the FCC recently issued a set of proposed "net neutrality" or "open Internet" rules governing the providers of telecommunications facilities, but forbearing from regulation of providers of content, applications, and services.¹⁴

At first glance, the FCC's proposed rules do not sound particularly notable, given that they embody a series of principles that telecommunications providers avow they are already following and will continue to follow regardless of whether and how the principles are formalized.¹⁵ Invoking the language of consumer rights and expectations, the FCC seeks to codify the following six user-focused principles:

- access to lawful Internet content of one's choice;
- ability to run applications and services of one's choice;
- ability to connect one's choice of legal devices that do not harm the network;
- competition among network providers, application and service providers, and content providers;
- a ban on broadband providers' ability to discriminate based on the lawful content, applications, or services accessed by their users; and
- disclosure of network management practices by broadband providers.¹⁶

12. 47 U.S.C. § 153(43) (2006).

13. *Id.* § 153(20). Congress specifically stated that an information service "does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id.* (emphasis added). For a more detailed discussion of this "telecommunications management exception" to the definition of information services, see Reply Comments of Nicholas Bramble, *Broadband Framework NOI*, *supra* note 1, GN Docket No. 10-127, at 14-17 (Aug. 12, 2010), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020706676> (discussing and applying criteria of the adjunct-to-basic designation in the context of Internet connectivity).

14. See *Open Internet NPRM*, *supra* note 1, at 13065 para. 4.

15. See, e.g., Comments of Verizon and Verizon Wireless, *Open Internet NPRM*, *supra* note 1, GN Docket No. 09-191, at 1 (Jan. 14, 2010) [hereinafter Verizon NPRM Comments], available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020378523> ("Everyone agrees the Internet should be open, driven by informed consumer choice, and exist in an environment that allows innovation and investment to continue to flourish.").

16. See *Open Internet NPRM*, *supra* note 1, at 13101-08 paras. 92, 104, 119.

Of these principles, the most divisive has been the fifth: a ban on broadband providers' ability to discriminate based on the content, applications, and services that are being accessed by the providers' users.¹⁷ This nondiscrimination rule sits at the heart of the FCC's recent "open Internet" rulemaking,¹⁸ and has generated a fair amount of controversy among the Internet connectivity providers who might be subject to it. For instance, in response to the proposed nondiscrimination rule, AT&T argued that the FCC would effectively be infringing upon the speech rights of broadband providers in four separate ways. First, AT&T argues that the rule would wrongfully compel providers "to carry the messages of all content and application providers."¹⁹ Second, as AT&T would have it, the nondiscrimination rule bars broadband providers from exercising the "editorial discretion" guaranteed by cases such as *Turner* and *Time Warner*.²⁰ Third, AT&T contends that the rule would preclude providers "from entering into arrangements that would allow them to provide high-quality content" to users.²¹ Finally, AT&T argues that the rule would unconstitutionally increase the expense of broadband providers' speech "by necessitating capacity upgrades."²²

Other telecommunications carriers and advocates have raised a similarly broad set of First Amendment objections to the FCC's rules,²³ arguing that the proposal "would impermissibly burden speech" of both Internet providers and their partners.²⁴ In response to a later FCC notice relating to reclassification of broadband Internet service under Title II of the Communications Act,²⁵ Verizon conceptualizes the matter more succinctly:

Verizon's broadband platform is a medium through which it offers a form of speech—its own Internet and other content

17. The FCC proposes to formalize this fifth principle as follows: "Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner." *Id.* at 13104 para. 104.

18. *See id.* at 13104–08 paras. 103–17.

19. Comments of AT&T Inc., *Open Internet NPRM*, *supra* note 1, GN Docket No. 09-191, at 236 (Jan. 14, 2010) [hereinafter AT&T NPRM Comments] (emphasis omitted), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020377217>.

20. *Id.* at 236 & n.518 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129–30 (D.C. Cir. 2001)).

21. *Id.* at 236.

22. *Id.* at 236–37.

23. *See, e.g.*, Comments of Time Warner Cable, Inc., Ex. A, *Open Internet NPRM*, *supra* note 1, GN Docket No. 09-191 (Jan. 14, 2010) [hereinafter Tribe & Goldstein NPRM Comments], *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020375998>.

24. Comments of Verizon and Verizon Wireless, *Broadband Framework NOI*, *supra* note 1, GN Docket No. 10-127, at 9 (July 15, 2010) [hereinafter Verizon NOI Comments], *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020544554>.

25. *See Broadband Framework NOI*, *supra* note 1.

services—to its customers. That platform serves as the microphone through which broadband Internet access providers speak, and governmental restrictions that inhibit the reach or use of that microphone necessarily impinge on First Amendment interests.²⁶

Verizon argues that broadband Internet access providers occupy a position under the First Amendment that “is no different than a newspaper publisher’s.”²⁷ Verizon analogizes the function of broadband networks to the printing press on two grounds: first, “[b]oth are the means by which speech is facilitated and disseminated,” and second, “in both contexts the speaker makes numerous choices about the content and format of the speech that will be disseminated.”²⁸ All in all, Verizon suggests that “[t]he role of the Internet as a mode of mass communications” is closely on par with “the role of privately-owned newspapers in earlier days.”²⁹

However, notwithstanding these analogies to cable and newsgathering enterprises, telecommunications providers spend little time on the question of how precisely they are to be considered as “speakers” under the First Amendment. AT&T, for instance, simply avows that broadband providers are speakers because providers (1) “may include original content in their offerings;” (2) “may engage in the editorial organization of content;” and (3) “may provide tailored offerings aimed at certain subscriber groups.”³⁰

The following sections thus attempt to elucidate and apply criteria to determine the answer to the question largely elided by respondents in this debate: whether or not providers of Internet connectivity engage in sufficient speech or expressive conduct to trigger First Amendment scrutiny of a regulation governing their actions.

II. TECHNOLOGICAL ARCHITECTURE OF THE INTERNET AS A BASIS FOR FIRST AMENDMENT EVALUATION

The First Amendment argument most salient to the FCC’s proposed nondiscrimination rule is found within AT&T’s claim, listed above, that broadband providers engage in speech through their “editorial organiza-

26. Verizon NOI Comments, *supra* note 24, at 79. Verizon was the sole telecommunications provider to mount a First Amendment objection in its comment to this reclassification proceeding.

27. *Id.* at 80.

28. *Id.* at 79.

29. *Id.* at 79–80.

30. AT&T NPRM Comments, *supra* note 19, at 235–36.

tion” of the content requested by and delivered to subscribers.³¹ The separate argument that an Internet access provider receives speech protection in its provision of original content should be set to one side for purposes of this discussion. Internet access providers may well deserve to be treated as speakers for the content they originate; the key question here is how they should be treated with respect to the third-party content they merely convey.

This same “editorialization” theme is sounded in Laurence Tribe and Thomas Goldstein’s response to the FCC’s proposed nondiscrimination rules, in which they compare Internet access providers to newspapers and other content providers. Tribe and Goldstein argue that “[i]ndividuals and media outlets make countless decisions each day about what they will or will not say, and their decision not to communicate a particular message is entitled to the same First Amendment protection as their decision to communicate it.”³² Separately, Professor Tribe has argued that

[t]he Supreme Court has unanimously recognized that when you are a provider of communication, the right to decide what you will include in the package and what you will exclude—whether you will tell the consumer, “if you’re going to get this channel, you also have to get the Discovery Channel” or “if you’re going to get this, you also have to get C-SPAN, like it or not”—is at the heart of First Amendment freedom.³³

The basic point made by Tribe and others is that the practice of *making choices* as to what content passes through one’s pipes (or over one’s airwaves, or in one’s communications package) implies a right to be protected from governmental interference with how one makes these choices.

This set of arguments, while persuasive as to the free speech interests of journalists, and potentially relevant to the interests of cable television operators,³⁴ requires more detailed consideration before it can be applied to Internet access providers.

Autonomy for *speakers*, including autonomy for broadband providers when they are speaking as originators of Internet content, is a

31. *Id.* at 235.

32. Tribe & Goldstein NPRM Comments, *supra* note 23, at 2.

33. Laurence H. Tribe, Address at the Progress & Freedom Foundation’s 2007 Aspen Summit: Freedom of Speech and Press in the 21st Century: New Technology Meets Old Constitutionalism, 13–14 (Aug. 21, 2007), available at <http://www.pff.org/issues-pubs/pops/pop14.19tribetranscript.pdf>.

34. See *infra* Part II.B (discussing analogies and distinctions between cable television providers and Internet access providers).

fundamental First Amendment value, as the Supreme Court has affirmed in a number of cases.³⁵ But the conduct and the “decisions” that would be regulated under a nondiscrimination requirement—including the transmission of data packets containing information generated by third parties—differ in important ways from the conduct and decisions engaged in by organizers of a parade, a cable broadcasting system, and a newspaper. In brief, there are two chief differences between Internet access and these other forums for expression that have been proffered as analogues to the transport layer of the Internet.

First, in providing Internet access to subscribers, providers route bits of information from users to third parties, and from third parties back to users. The First Amendment no more shields their activities than it would shield the Postal Service, or a courier firm, that wished to selectively and secretly delay some of the letters it carried. Second, Tribe and Goldstein are incorrect to suggest that the FCC’s nondiscrimination rule “seek[s] to override the decisions of [Broadband Service Providers] about what content they will deliver to their subscribers.”³⁶ It is users, not Internet access providers, who make these decisions about what kinds of content to send and receive.

A. Routing or Transporting Information from One Party to Another Does Not Implicate an Internet Connectivity Provider in the Speech or Expression of Those Parties

The mere fact that Internet access providers carry the communications of others is, on its own, insufficient to bring a regulation of the actions of providers within the scope of First Amendment scrutiny. “[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken,

35. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (“The First Amendment securely protects the freedom to make—or decline to make—one’s own speech.”); see also *Rumsfeld v. Forum for Academic & Inst’l Rights, Inc.*, 547 U.S. 47, 61 (2006) (“Some of this Court’s leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say.”); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 576 (1995) (“[W]hen dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.”); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 20 (1986) (finding that a utility commission order “impermissibly burdens appellant’s First Amendment rights because it forces appellant to associate with the views of other speakers”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

36. Tribe & Goldstein NPRM Comments, *supra* note 23, at 3.

written, or printed.’”³⁷ Similarly, although the Supreme Court has worked from a broad understanding of the number and types of “messages” that count as speech,³⁸ the Court has consistently rejected the notion that “conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”³⁹ Conduct must be “inherently expressive” in order to merit First Amendment protection.⁴⁰ What is needed beyond the presence of language and the intention to express an idea, then, is the additional predicate of involvement with speech (or expressive selection of speech) by the party claiming a speech right.

In some other communications contexts, such as broadcast-based media, the owner and operator of a centralized infrastructure must decide which content and what programs to include in the channels it makes available to subscribers. In those settings, the selective activities of broadcasters may more closely resemble speech and expressive conduct.⁴¹ The expressive, propositional, or informational value associated with Internet connectivity, however, is located not within the technical protocol or the underlying infrastructure itself, but rather in the data that flows through that infrastructure. This different technological infrastructure yields a different First Amendment analysis.

1. A Brief Primer on the Network Infrastructure of Internet-Based Communications

The infrastructure underlying a communications technology like Internet connectivity serves primarily to route and transmit datagrams,

37. *Rumsfeld*, 547 U.S. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). For instance, “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words” do not receive First Amendment protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). Many additional categories of conduct are not inherently expressive and thus do not receive First Amendment protection, despite containing communicative elements. *See, e.g.*, *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 697–98 (1978) (finding government restrictions on agreements in restraint of trade outside of First Amendment scrutiny); *Giboney*, 336 U.S. at 498 (finding communications in furtherance of crimes not protected by First Amendment).

38. *See, e.g.*, *Hurley*, 515 U.S. at 569 (including the artistic works of Pollock, Schönberg, and Carroll within the limits of First Amendment protection despite their randomized, atonal, or nonsensical character).

39. *Rumsfeld*, 547 U.S. at 65–66 (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968)).

40. *Id.* at 65–66; *see also id.* at 64 (finding that a school’s decision to permit recruiters to enter campus was not inherently expressive). Conduct is not “inherently expressive” where it must be accompanied with additional speech in order to explain its meaning. *See id.* at 65–66.

41. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (finding the cable programmers are engaged in speech when they make editorial decisions about content or programming).

the basic transfer units between networks, generated by external parties.⁴² Under the Internet Protocol Suite, a given communication packet directed across the Internet from one endpoint to another will typically arrive at the routers of an Internet connectivity provider in the same form as it leaves those routers.⁴³ In the course of this transmission, the data or communications within the packet remains largely invisible to the Internet infrastructure provider, because it has been encapsulated within a series of headers that serve as addresses and frames enabling the data to enter and travel upon the physical network from the sending computer to the requesting computer.⁴⁴ These headers do facilitate a communicative purpose in the sense that they link one computer to another and ensure the stability and reliability of that link. Yet while this transmission link enables two external parties to accomplish a communicative goal, it contains no expression of its own. Indeed, by the time a communications packet reaches the requesting computer, the header and frame information that had been used to encapsulate the data in the course of its transit are removed, and the requesting computer is able to read this data in its pure form.⁴⁵ A physical, network-based, or TCP/IP-based link that *did* interject content of its own into the data being requested would interfere with the communications taking place between the external parties.⁴⁶

Internet access and transport involves routing whatever data the parties request from one place to another,⁴⁷ not upon the centrally managed

42. The Internet Protocol Suite consists of both a control component for directly exchanging data between hosts on a network (Transmission Control Protocol, or TCP) and a more systemic method for addressing and routing data across multiple networks (Internet Protocol, or IP). *See* Vinton G. Cerf & Robert E. Kahn, *A Protocol for Packet Network Intercommunication*, 22 IEEE TRANSACTIONS ON COMM. 605, 637 (1974) (developing the TCP/IP model for sharing data on a packet-switched network of networks); *see also* NETWORK WORKING GRP., REQUEST FOR COMMENTS 1812, REQUIREMENTS FOR IP VERSION 4 ROUTERS 28–31 (Fred Baker ed., June 1995) *available at* <http://tools.ietf.org/pdf/rfc1812> (describing functions to be performed by Internet routers).

43. *See* BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 55 (2010) (noting that the layering principle of network design, which mandates that a destination layer “receive exactly the same object sent by layer *n* at the source,” will be violated where a lower-layer protocol “permanently modif[ies] the object passed to it by a higher-layer protocol for delivery to its higher-layer protocol peer”).

44. *See How Encapsulation Works Within the TCP/IP Model*, LEARNING NETWORK (Jan. 27, 2008), <http://learn-networking.com/tcp-ip/how-encapsulation-works-within-the-tcpip-model>.

45. *See id.*

46. *See* BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 67 (2010) (“Lower layers of the system (the network) should provide only general services and functions of broad utility across applications in order to support as many higher-layer applications as possible.”) (addressing broad version of end-to-end network design principle).

47. *See* Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41 (2003) (describing the “advent of digital, packet-switched broadband networks that carry all forms of communication”).

delivery of carefully programmed channels. The administrators and access providers who *implement* Internet communications—but do not create or substantially alter the underlying bits of individual communications—do not express themselves through their activities. Rather, they facilitate the expression of others. An Internet access provider delivering Web content to a user has, at heart, nothing more to do than an act of translating a user's request into the bits that objectively correspond to that request, and then delivering those bits back to the user's browser. No creativity and no substantive editing takes place during this process.

In managing the network through which this content flows, an access provider may attempt to block spam, viruses, and other malicious software, and may act to resolve network congestion.⁴⁸ However, these network management practices all seek to ensure the rapid and objective satisfaction of a user's request, not to provide any content or speech above and beyond what the user has requested.⁴⁹ Thus, the role of the Internet access provider is conveyance rather than expression, and the process of offering Internet access and transmission does not satisfy the First Amendment predicate of speech or expressive selection of others' speech.

2. Analogies to Other Media

In a variety of cases beyond the world of the Internet where a medium, forum, or technology fulfills a fundamentally facilitative role, the administrator of that medium will generally not be found to be engaging in expressive conduct or speech.⁵⁰

For instance, the expressive content in a letter or package does not convert the transportation and delivery activities of FedEx, UPS, or DHL into speech or expressive conduct. Like these delivery services, Internet connectivity providers manage their networks to ensure fast and efficient communication from sender to recipient, and provide tools for reading

48. For instance, an Internet connectivity provider may seek to stop the spread of spam, fight against malware and virus-based attacks on network infrastructure, mitigate against the possibility of traffic congestion by efficiently routing and limiting access at certain times and places where appropriate, and build out network capacity. In addition, such a provider may also engage in more loosely defined forms of network management: assisting the activities of law enforcement, distributing optional filters for the protection of children from offensive content, etc.

49. Implicit in a user request for content, one might say, is a corollary request—and a settled expectation—that no spam or viruses be attached to the delivery of the requested content.

50. See, e.g., *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 64 (2006) (“[A] law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs.”).

the addresses of communications and routing those communications to their intended destination.

While transportation and mailing services may provide the simplest analogue to Internet access, a variety of additional media—such as airplane navigation charts and aeronautical charts—transmit expressive content to users and do *not* thereby trigger First Amendment scrutiny.⁵¹ Geographic, navigational, and instrument approach charts, for instance, are important not for performance of some original expressive function, but rather their ability to inform users—and the corresponding ability of users to rely upon these media for their needs.⁵² Courts have been explicit in articulating the importance of this reliance interest,⁵³ and have used that reliance interest, rather than any ostensible speech interest, as a basis for legal evaluation.⁵⁴

An aeronautical chart translates or transmits data provided by other content providers into a form that is accessible to the users and subscribers of the chart. In this manner, it is enabling navigation in roughly the same way that Internet access providers enable online communication. As with a hypothetical rule that might seek to preserve users' ability to rely upon navigational charts, the FCC's proposed nondiscrimination rules are an attempt to ensure that the communication facilities on which Internet users depend will continue to "translate [user-requested] information into an instantly understandable . . . representation."⁵⁵ The effective and efficient exchange of Internet communications from one speaker to another cannot take place if an intermediary interferes with the integrity, reliability, and certainty of this transmission process. Accordingly, the FCC's rule would ensure that those who create Internet applications and content can rely on the networks and transportation platforms on which their information is shared not to diverge from layer-

51. *See, e.g.*, *Brocklesby v. United States*, 767 F.2d 1288 (9th Cir. 1985); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983); *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339 (9th Cir. 1981).

52. *See Aetna*, 642 F.2d at 342 ("While the information conveyed in words and figures on the Las Vegas approach chart was completely correct, the purpose of the chart was to translate this information into an instantly understandable graphic representation. This was what gave the chart its usefulness; this is what the chart contributed to the mere data amassed and promulgated by the FAA.").

53. *See, e.g., id.* ("It was reliance on this graphic portrayal that Jeppesen invited.").

54. *See, e.g., id.*; *see also* Robert Post, *Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249, 1254 (1995) ("Navigation charts for airplanes, for instance, are clearly media in which speakers successfully communicate particularized messages. And yet when inaccurate charts cause accidents, courts do not conceptualize suits against the charts' authors as raising First Amendment questions.")

55. *See id.*

ing and modularity design principles based on circumstances and factors known only to the access provider or network manager.⁵⁶

*B. Because Internet Access Providers Are Not Speaking or
Engaging in Organization of Speech When They
Transport the Lawful Content and Applications of
Others, Regulation of This Activity Cannot
Represent Compelled Speech*

The inaptness of the analogy between Internet connectivity providers and speakers is further demonstrated by the far closer analogy between the conduct of Internet providers and the conduct of the law school plaintiffs in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*⁵⁷ Where a medium, forum, or technology performs a conveyance or facilitative role, a rule requiring the administrator of that medium to accommodate an external message does not amount to compelled speech where “the accommodation does not sufficiently interfere with any message of the [medium or forum].”⁵⁸ Broadband providers make it possible for third-party speakers and application makers to connect with end users, just as law schools make it possible for military recruiters (and other third-party speakers) to connect with law students. Neither broadband providers nor law schools accrue speech rights through these facilitative processes.

Resisting the above description of the non-expressive nature of routing and transporting Internet traffic, Verizon argues that the FCC’s proposed nondiscrimination rule triggers and fails First Amendment scrutiny because it “interferes with a speaker’s judgment on what speech

56. Numerous businesses supplying applications and content to users rely on predictable non-interference from the network infrastructure on which their information exchange platforms are built. If disclosure and nondiscrimination rules were not in place, the resulting situation would be analogous to one in which the owners of the power grid could ban users from plugging in a computer or a toaster, or grant more power to certain applications than to others on the same connection, or change voltages without notice to users. The disclosure and nondiscrimination rules proposed by the FCC are thus first and foremost about promoting users’ reliance upon an open, neutral, and reliable network. The rules are targeted not towards the message, speech, or expressive conduct of Internet access providers; instead, they are targeted towards the functional effects of access providers’ conduct within the ecosystem of the Internet. *See Open Internet NPRM, supra* note 1, 13088–90 paras. 62–64 (recognizing the “historically open architecture of the Internet” and the extent to which this architecture “has facilitated entrepreneurs’ entry into the market with new Internet services and promoted the [Communications] Act’s policies favoring ‘a diversity of media voices’ and ‘technological advancement’”).

57. *See generally* *Rumsfeld v. Forum for Academic & Inst’l Rights, Inc.*, 547 U.S. 47 (2006) (discussed *infra* Part III).

58. *Id.* at 64.

to feature or promote.”⁵⁹ Similarly, some Internet access providers have argued that a nondiscrimination rule may “preclud[e] market actors from enhancing particular messages to communicate more effectively with the public,” and that such a preclusion amounts to a First Amendment violation.⁶⁰ Laurence Tribe and Thomas Goldstein summarize these concerns in their argument that net neutrality proposals “generally would require a [Broadband Service Provider] to treat all the data on its own network equally, forbidding it to make the choices that will benefit its users in the aggregate and that will respond to customers’ desire to limit (or to accelerate delivery of) the Internet content they want to receive.”⁶¹

To make these and similar points, Verizon relies not on *Rumsfeld*, but on *Hurley*.⁶² In *Hurley*, the Supreme Court held under the First Amendment that organizers of a parade could not be compelled by the state to include a group of marchers whose message the parade organizers found objectionable.⁶³ The parade organizers were thus free to exclude a group of gay, lesbian, and bisexual marchers whose message was “that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals.”⁶⁴ The imprecision of the message carried by the parade was tempered by the recognition on the part of its organizers (along with audience members and would-be participants) that a clear message would be sent by the inclusion or exclusion of a group that had been “formed for the very purpose of marching in” the parade.⁶⁵ Both organizer and participant were well aware of the “message” the other side wished to communicate, the importance and salience of this mes-

59. Verizon NPRM Comments, *supra* note 15, at 116 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568–70 (1995)).

60. See, e.g., AT&T NPRM Comments, *supra* note 19, at 16–17, 235–44; Verizon NOI Comments, *supra* note 24, at 79 (arguing that restrictions on the reach or use of “the microphone through which broadband Internet access providers speak . . . necessarily impinge on First Amendment interests”).

61. Tribe & Goldstein NPRM Comments, *supra* note 23, at 3.

62. See Verizon NPRM Comments, *supra* note 15, at 116. A search of filings in relevant FCC proceedings—including *Open Internet NPRM*, *supra* note 1, and *Broadband Framework NOI*, *supra* note 1—reveals no citations to *Rumsfeld* by any telecommunications company.

63. *Hurley*, 515 U.S. at 570.

64. *Id.* at 574. Recognizing the “message” of a parade as more diffuse and decentralized than the message of a newspaper, the court still decided to extend First Amendment protection on the principle that a speaker should not be found to forfeit protection merely by “failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.” *Id.* at 569–70. The court found that the group in question wished to use its participation in the parade “to celebrate its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade.” *Id.* at 570. Clearly, the organization of the parade implicated a decision to express, or repress, a viewpoint and an identity.

65. *Id.* at 570.

sage, and the corresponding importance of their prospective participation in the parade.⁶⁶ Because the presence of a gay pride banner would likely convey to the public that the parade organizers approved of the group's message,⁶⁷ the Court held that parade organizers could not be compelled to carry this message.

Hurley, in short, stands for the principle that where groups of people seek to make a "collective point" through their participation in a shared activity,⁶⁸ and the messages espoused by participating groups will be reasonably imputed to the managers of the activity, the managerial choices as to which viewpoints to disseminate—and which to exclude—will be protected under the First Amendment.⁶⁹ But numerous factors distinguish the provision of Internet connectivity from the organization of a parade.

Compared with a parade, the size of the relevant pool of potential "participants" on the Internet is so much more immense that it simply cannot be said that access providers make individualized editorial decisions as to what content to include or exclude.⁷⁰ In the context of cable (or other "managed" media, such as a newspaper), it is clear that broadcasters necessarily exercise some measure of discretion in determining what package of programming content to deliver to customers, and that customers differentiate between cable companies based on which basic and premium programming options are offered. But in the context of Internet access, there are so many "participating units" that the decision to include or exclude one or another of these units (assuming such an inclusion or exclusion were even feasible) cannot possibly be said to

66. *See id.* at 568–69 (listing various forms of symbolic expression in a parade including spectators, costumes, uniforms, flags, banners, bands, and floats conveying political and moral messages to spectators and a television audience, and characterizing parades as "public dramas of social relations" where "performers define who can be a social actor and what subjects and ideas are available for communication and consideration" (quoting SUSAN G. DAVIS, *PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA* 6 (1986))).

67. *See id.* at 575.

68. *See id.* at 558.

69. *See id.* at 576 (declining to "force[] upon a speaker intimately connected with the communication advanced" the "dissemination of a view contrary to [the speaker's] own").

70. If the Internet were to be analogized to a parade, it would have to be considered the largest parade in the world—a parade to which everyone is invited to participate and everyone is invited to watch, with no restrictions on access. The analogy to a parade fails on the additional grounds that the Internet, unlike a parade, is not tethered to any time or physical location. *See Reno v. ACLU*, 521 U.S. 844, 851 (1997) ("Taken together, these tools [e-mail, listservs, newsgroups, chat rooms, and the World Wide Web] constitute a unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.").

have a substantial or, typically, even a *de minimis* effect upon the “message” supposedly being conveyed by an access provider.⁷¹

The Internet also lacks the *compositional* character of a parade or cable system.⁷² In contrast to the conduct of the parade organizers as composers in *Hurley*, there is no sense in which Internet access providers can exercise an even roughly similar degree of editorial discretion over the wealth of content on the Internet.⁷³ The complete absence of scarcity at the content and application layers of the Internet, the tremendous variety of modes and forums for expression, the ever-changing structure of this expression, and the constant creation of new expression all militate against the possibility of an Internet access provider’s ongoing editorial selection and supervision of the content traveling through its networks.⁷⁴ Few designations could be more inaccurate in describing the activities of an Internet access provider than that of a composer. And any attempt by providers to offer specific managed channels for the rapid delivery of

71. Some Internet access providers have proposed offering original or partner content on a channel separate from its provision of basic Internet connectivity. *See, e.g.*, Press Release, Google, Verizon-Google Legislative Framework Proposal (Aug. 9, 2010), available at http://www.google.com/googleblogs/pdfs/verizon_google_legislative_framework_proposal_081010.pdf. But these managed services can likely be differentiated, on both technological and First Amendment grounds, from the providers’ basic offer of Internet connectivity. *See infra* Part IV.B.1 (developing a list of factors for differentiating managed services from Internet access). Where a provider exercises a greater degree of editorial discretion in determining what content to provide within its managed channels, it ceases to provide Internet access and connectivity, and would begin to trigger a level of First Amendment scrutiny more analogous to that applied in *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), and other cases dealing with regulation of the organization of cable and newspaper content.

72. *Cf. Hurley*, 515 U.S. at 574 (“Rather like a composer, the Council selects the expressive units of the parade from potential participants. . . . [E]ach contingent’s expression in the Council’s eyes comports with what merits celebration on that day.”).

73. Those who organize a parade surely do not supply all of the wide range of messages and expressions contained within that parade, just as those who organize a cable system do not themselves generate all—or in some cases any—of the programming they transmit. What the organizers of a newspaper, cable system, and to a lesser extent a parade *do*, for the most part, is engage in a two-part process. First, they examine a range of possible candidates for inclusion within their particular medium of expression; then, they make a series of editorial selections as to which programming content—or in the case of a parade, which marching contingents—to include within their medium of expression. At the same time, they make a corresponding set of decisions as to which candidates to exclude. The same process holds true for newspaper editors: most opinion pages can be described as “the presentation of an edited compilation of speech generated by other persons,” the presentation of which requires an explicit rejection of some proffered submissions as well as an implicit rejection of a much wider range of other unconsidered candidates. *Hurley*, 515 U.S. at 570 (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). Organizers of these various media may be more or less “lenient in admitting participants,” *id.* at 569, but all, unlike Internet access providers, are essentially engaged in a process of editorial selection and coordination regarding which messages to transmit and which to suppress.

74. *See Reno*, 521 U.S. at 870 (describing the Internet as a “dynamic, multifaceted category of communication [that] includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real time dialogue”).

specific premium content would fundamentally restructure the character of Internet access to an extent that it would no longer be practicable to describe the resulting channel as part of the Internet.⁷⁵

Thus, AT&T, Comcast, Verizon, Time Warner Cable, and other Internet connectivity providers are unable—unlike the parade organizers in *Hurley*—to articulate an instance in which the FCC’s proposed regulations would “interfere with any message” that they as Internet access providers wish to communicate.⁷⁶ Internet access functions as a commodity input, essential to basic participation in a networked ecosystem and to a wide variety of economic and informational exchange systems engaged in by users and third-party content and application providers.⁷⁷

In practice, a discretionary decision made by organizers of an Internet access network to deny or enhance the transmission of a particular content or application provider’s services likely has more to do with the assertion of economic leverage than with any desire to “propound a particular point of view” to users.⁷⁸ Similarly, website operators and other

75. See Joint Reply Comments of Various Advocates for the Open Internet, *Open Internet NPRM Further Inquiry*, GN Docket No. 09-191, at 5 (Nov. 4, 2010) (“If a service provides prioritized access to a particular application or endpoint/destination, it is not an open Internet service.”).

76. *Rumsfeld v. Forum for Academic & Inst’l Rights, Inc.*, 547 U.S. 47, 64 (2006).

77. Twitter, Facebook, Google, Yahoo!, Skype, Netflix, Amazon, and a variety of similarly structured information services (insofar as they attempt to convey speech and data through access providers’ networks to a maximal number of end users) seek to enter the economic marketplace of the Internet and to participate in an international network of networks on which they have built their businesses and methods for communication and distribution. These companies’ participation and desire for interaction with the end users of AT&T, Verizon, Comcast, and other access providers is a matter of functioning effectively as search engines, social networks, and application providers, and of drawing upon the network effects that hinge upon reaching as many end users and searchable websites as possible. While these third parties may gain a speech interest through their provision of original, edited, or carefully aggregated and arranged information, no such interest accrues to those who provide transportation pathways for this information. A search engine, for instance, can plausibly be said to make a context-sensitive evaluation of a user’s search query, profile, and prior web-browsing history in order to determine what content best corresponds to what it believes the user was looking for (and indeed, can compete with other search engines based on how well it makes this determination). See *Search King Inc. v. Google Tech., Inc.*, CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003) (concluding that Google’s PageRank search technology is protected under the First Amendment because its “representation of relative significance of a particular web site . . . is fundamentally subjective in nature”). *But see* Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1197, 1200 (2008) (arguing that the speech of a search engine provider is a “thin and limited form of speech” based upon “‘observations’ of relevance manifested as a specific ranking of websites that results from a user’s search query” and that regulations intended to limit “the biases and discriminatory practices of search engines” will likely be adjudged to be permissible under the First Amendment).

78. *Hurley*, 515 U.S. at 575. Doubtlessly, some businesses rely on nondiscriminatory Internet routing, and other businesses—notably Internet access providers—may profit by moving to discriminatory models, particularly given the oligopolistic character of the market

information service providers do not understand themselves to be subjecting their speech and data to the editorial discretion of access providers.⁷⁹ AT&T's continued transmission of Google's (or any other information providers') services may be essential to Google's business model, but it does not bear on the question of whether AT&T is going to speak as it currently speaks. The speech of AT&T takes place elsewhere: among other places, on its public policy blog and website.⁸⁰

The fundamental purpose of providing Internet access is not to convey the viewpoints of a channel manager or access provider (an activity easily performed on the access provider's own website), but rather to create an *opportunity for an exchange of information* between users and content and application providers (which may include the access provider acting in its capacity as a content and application provider). The FCC seeks to provide "a non-discriminatory platform for the robust interchange of ideas."⁸¹ This purpose of creating an opportunity for the open exchange of "lawful content, applications, and services"⁸² is analogous to the purpose of the law at issue in *Rumsfeld*, which enabled information exchange between military recruiters and students, and ensured that these parties could discuss a potential employment relationship in a space that the school had already opened up to other parties engaging in similar discussions.⁸³ In upholding that law, the Court rejected a number of First Amendment objections based on its technical understanding of the service and platform provided by law schools.⁸⁴

III. USER PERCEPTIONS AND CONSUMER EXPECTATIONS REGARDING THE CONDUCT OF INTERNET ACCESS PROVIDERS

In evaluating First Amendment "compelled speech" claims in the wake of *Rumsfeld* and *PruneYard Shopping Center v. Robins*, it is important to note that courts analyze not just the technical infrastructure of the

for Internet service. But this economic interdependence has no bearing on the putative speech interests of service providers.

79. *Cf. id.* at 569 (unlike a parade, there is no expectation among Internet users and information providers that a centralized Council will make decisions to exclude or admit participants).

80. *See, e.g.,* AT&T PUB. POL'Y BLOG, <http://www.attpublicpolicy.com> (last visited Oct. 7, 2010); AT&T, <http://www.att.com> (last visited Oct. 7, 2010); *see also infra* Part IV.

81. *Open Internet NPRM*, *supra* note 1, at 13107 para. 116.

82. *Id.* at 13067 para. 11 (emphasis omitted).

83. *See Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 53 (2006) (citing the government's informal policy under the Solomon Amendment of "requir[ing] universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters" (citation omitted) (internal quotation marks omitted)).

84. *Id.* at 65; *see also infra* Part III.

relevant communications platform but also whether reasonable users and observers would understand the regulated party to be engaging in speech or expressive conduct. The following section thus seeks to determine whether Internet users perceive their broadband providers to be engaged in speech with respect to the content, applications, and services that users create, share, interact with, and download on the Internet.⁸⁵

Generally, conduct will be found to be expressive if it communicates a message—either directly or more diffusely through some broader medium of expression. The Supreme Court has framed this question as a matter of whether speech or conduct is “sufficiently imbued with elements of communication to fall within the scope of the First [Amendment].”⁸⁶ In answering this question, the Court asks two basic questions: first, whether the entity *intended* to convey a message, and second, “[whether] the likelihood was great that the message *would be understood by those who viewed it.*”⁸⁷

Both of these factors—intent to convey a message, and viewer/user understanding of a message—must be satisfied in order for conduct to fall within the scope of First Amendment protection. Where there is not a great likelihood that “the message [of particular conduct] would be

85. The FCC addressed some of these general issues in a 2008 order finding that Comcast had violated the FCC’s Internet Policy Statement by interfering with subscribers’ use of the BitTorrent protocol and other peer-to-peer networking applications. *See* Formal Complaint of Free Press & Pub. Knowledge, 23 FCC Rcd. 13028, 13054 para. 45 (2008) (barring Comcast from interfering with its subscribers’ use of peer-to-peer networking applications). Responding to First Amendment concerns with respect to the Comcast case, the FCC explicitly stated that its Order “does not prevent Comcast from communicating with its customers or others.” *Id.* at 13053 n.203. The FCC denied that it was “dictating the content of any speech,” and rejected the notion that Comcast itself would even be deemed (by its customers) to be the speaker of any content delivered through peer-to-peer applications. *Id.* The FCC instead found that subscribers would be more likely to attribute peer-to-peer content “to the other parties with whom they have chosen to interact through those applications.” *Id.* For these reasons, the FCC rejected a proposed analogy of broadband providers to newspapers, and found that no First Amendment concerns were raised by its enforcement of a nondiscrimination rule against Comcast. *Id.*

86. *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam).

87. *Texas v. Johnson*, 491 U.S. 397, 403–04 (1989) (emphasis added) (internal quotation marks omitted) (quoting *Spence*, 418 U.S. at 410–11); *see also* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70 (1995) (finding that gay, lesbian, and bisexual individuals intended to convey message through participation in parade and that such message would be understood by parade viewers). Intent can be based either on a speaker’s particular intent to convey a message or on an administrator’s expressive decision to accommodate the message of a speaker on its forum. *See* *Hurley*, 515 U.S. at 570 (describing expressive characteristics of both the Council’s “selection of contingents to make a parade” and the marching group’s own organizational purposes).

understood by those who viewed it," the regulated conduct will not constitute protected speech under the First Amendment.⁸⁸

This second factor of viewer-understanding is generally more difficult to satisfy. In *Rumsfeld*, a number of law schools sought to convey their disapproval of the military's "Don't Ask Don't Tell" policy by blocking military recruiters from campus.⁸⁹ The activity being regulated thus involved an intention to exclude a viewpoint, in addition to actions taken to implement that intention. Yet the Supreme Court still found that "accommodating the military's message does not affect the law schools' speech, *because the schools are not speaking* when they host interviews and recruiting receptions."⁹⁰ The crucial factor in the case was whether "users" of the law schools perceived the schools to be engaging in speech through their inclusion or exclusion of military recruiters.⁹¹

The Court in *Rumsfeld* held that the mere fact of hosting (or not hosting) "interviews and recruiting receptions" on campus was insufficient to demonstrate that the hosts approved of the speech engaged in by their guests on campus.⁹² Rather, whether the owner of a conduit for speech (for example, a law school) assumes responsibility for messages and expression flowing through that conduit was found to turn on whether users of that conduit identified the owner as a speaker or supporter of the messages and expression.⁹³ And where a forum like a school is "repeatedly . . . used by a wide variety of private organizations," the Court has held that there is "no realistic danger that the community would think that the [forum] was endorsing" any one of these particular organizations or their ideas.⁹⁴

Dwelling on the importance of user perceptions, in *Rumsfeld* the Court noted that "*an observer* who sees military recruiters interviewing away from the law school *has no way of knowing* whether the law school is expressing its disapproval of the military, all the law school's inter-

88. See *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410–11) (finding that conduct that is not understood by viewers does not "possess[] sufficient communicative elements to bring the First Amendment into play").

89. *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 51.

90. *Id.* at 64 (emphasis added). The Court added that "a law school's decision to allow recruiters on campus is not inherently expressive." *Id.*

91. See *id.* at 64–65.

92. See *id.* at 65 ("Nothing about recruiting suggests that law schools agree with any speech by recruiters We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.").

93. See *id.* at 65.

94. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 395 (1993); see also *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place.").

view rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.”⁹⁵ Similarly, in *PruneYard*, no First Amendment violation was found where users were not under the impression that the owner of the shopping center necessarily shared the views of those who happened to be protesting at his shopping center.⁹⁶ In both cases, the Court analyzed the expectations of users within these forums and found that users would not expect the administrators of these forums to be responsible for the speech that passes through these conduits.

From a user’s perspective, the conduct an Internet access provider engages in when facilitating the transmission of third-party content and applications to its users is roughly analogous to the conduct at issue in *Rumsfeld* and *PruneYard*. Consider that a user who encounters a slow or inaccessible website or application has no way of knowing whether that content is being slowed down or blocked by her Internet access provider, or by some external cause or actor. A slowdown or blockage might be caused by another entity’s network congestion,⁹⁷ by another entity’s (such as a government’s or browser provider’s) decision to block the website, by the website provider’s own lack of funding to maintain the site, or, finally, by the website provider’s explicit decision not to transmit content at that time and location.⁹⁸ But the user will typically have no way of knowing which of these causes or actors to blame for the site’s inaccessibility. Because the blockage of a site does not inherently express an Internet access provider’s disapproval of that site to users, and because access providers can only make their expression manifest to users by *separately* providing speech that explains their conduct, the blockage or degradation of the speed of a website will not typically constitute expressive conduct.⁹⁹

Nor do users typically understand an access provider to be communicating a message through its passive transmission of informational

95. *Rumsfeld*, 547 U.S. at 66 (emphasis added).

96. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (“It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.”)

97. Internet packets must pass through a wide variety of external routers between origin and destination. *See supra* Part II.A.

98. *See, e.g., YouTube and the Rise of Geolocation Filtering*, OPENNET INITIATIVE (Mar. 13, 2008), <http://opennet.net/blog/2008/03/youtube-and-rise-geolocation-filtering> (discussing tools used by Google and other website providers to block or limit video content in specific locations).

99. *See Rumsfeld*, 547 U.S. at 66 (“An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school’s interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.”).

content, even when that content is fraught with strong ideological or moral expression. A user does not in any sense view the cable provider RCN (or any other Internet access provider) as speaking, making, editing, performing, endorsing, or even acquiescing to the content delivered through an Internet connection that happens to be provided by RCN. Rather, users view their Internet access provider as a neutral gateway to the open and unfiltered Internet—an impression that is affirmed by the advertising materials of the providers themselves.¹⁰⁰ Thus, users of Internet access providers do not treat the provision of a site as a value judgment made upon that site by their access provider.¹⁰¹ Rather, users understand the provision of Internet access as a gateway to a forum where content providers, application providers, and other users are free “to come and go as they please.”¹⁰²

In *Turner*, the Supreme Court found that based on “cable’s long history of serving as a conduit for broadcast signals,” there was “little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.”¹⁰³ While this “risk” is already minimal in the context of cable, it is even more attenuated in the context of the Internet, where access providers engage in little if any of the content cultivation and programming engaged in by cable operators and broadcasters.¹⁰⁴ Responsibility, both legal and ethical, falls on the originator or end user of the content.

100. See, e.g., *High Speed Internet—Optimization*, RCN (May 24, 2008), <http://web.archive.org/web/20080524060125/http://www.rcn.com/internet/highspeed/optimization.php> (accessed by searching for RCN in the Internet Archive index) (claiming that the RCN network is built “so you can enjoy the Internet the way it was intended to be—fast and uncapped”). RCN has removed this statement from its website.

101. Indeed, the user may be entirely unaware of the role played by the access provider in delivering content, and may think of the browser (Firefox, Internet Explorer, Safari, Chrome, etc.) or even the operating system (Mac OS X, Windows, Linux, Android, etc.) as the relevant unit of content-delivery.

102. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

103. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994).

104. The absence of any user assumption that Internet access providers speak or endorse the content and applications that flow through their conduits is further demonstrated by the fact that users (as well as courts, see *infra* Part IV.B.2) tend not to hold even information intermediaries—such as platform proprietors (Facebook, Myspace, Twitter, YouTube, etc.), search aggregators (Google, Yahoo!, Bing, etc.), and communication facilitators (Skype, Vonage, AOL Instant Messenger)—responsible for the information conveyed on their services, let alone the network intermediaries through which users access these platforms, aggregators, and facilitators. Speech rights may accrue to some of these former information intermediaries as a result of their careful aggregation, arrangement, and management of the information that flows through their platforms. However, a clear distinction remains in place between an information aggregator or second-order platform such as Facebook and a communications transportation mechanism such as an Internet access provider, with no speech rights accruing to the latter, non-expressive actor.

The conduct of Internet access providers in routing third-party content and applications to users is thus highly unlikely to be understood by users as the articulation of an access provider's "message." As in *Rumsfeld*, nothing about either the provision and functionality of Internet access or the nature of subscribers' understanding of Internet access suggests, in any consistent or fundamental way, that Internet access providers agree with the speech, messages, and information provided by external content and application providers. Because a decentralized communications network such as the Internet is "repeatedly . . . used by a wide variety of private organizations," there is no danger that users of the network would think that the owners of the network's conduits are endorsing the speech of those private organizations.¹⁰⁵ Users have proven adept at distinguishing between speech that an Internet access provider sponsors and speech that an Internet access provider simply transports.¹⁰⁶ Users simply do not understand the views of Internet access providers to be somehow embedded in the third-party content and applications transported by these access providers to users.¹⁰⁷ Courts would be unlikely to protect these routing and transmission activities under the First Amendment.

IV. SEPARATING OUT THE SPEECH OF INTERNET ACCESS PROVIDERS FROM THE SPEECH OF CONTENT, APPLICATION, AND SERVICE PROVIDERS

Beyond the technological infrastructure of the Internet as a medium for transporting third-party content and speech¹⁰⁸ and the question of whether subscribers perceive Internet access providers to be responsible for the third-party speech they transmit,¹⁰⁹ the compelled speech doctrine also requires an examination of whether the owner of a platform on

105. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 395 (1993).

106. Internet access providers can be analogized to schools with respect to the ease by which "users" of these different kinds of access providers can distinguish (a) speech *sponsored* by the provider from (b) speech that merely flows through the provider's facilities. See *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 65 (2006) ("[H]igh school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.").

107. As discussed *supra* in note 100 and accompanying text, this characterization of Internet access as the provision of a neutral access conduit or transportation gateway to the wider Internet also reflects the dominant way in which Internet access providers themselves characterize their services, both in marketing materials and in earnings calls, to the general public—through references to unfettered, unimpeded, uninterrupted, and/or unrestricted access to the entire Internet or World Wide Web.

108. See *supra* Part II.

109. See *supra* Part III.

which others are speaking has the opportunity to expressly disavow connection with the speech and ideas of these third-party content providers.¹¹⁰ The following section considers the variety of mechanisms that Internet access providers have at their disposal in order to differentiate their speech from third-party content providers—and vice versa.

A. Internet Access Providers Have the Ability and Numerous Practical Opportunities to Disclaim Affiliation with the Speech of Third-Party Content and Application Providers

The forum owner's ability to *disclaim association* with the speech of those using the forum was the second analytical point in the Supreme Court's holding in *PruneYard Shopping Center v. Robins*. In *PruneYard*, a shopping mall owner was able to "expressly disavow any connection with the message [of protestors] by simply posting signs in the area where the speakers or handbillers stand."¹¹¹ This ability to "disclaim any sponsorship" of a message generated by other content providers militated against a finding that the owner would be understood to have expressed that message.¹¹² The Court built on this finding in *Turner*, where the existence of a "common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility" augured against a finding that the speech of broadcasters would be unlawfully compelled by the must-carry rules at issue.¹¹³ The Court continued to invoke this line of reasoning in *Rumsfeld*, where it noted that plaintiff law schools would "remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy."¹¹⁴ In contrast, the corresponding *absence* of any "customary practice" within parades, "whereby private sponsors disavow 'any identity of viewpoint,'" led the Court in *Hurley* to hold that requiring the parades to include messages from all comers would violate the organizers' First Amendment rights.¹¹⁵

The FCC's proposed nondiscrimination rules bear more similarities to the laws and regulations upheld in *PruneYard*, *Turner*, and *Rumsfeld*. The FCC's rules (a) require only neutral access, (b) do not force Internet access providers to carry a governmental message, and (c) continue to

110. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

111. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

112. *Id.*

113. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 655 (1994).

114. *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 60 (2006) (noting that law schools "could put signs on the bulletin board next to the door, . . . could engage in speech, [and] could help organize student protests" in response to the obligation to allow military recruiters to enter their campus).

115. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 576-77 (1995).

permit express disavowal of endorsement by the access provider.¹¹⁶ There exist numerous opportunities and forums through which an Internet provider can distinguish its speech from speech provided by external parties and disclaim affiliation with the views or messages contained in the speech it carries to subscribers. The existence of these opportunities provides further evidence that an Internet access provider would not be deemed to be the speaker of the third-party content and applications that it routes to its users.

There is nothing about the FCC's proposed regulations, for instance, that restricts what Internet access providers may say about the policies and practices of the content and applications that they route to their users (or, for that matter, about the policies of the government requiring them to transport this data to users in a nondiscriminatory fashion), just as there was "nothing in the Solomon Amendment [that] restricts what the law schools may say about the military's policies."¹¹⁷ If AT&T or another broadband provider sought to disclaim any association between itself and the packets it transmits, it would be able to do so through an announcement on its own website portal¹¹⁸ and on a variety of other affiliated websites. It would also be perfectly within the rights of providers to include a notice on a billing statement or in another piece of direct mail or email to its subscribers disclaiming affiliation or approval with the content of the packets transmitted over its networks.¹¹⁹ Furthermore, an access provider could place an identifying logo somewhere on content and applications that it has created or is otherwise responsible for, distinguishing in-house content and applications from that generated by external providers. Viewers would come to understand the absence of such a logo as an indication that an external party had generated the content or application.

116. See *PruneYard*, 447 U.S. at 86. To some degree, Internet access providers open their networks to the public and thus serve as a conduit for public speech in a manner analogous to the proprietors of the shopping mall in *PruneYard*, who were found to run "a business establishment that is open to the public to come and go as they please." *Id.* at 87. In addition, they have benefited from heavy governmental investment in the provision of Internet access services, including grants of rights of way, licensing and franchising access (rather than open or unlicensed access), spectrum allocation, universal service funding, and other grants. These federal investments and subsidies imply some corresponding ability to control how providers manage access. However, it should be noted that the fact of federal provision of services was not a necessary condition to the rejection of First Amendment claims in *Rumsfeld*, 547 U.S. at 61.

117. *Rumsfeld*, 547 U.S. at 65.

118. See, e.g., ATT.NET HOME, <http://att.my.yahoo.com/> (last visited Nov. 16, 2010). The website is currently operated under the Yahoo! domain.

119. See *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 8 (1986) (holding that appellant's delivery of a newsletter containing political editorials in the same envelope as its billing statement "receives the full protection of the First Amendment").

Notably, the fact that Internet access providers for the most part do *not* issue such disclaimers, despite a clear option to do so, may indicate that both access providers and users are unlikely to assume that the views of third-party content and application providers would “be identified with those of the owner” granting these parties access to its routers.¹²⁰

B. Internet Access Providers’ Role as a Transportation Conduit Through Which Users Gain Access to the Larger World of Third-Party Content and Applications on the Open Internet Is Easily Distinguishable from Situations in Which Internet Providers are Originators of Content

The FCC’s proposed nondiscrimination rules are consistent with a recognition that access providers may become direct information providers in contexts where they explicitly create, aggregate, and organize content for their users. Through use of the labels “Internet access providers” and “Internet connectivity providers” (as opposed to information or content providers), the FCC has signaled a willingness to treat providers with a bifurcated set of rules depending on whether they are positioning themselves as conduits through which users may gain access to the open Internet, or as providers of specific content-driven services to those users.¹²¹ Where an access provider also functions as an *originator* of Internet packets, rather than as a *router* of packets to and from users, that access provider is engaging in speech that is protectable under the First Amendment and for which it can be found legally responsible.¹²²

1. Actions as Content and Application Providers Are Separately Regulable from Provision of a Basic Telecommunications Conduit to Subscribers

A connectivity provider such as AT&T may occasionally transmit its own in-house content over the Internet to all end users (not necessarily just to subscribers).¹²³ In comments to the FCC, AT&T has pointed out

120. See *PruneYard*, 447 U.S. at 87 (holding that views expressed by speakers who are granted a right of access to a shopping center would “not likely be identified with those of the owner”).

121. See *Broadband Framework NOI* at 7873 para. 16 (citing *Cable Modem Declaratory Ruling*, 17 FCC Rcd. at 4804, paras. 16–18) (referencing prior Commission distinctions between “Internet connectivity” and applications provided through Internet access services such as e-mail, newsgroups, and personal web pages).

122. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) (classifying a cable provider as a First Amendment speaker to the extent that it engages in “original programming”); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (noting that a cable provider may gain speech rights through exercising “a significant amount of editorial discretion regarding what their programming will include”).

123. See AT&T NPRM Comments, *supra* note 19, at 236 n.517.

that it “owns and provides a wide variety of Internet content that is available over its own and other service providers’ networks,” listing not only its in-house sports and entertainment video programming¹²⁴ but also the fact that “the default home page for AT&T’s wireline Internet access service is ‘powered by Yahoo!’ and includes a variety of Yahoo!-provided content, such as weather, sports, news, games, and video.”¹²⁵ Based on these service offerings, AT&T argues that it “clearly is a First Amendment speaker in its capacities as an Internet service provider and content provider.”¹²⁶ AT&T further suggests that the codification of a nondiscrimination rule by the FCC might prohibit AT&T from featuring its own content in these ways, because “AT&T’s selection of featured content arguably involves ‘discrimination’ in favor of such content and against content from other entities.”¹²⁷ Verizon, too, suggests that broadband providers are “engag[ing] in speech by providing video programming to their customers” that is increasingly “integrated with the Internet.”¹²⁸

Certainly, broadband access providers often intermingle basic telecommunications transport offerings with enhanced data-processing services that may be unique to the Internet access provider’s network.¹²⁹ Yet there is no language in the FCC’s proposed rules barring a company that acts as an Internet access provider from making content, applications, and other communications available in separate contexts. For instance, the FCC’s proposed rules would not necessarily bar entities that function as Internet access providers from hosting their own websites or from making available their own content offerings over the Internet, so long as no preferential treatment is bestowed on these offerings and no discriminatory treatment is imposed on unaffiliated offerings (either in terms of higher prices or degraded quality). Nor would the proposed regulations bar AT&T from offering various email and web-hosting services as part of the Internet access package it makes available to subscribers—again, so long as it did not discriminate against the email and web-hosting services available from Internet businesses unaffiliated with AT&T.

124. AT&T U-VERSE ONLINE, <http://entertainment.att.net/tv> (last visited Dec. 8, 2010); AT&T FAN ZONE, <http://fanzone.att.net> (last visited Dec. 8, 2010).

125. *Id.* at 236 n.517.

126. *Id.*

127. *Id.*

128. Verizon NOI Comments, *supra* note 24, at 112.

129. Verizon’s FiOS service is one example, insofar as Verizon delivers television services over the same fiber link that its Internet subscribers use to access the Internet. The FCC specifically suggests that some services such as “IP-enabled ‘cable television’ ” are delivered “over the same facilities as broadband Internet access service, but may not themselves be an Internet access service and instead may be classified as distinct managed or specialized services” not subject to the proposed regulations. *Open Internet NPRM*, *supra* note 1, at 13104 para. 108.

Further, despite some measure of integration, it remains possible to distinguish “managed services,” such as subscriber-only video and television programming and the “Yahoo!-provided content” referred to by AT&T, from “Internet services,” such as the basic routing and transport of data, information, content, and applications back and forth from a third-party provider to a user.¹³⁰ Various factors can be used in making this distinction between basic Internet service and separate managed services. These factors include:

- Whether traffic on the service is identified and routed using TCP/IP or some other protocol;
- Whether content and applications are portable across multiple devices, networks, and architectures;
- Whether a particular service is held out to consumers as Internet service or as a managed service separate from the rest of the generalized Internet;
- Whether a service is unique to the access provider’s network or is common to all Internet users;
- What users’ expectations are regarding the breadth of access offered by the service; and
- How users actually experience and use the service.

Even in cases where an Internet access provider has entered into deals with content providers such as Disney or ESPN, the provider typically demarcates such service offerings from its provision of basic Internet access.¹³¹ These special services—also offered by providers such as Comcast, AT&T, and Verizon—are easily distinguishable and delimited from the providers’ basic offering of unfettered Internet access,¹³² which all providers list first on their customer-facing websites before any mention of special services. Furthermore, Internet access providers typi-

130. For instance, although a broadband provider may offer a variety of specialized adjunct services—ranging from security capabilities and domain name lookup to more advanced services such as website caching—these services primarily facilitate the provider’s basic transportation and telecommunications services, such as directory assistance services can be considered adjunct to basic telephone service. *See* Reply Comments of Nicholas Bramble, *supra* note 13, at 6–8 (describing potential uses of the adjunct-to-basic designation in the context of Internet connectivity).

131. *See, e.g., High Speed Internet*, RCN, <http://www.rcn.com/new-york/high-speed-internet> (last visited Apr. 20, 2010) (listing provision of “Fiber-Optic Internet Speeds” separately from “special access” to services such as ESPN360.com and Disney Connection).

132. *See* Reply Comments of Nicholas Bramble, *FCC Further Inquiry*, GN Docket No. 09-191, at 2 (Nov. 4, 2010) (arguing that “specialized services” are services that either “(a) cannot be offered over the best-efforts Internet . . . due to performance or reliability requirements or (b) do not involve two-way transmission of user-requested information”).

cally do not compete on special content offerings (outside of the different “triple play” context, where providers offer affiliated—but not integrated—television and telephone plans),¹³³ nor do they distinguish within their own array of Internet access options based on the presence or absence of special content offerings. That is, both among competitors and within their own internal pricing plans, Internet access providers differentiate service offerings based on speed and price of Internet access, not specialized content.¹³⁴ Accordingly, there is a strong basis for rejecting claims that Internet access providers have inextricably intermingled their basic access offerings with managed service offerings.¹³⁵

Notably, the structure of Internet access service offerings stands in stark contrast to the world of cable and satellite television offerings, wherein different competitors strongly distinguish their subscription plans *based on content and programming availability*. For instance, the cable provider RCN has noted that surveys

confirm the vital importance of local sports programming to a cable operator’s success: the data show that some 40–58% of cable subscribers would be less likely to subscribe to cable service if it lacked local sports programming and, in one survey, an additional 12% of subscribers said they were not sure whether the absence of local sports programming would impact their decision whether to take the service.¹³⁶

133. See, e.g., *Comcast Triple Play: Cable, Internet, and Phone Service*, COMCAST, <http://www.comcast.com/Corporate/Learn/Bundles/bundles.html> (last visited Nov. 16, 2010).

134. RCN, for instance, currently offers three high-speed Internet access options, distinguished only by speed and price. See *Plans and Pricing*, RCN, <http://www.rcn.com/new-york/high-speed-internet/services-and-pricing> (last visited Apr. 20, 2010) (offering 1.5 Mbps Internet for \$16.99/month, 10 Mbps Internet for \$26.99/month, and 20 Mbps Internet for \$51.99/month in New York, NY). From the webpage describing these three speed options, one must click on a separate, smaller box marked “Included Features” in order to compare associated content offerings; a click on this box reveals that all three speed/price plans offer the same exact set of content offerings. Similarly, Comcast lists four high-speed Internet access options, again differentiated only along the parameters of speed and price. See *Looking for Products and Prices?*, COMCAST, <https://www.comcast.com/localization/localize.aspx> (accessed by using the address “1000 Campbell Ave, 06516,” then selecting “Faster Internet”) (last visited Oct. 24, 2010) (offering 1.5 Mbps Internet for \$26.95/month, 12 Mbps Internet for \$44.95/month, 16 Mbps Internet for \$54.95/month, and 50 Mbps Internet for \$99.95/month in New Haven, CT).

135. Some providers have argued that the proposed rules “would make it per se unlawful for broadband Internet access service providers to offer any content-differentiated service,” such as “a ‘family-friendly’ service that would permit access only to online content that fits this description.” See Comments of Time Warner Cable Inc., *Open Internet NPRM*, *supra* note 1, GN Docket No. 09–191, at 45 (Jan. 14, 2010), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020375997>.

136. Petition of RCN Telecom Servs., Inc., to Deny Applications for Condition Consent, Applications for Consent to the Transfer of Control of Licenses by Comcast and AT&T, MB

The presence or absence of sports programming is thus a primary selling point for a cable provider; RCN concluded that a provider lacking this variety of programming “will have little or no chance of winning as subscribers as much as 40–70% of its potential customer base.”¹³⁷

A dual regulatory scheme of the sort outlined above is not unheard of: for instance, cellular telephone service providers are regulated both as common-carrier telecommunications services with respect to their provision of basic phone access,¹³⁸ and as information services with respect to their provision of richer media and content-based services to their wireless users.¹³⁹ This sort of bifurcated treatment for Internet access providers is anticipated by statute,¹⁴⁰ and Justice Scalia, too, has argued that the activities of transporting and delivering content can be separated out from the process of providing enhanced information services.¹⁴¹

Accordingly, under a First Amendment analysis, it is both possible and useful to differentiate the provision of basic Internet access from the provision of managed services.¹⁴²

Docket No. 02-70, at *31 (Apr. 29, 2002), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6513188003>.

137. *Id.*

138. See Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers, 22 FCC Rcd. 15817 (2007) (order and further notice of proposed rulemaking) (maintaining common carrier status for cellphone providers).

139. See Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, 22 FCC Rcd. 5901 (2007) (declaratory ruling) (classifying wireless broadband access provided by cellphone carriers as an information service).

140. See 47 U.S.C. § 153(44) (2006) (“A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.”).

141. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1007 (2005) (Scalia, J., dissenting). In his dissent, Justice Scalia offered the following analogy to support the notion that the provision of telecommunications services could be distinguished from the provision of information services, even when offered by the same carrier:

If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common “usage,” would prevent them from answering: “No, we do not offer delivery—but if you order a pizza from us, we’ll bake it for you and then bring it to your house.” The logical response to this would be something on the order of, “so, you *do* offer delivery.” But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: “No, even though we bring the pizza to your house, we are not actually ‘offering’ you delivery, because the delivery that we provide to our end users is ‘part and parcel’ of our pizzeria-pizza-at-home service and is ‘integral to its other capabilities.’” Any reasonable customer would conclude at that point that his interlocutor was either crazy or following some too-clever-by-half legal advice.

Id. (citations omitted).

142. To the extent that a managed service is offered independently of Internet access (based on the six factors listed above), a rule regulating the provision of this managed service would likely be subject to a level of intermediate scrutiny—similar to the scrutiny applied to

2. Existing Legal Distinctions Between Content Providers and Intermediaries

Following the FCC's decision in 2002 to classify high-speed cable access providers as Title I-regulated information services and its 2005 decision to apply the same classification to DSL providers,¹⁴³ the formal statutory basis for imposing Title II interconnection requirements on telecommunications infrastructure providers fell away,¹⁴⁴ and cable and DSL providers were no longer under any obligation to open their networks to third-party access providers. However, Comcast, AT&T, Verizon, and other DSL and cable broadband services continue to function primarily as neutral conduits with respect to their routing and delivery of information from application and content providers to subscribers, and vice versa.¹⁴⁵

This functional status as a neutral conduit is further demonstrated by the fact that Internet access providers have continued to take advantage of legal protections and immunities commonly granted to general-purpose transportation services. Despite not operating as Title II-regulated common carriers of telecommunications, access providers have nevertheless frequently invoked and advocated for immunity from copyright and defamation liability by positioning themselves as mere conduits or carriers of content, rather than as expressive speakers or editors of that content. They have distinguished themselves in this manner from cable operators and newspaper publishers, who seldom if ever characterize themselves

laws regulating the provision of cable television service in *Turner Broadcast Systems v. FCC*, 512 U.S. 622, 655 (1994).

143. Internet Over Cable Declaratory Ruling, 17 FCC Rcd. 4798 (2002). This classification scheme was eventually upheld in *Brand X*, 545 U.S. 967.

144. Title II of the Telecommunications Act of 1996 generally imposes three types of regulations on providers of telecommunications services: § 201 bans "unjust or unreasonable" rates or practices, § 202 prohibits "unjust or unreasonable discrimination," and § 208 structures the complaint process. Communications Act of 1934, 47 U.S.C. §§ 201-02, 208 (2006).

145. Indeed, Justice Scalia's dissenting opinion in *Brand X* makes clear that with respect to their functionality as deliverers and neutral conduits of information, Internet access providers can be subject to neutrality and nondiscrimination obligations. *Brand X*, 545 U.S. at 1005-06, 1014 (Scalia, A., dissenting) (arguing in dissent that cable-modem service providers offer telecommunications to the public and are accordingly "subject to Title II regulation as common carriers"). Where the "information" that an Internet access provider transmits is facilitative of a communication between two external parties, and does not add to that communication, then the access provider is functioning as a telecommunications service under Title II, not as an information service. *See* 47 U.S.C. § 153(50) (2006) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received").

as “neutral conduits” for information and applications provided by others.¹⁴⁶

For instance, § 230(c)(1) of the Communications Decency Act of 1996 (“CDA”) provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁴⁷ Section 230 was effectively an effort to grant “interactive computer service[s]” (a category under which Internet access providers fall) a common carrier-style immunity from liability for the user-generated content they transport through their networks, without at the same time burdening providers with the full array of common carrier obligations.¹⁴⁸

Analogously, in the copyright context, § 512(c)(1) of the Digital Millennium Copyright Act (“DMCA”) provides that “[a] service provider shall not be liable . . . for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider”¹⁴⁹ This legal principle that an Internet intermediary is “not a speaker” and is to be distinguished from the publisher, speaker, or user of information has taken firm hold and serves as a settled expectation around which a thriving Internet economy and ecosystem has been built.¹⁵⁰ This expectation—along with the expectation of immunity created by § 230 of the CDA—would be severely damaged by a judicial determination that Internet access providers are in fact speakers, publishers, or editors of the content that they transport on their networks.

The FCC’s rules, on the other hand, would not disrupt these expectations, nor would they preclude the speech of Internet access providers in their capacity as access providers—contrary to the contentions of Laurence Tribe and Thomas Goldstein. Tribe and Goldstein argue that under

146. See, e.g., *Turner*, 512 U.S. at 653 (noting that broadcaster appellants “maintain that the must-carry provisions trigger strict scrutiny because they compel cable operators to *transmit speech not of their choosing*” (emphasis added)).

147. Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) (2006) (granting interactive computer services immunity from defamation liability).

148. Compare *id.* (declining to condition service provider immunity on any prohibitions on unjust or unreasonable discrimination), with *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641–42 (D.C. Cir. 1976) (describing a “quid pro quo whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public’s business”).

149. Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1) (2006).

150. See Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 101–02 (2007) (“Internet intermediaries—service providers, Web hosting companies, Internet backbone providers, online marketplaces, and search engines—process hundreds of millions of data transfers every day They can process and host that data instantaneously only because they automate the process. . . . [I]f Internet intermediaries were liable every time someone posted problematic content on the Internet, the resulting threat of liability and effort at rights clearance would debilitate the Internet.”)

“net neutrality,” three speech activities would be barred: a broadband provider could not “refuse to carry certain content (because it was, for example, offensive),” “speed its delivery of particular content to premium subscribers,” and “limit the volume of data of a handful of customers who interfere with others’ access to the Internet by putting tremendous strains on the network through massive file downloads.”¹⁵¹

But the FCC’s proposed rules clearly leave open the option for Internet access providers to block various forms of categorically unlawful content, and other forms of offensive content if requested to do so by a user.¹⁵² Certainly, as the FCC has recognized in its discussion of proposed nondiscrimination rules, there exist clearly established categories of content that access providers are *legally*—not just morally—obligated to take down. These categories include child pornography, material relevant to law enforcement and anti-terrorism activities, copyright-infringing material if access providers have actual knowledge of said material, and other categories of obscene or unlawful content.¹⁵³ For obvious reasons, a nondiscrimination rule would not prevent Internet access providers from filtering, removing, or disclosing these categories of content. Good Samaritan rules, too, enable providers to “restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” without thereby sacrificing their immunity from intermediary liability under § 230 of the CDA.¹⁵⁴ Moreover, Internet access providers will likely also have the ability under the FCC’s proposed rules to block “harmful traffic” such as spam and malware and “traffic unwanted by users” such as pornography.¹⁵⁵ It would be inaccurate to describe *any* of this range of exclusionary activities as a form of speech by access providers. Instead, these activities are rightly characterized by the FCC and others as elements of reasonable network management practices.¹⁵⁶

The latter two of Tribe and Goldstein’s contentions—that the rules would bar providers from managing their network in response to excessive use by particular subscribers and from offering fast delivery to premium subscribers—describe activities that either fall outside the scope of First Amendment scrutiny or are not barred by the FCC’s

151. See Tribe & Goldstein NPRM Comments, *supra* note 23, at 3.

152. See *Open Internet NPRM*, *supra* note 1, at 13114 para. 139 (proposing that access providers “would not violate the [FCC’s proposed Internet] principles in taking reasonable steps to address unlawful conduct on the Internet” and could “reasonably prevent the transfer of content that is unlawful”).

153. *Id.* at 13114–16 paras. 139, 142–43, 145–46.

154. Communications Decency Act of 1996, 47 U.S.C. § 230(c) (2006).

155. *Open Internet NPRM*, *supra* note 1, at 13114 para. 138.

156. *Id.* at 13114 paras. 138–39.

proposed rules. Existing and prior FCC rules have permitted the provider of a basic transportation or telecommunication service to engage in network management by “structur[ing] its communications network such that the network efficiently functions as the basic building block upon which it . . . can add computer facilities to perform myriad combinations and permutations of information processing, data processing, process control, and other enhanced services.”¹⁵⁷ There is no reason to expect that the current proceedings would not result in allowances for similar forms of network management. Similarly, a nondiscrimination rule would permit metered pricing, as well as the capability to charge users more for faster baseline access speeds—two practices that every Internet access provider already engages in.¹⁵⁸

Courts are thus unlikely to view the activities of access providers as sufficiently weighted with symbolic or expressive intent to merit protection under the First Amendment, because they are barred—by law in some cases, and by expectation, tradition, and practice in others—from making decisions about what content to include or exclude when serving as a transportation conduit between users and third-party content and application providers.

V. THE PAST AND FUTURE OF THE INTERNET

In the 1997 decision *Reno v. ACLU*, the Supreme Court described the Internet as a “unique and wholly new medium of worldwide communication,” replete with countless modern “town crier[s]” and “pamphleteer[s].”¹⁵⁹ However, the Court never clarified the constitutional status of the conduct engaged in by the access providers who offer Internet connectivity to these town criers, pamphleteers, and content providers. Indeed, the opinion contains an overwhelmingly content-driven analysis of the Internet, and little if any analysis of the underlying communications infrastructure of the Internet. The Court placed primary

157. *Second Computer Inquiry*, 77 F.C.C.2d 384, 420 para. 96, *modified on recon.*, 84 F.C.C.2d 50, *modified on further recon.*, 84 F.C.C.2d 512 (1980), *aff'd sub nom.* *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *aff'd on second further recon.*, 56 Rad. Reg. 2d (P & F) 301, 1984 FCC Lexis 2809 (May 4, 1984).

158. As to the question of premium content channels offered by providers, such services can be differentiated from Internet access and connectivity, and evaluated on separate First Amendment grounds. See *Verizon-Google Legislative Framework Proposal*, *supra* note 71. See *supra* Part IV.B for a more detailed discussion of constitutional distinctions between the offer of Internet access and the offer of managed services.

159. *Reno v. ACLU*, 521 U.S. 844, 850, 870 (1997); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 657 (1994) (recognizing that the Internet presents an exemption from the rationale typically given by courts to uphold governmental regulation of “physical control of a critical pathway of communication”).

emphasis on Internet *users*, not Internet *access providers*, as speakers, and did not reach the question of what protection, if any, the First Amendment might provide owners of the telecommunications infrastructure.¹⁶⁰

The only reference to Internet access providers in *Reno* is a brief note that “[i]ndividuals can obtain access to the Internet from many different sources.”¹⁶¹ When the Court considered who might be the speakers and “publishers” of information on the Internet, it focused on *users*, not network providers:

Any person or organization with a computer connected to the Internet can “publish” information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege.¹⁶²

Nowhere does the Court suggest that the provision of connectivity, transport services, or underlying infrastructure to these publishers might itself be an expressive activity. The focus is instead on those who are actually creating and producing information, not those who are transmitting it from one network node to another.

Additionally, if the First Amendment status of access providers remained unclear at the time of the decision issued in *Reno*, it should be clearer today. The Internet has evolved away from the integrated network and information services once provided by Prodigy, America Online, the Microsoft Network, and CompuServe. In 1997, the Supreme Court described these walled-garden networks as “online services” that “offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet.”¹⁶³ The Court then described

160. See *Reno*, 521 U.S. at 844.

161. *Id.* at 850 (noting the existence of service providers such as America Online, CompuServe, the Microsoft Network, and Prodigy through which users gain access both to “extensive proprietary networks as well as a link to the much larger resources of the Internet”).

162. *Id.* at 853.

163. *Id.* at 850. Prodigy, America Online, and other walled-garden services were themselves not “Internet access providers” in the sense that Verizon, AT&T, and Comcast are today; rather, these early networks were services into which users could dial with their general-purpose phone lines, often simply by making a local call. But because the providers of the general-purpose phone lines were subject to Title II common carrier obligations under the Telecommunications Act of 1996, they were banned from charging additional fees or imposing differential access and speed obligations to users of these dialup services. Prodigy, America Online, the Microsoft Network, and CompuServe likely could not have taken the form they did, were it not for a general-purpose telecommunications platform that enabled

the Internet as a “vast library . . . and a sprawling mall offering goods and services.”¹⁶⁴ These metaphors would seem to presume some curatorial or editorial role to be played by those who grant access to the Internet’s wealth of information and users, which accurately reflects the role played by early online services such as Prodigy and America Online. But since the issuance of *Reno* in 1997, the Web has grown far more “vast” and “sprawling,” to the point that it is no longer feasible to use enclosed spatial metaphors to describe the startling diversity of users, curators, aggregators, content providers, search providers, and application makers on the open Internet.¹⁶⁵

users to access these independent services on a nondiscriminatory basis. No additional fees were charged either to users themselves or to the Internet companies that enabled these users to “dial into” the Internet.

164. *Id.* at 853.

165. The falloff of Prodigy, America Online, and CompuServe indicates that the formerly dual role of access providers—as both creators of and conduits for content—has been replaced by a core functionality of providing generalized access to the wealth of content and applications on the Internet. Rather than competing on programming and content offerings, access providers increasingly compete along the more singular dimensions of speed of service and breadth of geographic coverage. Although many continue to offer email and website-hosting services to customers, even these services are fairly indistinguishable in character from one another, and are not at the heart of the service provider’s marketing efforts to consumers. *See supra* text accompanying notes 130–31. Additionally, as noted above, § 230 of the CDA, 47 U.S.C. § 230 (2006), and § 512 of the DMCA, 17 U.S.C. § 512 (2006), exempt these carriers from various forms of tort and copyright liability for the communications they transport, and thus further disincentive the carriers from acting as speakers or editors of the content they carry. *See supra* Part IV.B.2.

While the 1990s trend towards vertical integration of dialup Internet access services with content services has largely disappeared, some of the most popular applications and devices associated with higher-layer content and communications platforms increasingly share characteristics with those earlier “walled garden” services. *See, e.g.,* JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 101–02 (2008) (“In a development reminiscent of the old days of AOL and CompuServe, it is increasingly possible to use a PC as a mere dumb terminal to access Web sites with interactivity but with little room for tinkering.”); Chris Anderson, *The Web Is Dead. Long Live the Internet*, *WIRED*, Sept. 2010, at 118, 118 (describing a “shift[] in the digital world . . . from the wide-open Web to semiclosed platforms that use the Internet for transport but not the browser for display,” and noting that this shift is driven “by the rise of the iPhone model of mobile computing, and it’s a world Google can’t crawl, one where HTML doesn’t rule”); Tim Berners-Lee, *Long Live the Web: A Call for Continued Open Standards and Neutrality*, *SCI. AM.*, Dec. 2010, at 80, 82 (decrying the rise of proprietary applications such as Apple iTunes and magazine apps for smartphones that give “a restricted subset of the Web” and prohibit links to and from the rest of the Web); Ryan Singel, *How Facebook Could Beat Google to Win the Net*, *WIRED: EPICENTER BLOG* (Nov. 13, 2010), <http://www.wired.com/epicenter/2010/11/google-fears-facebook> (“[Facebook] has become a decent-sized replica of the Web inside the Web. And Google can’t crawl and analyze much of what happens in there.”). Although such services generally fall outside the scope of this Article, it is worth pointing out that this new manifestation of enclosure at a higher layer is, in at least two senses, qualitatively different from earlier walled-garden services. First, applications on Facebook, the iPhone, and other platforms will likely continue to rely on a nondiscriminatory Internet architecture to transport datagrams to and from users without interference from lower-layer connectivity providers. Second, so long as lower layers of the Internet’s architec-

Instead of the enclosed and centralized architecture associated with a cable broadcast network, a newspaper publishing house, or even the early days of Prodigy and America Online, the Internet has developed within a distributed architecture and layered network model.¹⁶⁶ As described earlier, the protocol suite underpinning the Internet constructs a series of layers which enable the encapsulation and transportation of user-created content and applications on the underlying logical and physical infrastructure of the network.¹⁶⁷ This layered architecture enables parties to develop content and applications without needing to enter into agreements with the entities that comprise or control the underlying logical and physical layers of the Internet. The logical and physical layers of the network thus serve as a standardized platform for a wide array of innovative content and applications—much of it developed by decentralized users rather than managers of the network infrastructure.¹⁶⁸

Given this divided architecture and the openness to interconnection with multiple networks, much of the diversity of thought and inquiry on the Internet can be traced back not to a few centralized owners of the physical components of networks but instead to millions of individual and business users who cluster around particular nodes that interest them—and then form peer communities or discussion and development groups wherein they can determine for themselves how they will take up particular topics or implement particular ideas.¹⁶⁹ Specific websites, applications, and services then pool and aggregate these diverse discussions so that they can be accessed through search engines or common databases. The result, then, is a wealth of creative expression on the Internet by users and aggregators who create content and build

ture have not been optimized for the delivery of one instance of a given type of application over another, the competition among such applications will continue in a relatively undistorted manner and it will be up to users, rather than connectivity providers, to decide which of these applications will thrive.

166. There are four primary functional layers in the architecture of the Internet: application, transport, Internet, and link.

167. See *supra* Part II.A.1.

168. See Reply Comments of Nicholas Bramble, *FCC Further Inquiry*, *supra* note 132, at 6–9 (addressing potential harms to user innovation if specialized service providers and wireless providers were permitted to vitiate open Internet protections and exert greater management and control over the development of new services and applications).

169. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 168–69 (2006) (“What emerges in the networked information environment . . . will not be a system for low-quality amateur mimicry of existing commercial products. What will emerge is space for much more expression, from diverse sources and of diverse qualities.”), available at http://cyber.law.harvard.edu/wealth_of_networks/Main_Page; see also Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007) (describing positive externalities and “spillover effects” resulting from a layers-based Internet architecture).

applications atop a core general-purpose network. The *less* creativity and editorial expression engaged in at the underlying layers by the general-purpose network provider, the more room for creativity and expression at the layers closer to the user.¹⁷⁰

The regulatory challenge going forward, then, is to preserve the conception of the Internet as a modular system built upon common standards—where instead of needing to build one vertically integrated system, providers at different layers “can construct smaller pieces of the system, connect them at a defined interface and not have to worry about what happens on the other side of the interface.”¹⁷¹ Rules of stability and interoperability, including nondiscrimination rules of the sort proposed by the FCC, provide assurance to content providers and application makers that the information they solicit and distribute over the Internet will be accessible by anyone with an Internet connection. Such rules also

170. For some, the result of this decentralization of creative expression and corresponding development of edge-driven innovation is a different conception of the purposes of the First Amendment. *See, e.g.*, LAWRENCE LESSIG, *CODE VERSION 2.0* 236 (2006) (“Relative anonymity, decentralized distribution, multiple points of access, no necessary tie to geography, no simple system to identify content, tools of encryption—all these features and consequences of the Internet protocol make it difficult to control speech in cyberspace.”), available at <http://pdf.codev2.cc/Lessig-Codev2.pdf>; *see also* Neil Netanel, *New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age*, 76 *GEO. WASH. L. REV.* 952, 960 (2008) (“[For Benkler,] First Amendment goals are best served by allowing peer communication to flourish and preventing the mass media from reasserting the one-way hub-and-spoke model in the digital network arena. Radically distributed clusters of inquiry, debate, and collective action make up the backbone of our system of free expression in the digital age.”). Instead of relying upon one-way broadcasters to provide the “diverse and antagonistic” expressions upon which traditional First Amendment theories have relied, *see, e.g.*, *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 139–40 (1969) (“[The First Amendment] ‘rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.’” (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))), the Internet is seen to enable the solicitation of diverse views from a spillover-rich environment without the need for centrally managed selection of which “programming” users should receive, *see* Richard Posner, *Introduction to the Becker-Posner Blog*, BECKER-POSNER BLOG (Dec. 5, 2004, 11:23 PM), <http://www.becker-posner-blog.com/2004/12/introduction-to-the-becker-posner-blog.html> (“[Blogging] is a fresh and striking exemplification of Friedrich Hayek’s thesis that knowledge is widely distributed among people and that the challenge to society is to create mechanisms for pooling that knowledge.”).

171. Kevin Werbach, *Higher Standards Regulation in the Network Age*, 23 *HARV. J.L. & TECH.* 179, 196 (2009). As the FCC has observed on multiple occasions: “[s]o far in the Internet’s history, the basic standards underlying the operation of the Internet have created the equivalent of perfect competition . . . among applications and content . . . with a minimum [of] interference by the network or platform owner.” *Open Internet NPRM*, *supra* note 1, at 13085 para. 52 (citations omitted) (quoting Formal Complaint of Free Press & Pub. Knowledge, 23 *FCC Rcd.* 13028, 13054 para. 45 (2008)) (internal quotation marks omitted).

enable the network effects on which a variety of social, user-driven, and Web 2.0 applications depend.¹⁷²

Accordingly, a decision to treat Internet access providers as neutral carriers with respect to their transmission of content would not jeopardize or erode any existing “journalistic discretion of broadcasters in the coverage of public issues,”¹⁷³ given that Internet access providers do not currently make such discretionary journalistic choices in determining how to structure their carriage of content and applications developed by others. The particular activity recognized to receive heightened First Amendment protection in *Reno* was the development and aggregation of content and applications, not the design of the underlying mechanisms by which such content was delivered and transmitted.¹⁷⁴ A regulation targeted towards these mechanisms—rather than towards the content itself—would not receive scrutiny under the First Amendment, particularly where the regulation’s impact on speech was found to be minimal.¹⁷⁵

The FCC’s proposed rule would enshrine a principle of equal access analogous to that found in the Solomon Amendment, which required that when schools “send e-mails or post notices on bulletin boards on an employer’s behalf,” they are equally obligated to “send e-mails and post notices on behalf of the military.”¹⁷⁶ In the context of Internet access, the proposed regulation would ensure that when access providers route “lawful content, applications, and services” to users on behalf of some third-party information providers, they are also obligated to route lawful content, applications, and services to users from all other information

172. One purpose of requiring general-purpose Internet access providers to offer nondiscriminatory access to their subscribers is to ensure that different gateways and “on-ramps” to accessing the Internet will all enable access to the same set of content and applications, thus generating the largest possible user base for these services.

173. *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 124 (1973).

174. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Although one District Court has observed that “[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion,” *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000) (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)), courts generally resist from employing so broad a conception of the “press” as to swallow up new technological modes for the creation and distribution of content and applications. *See, e.g.*, *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 777 (1996) (Souter, J., concurring) (“In my own ignorance I have to accept the real possibility that ‘if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong.’” (quoting Lawrence Lessig, *The Path of Cyberlaw*, 104 *YALE L.J.* 1743, 1745 (1995))).

175. *See IMS Health, Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009) (describing laws preventing the data-mining of patient prescription information as “inoffensive to the core values of the First Amendment . . . because they principally regulate conduct and, to the extent that they regulate speech at all, that putative speech comprises items of nugatory informational value”).

176. *Rumsfeld v. Forum for Academic & Inst’l Rights, Inc.*, 547 U.S. 47, 61 (2006).

providers. In *Rumsfeld*, the Court rejected the schools' First Amendment objections to this sort of equal access rule on both jurisprudential and historical grounds. The Court noted that

[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.¹⁷⁷

In short, the law schools in *Rumsfeld* were treated by the Court as a general-purpose platform on which multiple users could exchange information, and this finding militated against the notion that the law schools could invoke autonomous individual speech rights in the same manner as traditional compelled-speech plaintiffs. First Amendment objections to a rule compelling general-purpose Internet access providers to offer the same kind of nondiscriminatory access will likely trigger a similar analysis.

CONCLUSION

A firm technological understanding of the Internet is in place; it should not be dislodged through the discretionary introduction of a novel theory of First Amendment interests into a domain where no speech occurs. In *Rumsfeld*, the Court found that the selective activities engaged in by hosts of recruiting events fell outside the scope of First Amendment protection.¹⁷⁸ Notably, when compared to the relevant actors in *Rumsfeld*, Internet access providers play a far less selective and far more attenuated role with respect to the content and applications being transported through their networks. Whereas a law school administrator must analyze a pool of potential recruiters and make a variety of content-based, time-based, and space-based decisions as to which of these recruiters to invite to campus and which to exclude, the expansive and evolving me-

177. *Id.* at 62. Compare *id.* (upholding law promoting equal access to recruiting services), with *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating law requiring drivers to carry certain state-approved messages on their license plates such as "Live Free or Die"), and *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating law forcing schoolchildren to pledge allegiance to the flag). The Court in *Rumsfeld* noted that to find otherwise would "plainly overstate[] the expressive nature of their activity and the impact of the [proposed regulations] on it, while exaggerating the reach of . . . First Amendment precedents." *Rumsfeld*, 547 U.S. at 70.

178. See *Rumsfeld*, 547 U.S. at 70 (finding a law "incidentally affect[ing] expression" permissible under the First Amendment).

dium of the Internet prevents an access provider from making these same decisions. Internet access providers do not make any meaningful ongoing editorial decisions as to which content to allow within their networks and which to suppress.

The theory of strong First Amendment protection advanced by some parties before the FCC fails to illuminate the debate over the proper scope of reasonable network management. Not only does the proffered analogy to other forms of speech fundamentally mischaracterize the nature of the conduct associated with telecommunications technologies, it also attempts to shut down this debate before it begins by suggesting that *any* management or blocking of user and third-party content is per se within the speech rights of the access provider to perform.

Courts determine whether an entity is engaged in speech or expressive conduct based in part on a consideration of the content, context, and medium of the relevant activities, and in part on the understanding of those who view or receive the conduct as to whether they are viewing or receiving a message. Based on an application of these factors to the activities and conduct of Internet access providers, it is clear that such providers do not engage in speech or expressive conduct with respect to their provision of access to the worldwide Internet. Accordingly, the nondiscrimination rule proposed by the FCC regulates neither the speech nor expressive conduct of Internet access providers in a manner that is cognizable for purposes of the First Amendment.