FAIRNESS DOCTRINE 2.0: THE EVER-EXPANDING DEFINITION OF NEUTRALITY UNDER THE FIRST AMENDMENT

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ABSTRACT

Since the early days of dial-up service, prominent voices have urged government regulation of speech on the Internet. A cross-section of policymakers and pundits are now calling for a change in the status quo, while others warn that recent developments could spur a departure from the "hands-off" policy of the FCC.

During the net neutrality debates, many critics feared that the Open Internet Order would lead to greater FCC control of the Internet, with some even going further: warning that the agency would implement some form of a new Fairness Doctrine for the medium. Despite the Restoring Internet Freedom's essential repeal of the Open Internet Order, these concerns have been given credence by calls for crackdowns on fake news and extremism; for platform, search, and app neutrality; and for government intervention to stop the censorship policies of Silicon Valley companies.

This Article begins by surveying several developments that give rise to this alarmism. It examines whether the FCC would have the statutory authority to regulate content on the Internet. It then considers several policy proposals before assessing the constitutionality of any regulatory intervention. It argues that greater regulation of online political content will chill free speech, spawn unintended consequences, and run afoul of the Constitution. It argues that an attempt to enforce any type of Fairness Doctrine for the Internet will be too difficult to administer, leading to suffocating litigation; unfair application to ISPs, platforms, and websites; and an intellectually diminished Internet.

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I. INTRODUCTION

Bloggers beware: according to former Federal Election Commission (FEC) Chairman Lee Goodman, Americans are one vote away from a "Chinese censorship board," in which you could be fined for posting about politics during election seasons.[1] Goodman's warning followed an FEC decision that narrowly staved off setting precedent for new rules requiring citizen bloggers to register with the government and provide financial records.[2] After review of a complaint in October 2014, the six members of the FEC deadlocked three-three along partisan lines, resulting in dismissal of a case,[3] but igniting debate about limits to the FEC's regulation of Internet political speech. Under the current rule, issued in 2006, the FEC can regulate only two categories of online political commentary: campaign content and paid advertising.[4] The FEC has purview over candidates, parties, and political action committees (PACs) in other media,[5] so the rule's rationale is that campaigns should not be able to avoid restrictions and requirements simply by moving the same content online. Similarly, campaign finance laws apply to television and radio advertising, and the rule extends that authority to the Internet as well.[6]

At issue before the commission were two videos created by a nonprofit and posted to YouTube during the 2014 congressional midterm season.[7] Because the organization was not a campaign entity subject to existing FEC regulation and did not pay for the videos or their placement, the FEC's three Republican members reasoned that the nonprofit was not subject to any restrictions or reporting requirements under

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[1] Stephen Dinan, *FEC Democrat Pushes for Controls on Internet Political Speech*, WASH. TIMES (Oct. 24, 2014), http://www.washingtontimes.com/news/2014/oct/24/fec-democrat-pushes-controls-internet-political-sp/?page=all.

[2] *Id.*

[3] Checks and Balances for Economic Growth, MUR 6729 (FEC Oct. 24, 2014) (statement of Chairman Lee E. Goodman et al.), http://eqs.fec.gov/eqsdocsMUR/14044363864.pdf ("Consistent with [the Office of General Counsel]'s recommendation, we voted to find no reason to believe a violation occurred and the matter was closed.").

[4] Internet Communications, 71 Fed. Reg. 18,589 (Apr. 12, 2006) (to be codified at 11 C.F.R. pt. 100, 110, 114).

[5] *The FEC and the Federal Campaign Finance Law*, FED. ELEC. COMM'N (Feb. 2004), https://transition.fec.gov/pages/brochures/fecfeca.shtml#Campaign_Finance_Law (last updated Feb. 2017) ("The FECA requires candidate committees, party committees and PACs to file periodic reports disclosing the money they raise and spend.").

[6] Internet Communications, 71 Fed. Reg. at 18,589.

[7] Checks and Balances for Economic Growth, MUR 6729 (FEC Oct. 24, 2014) (statement of Chairman Lee E. Goodman et al.), http://eqs.fec.gov/eqsdocsMUR/14044363864.pdf.

current rules.[8] Four members must vote to hear a case, [9] so the deadlock precluded a formal ruling on the matter. But then-FEC Vice Chair Ann Ravel vowed that the Commission would revisit the issue in 2015 to consider changing the current rule[10] that leaves the Internet largely unregulated as a unique medium of "low cost" and "widespread accessibility."[11] Ravel and like-minded advocates argue that the 2006 rule fails to foresee how the Internet is evolving, and how sophisticated PACs, campaigns, and political operatives can skirt campaign finance laws governing traditional political advertising by publishing comparable, if not identical, material online.[12]

On February 11, 2015, the FEC held hearings on campaign finance regulation, including new rules for Internet political speech, receiving more than 32,000 comments in response to its public notice.[13] Less than two weeks later, Commissioner Lee Goodman and Ajit Pai of the Federal Communications Commission (FCC) countered with a joint column criticizing the plan.[14] They argue greater regulation of online political content will unfairly target citizen groups, bloggers, and social media users by imposing onerous registration and reporting requirements that will ultimately curb free speech.[15] Even if the FEC does not amend the 2006 rule, it argues that the current ad-hoc, case-by-case approach to adjudicating Internet political content—determined largely by the make-up of the commission at the time of any given ruling—will discourage many from posting or publishing online political content, resulting in a chilling of speech.[16]

FCC Chairman Pai has also criticized prior initiatives by his own agency, such as the "Multi-Market Study of Critical Information Needs," which would have sent FCC agents to

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[8] *Id.*

[9] *About the FEC*, FED. ELECTION COMM'N, https://classic.fec.gov/about.shtml (last visited May 3, 2018).

[10] *See* Statement of Vice Chair Ann M. Ravel Encouraging Public Comments to Increase Disclosure and Address Corruption in the Political Process, Oct. 20, 2014, *available at* https://www.fec.gov/resources/about-fec/commissioners/ravel/statements/141020_Ravel_Statement_on_McCutcheon.pdf [hereinafter Statement of Vice Chair Ann M. Ravel Encouraging Public Comments].

[11] Internet Communications, 71 Fed. Reg. at 18,589.

[12] *See* Statement of Vice Chair Anne M. Ravel Encouraging Public Comments, *supra* note 10.

[13] Press Release, Fed. Election Comm'n, FEC Public Hearing on the *McCutcheon v. FEC* Advance Notice of Proposed Rulemaking, February 11, 2015 (Feb. 10, 2015), https://www.fec.gov/updates/fec-public-hearing-on-the/.

[14] Ajit Pai & Lee Goodman, *Internet Freedom Works*, POLITICO: MAG. (Feb. 23, 2015), https://www.politico.com/magazine/story/2015/02/fcc-internet-regulations-ajit-pai-115399.

[15] *Id.*

[16] *Id.*

question reporters, editors, and broadcast station chiefs about their news practices, an effort he argued was a step toward reinstituting the now-defunct "Fairness Doctrine" of policing political news content.[17] The FCC backed away from the study in response to controversy.[18] Corydon B. Dunham, NBC's former executive legal counsel of twenty-five years,[19] warns that the FCC seeks to control TV and radio news through a revamped "Localism, Balance and Diversity Doctrine" that would establish regulations and appoint boards to monitor broadcast stations' exercise of news judgment.[20] Given that the FCC is currently auctioning off much of the broadcast spectrum to wireless broadband providers to expand and improve smartphone service,[21] Dunham fears that narrowing the already scarce range of broadcast frequencies will intensify competition for the dwindling number of TV station licenses.[22] Because TV stations must apply to the FCC for licenses to operate, he argues that this increased competition will give the FCC greater leverage over station managers, who in turn may worry that their editorial judgments could affect the likelihood that the FCC will renew their licenses.[23] This may dampen stations' enthusiasm for covering certain issues, shaping the content of not only what they broadcast, but what they share online.

While the FEC and FCC have independent statutory authority, they are both means by which government can regulate public debate, an objective of many academics, politicians, and policymakers who are frustrated by both the *Citizens United v. FEC*[24] decision striking restrictions on campaign spending[25] and the current state of mass media. Traditionally, many proponents of greater government control online have been liberals or Democrats, but recent allegations

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[17] Ajit Pai, *The FCC Wades Into the Newsroom*, WALL ST. J. (Feb. 10, 2014, 7:26 PM), http://www.wsj.com/news/articles/SB10001424052702304680904579366903828260732?cb=logged0.4133963421443206.

[18] Julian Hattem, *FCC Pulls Plug on Press Study*, THE HILL (Feb. 21, 2014, 4:03 PM), http://thehill.com/policy/technology/198943-fcc-kills-contested-press-study.

[19] Ginny Grimsley, *Former NBC Legal Exec Cory Dunham Warns of New Threats to Free Speech*, MARKETWIRED (Mar. 9, 2012, 2:34 PM), http://www.marketwired.com/press-release/former-nbc-legal-exec-cory-dunham-warns-of-new-threat-to-free-speech-1630259.htm.

[20] CORYDON B. DUNHAM, GOVERNMENT CONTROL OF NEWS: A CONSTITUTIONAL CHALLENGE 3 (2011).

[21] Matt Hamblen, *FAQ: The FCC's Upcoming Broadcast-TV Spectrum Auction*, COMPUTER WORLD (Oct. 16, 2015, 12:09 PM), http://www.computerworld.com/article/2994217/mobile-wireless/faq-the-fcc-s-upcoming-broadcast-tv-spectrum-auction.html.

[22] DUNHAM, *supra* note 20, at 2.

[23] *Id.*

[24] 558 U.S. 310 (2010).

[25] *Id.* at 372.

of censorship by tech giants such as Google[26] (whose parent company Alphabet was the second largest donor to the 2016 Clinton campaign[27]), YouTube (a subsidiary of Google),[28] Facebook,[29] and Twitter,[30] have elicited calls by some conservatives and Republicans for government to referee the Net.[31]

Lawmakers are increasingly zeroing in on Silicon Valley, and several of them head relevant committees of jurisdiction. Commerce Committee chairman Senator John Thune, R-S.D., sent a letter to Facebook CEO Mark Zuckerburg, demanding the company disclose how it generates its news feeds.[32] Twitter banned Rep. Marsha Blackburn (R-Tenn.), Chairman of the House Subcommittee on Energy and Technology, from posting a Senate campaign ad that its curators deemed too inflammatory for its criticisms of Planned Parenthood.[33] The following day, Twitter reversed course, but not before Blackburn pounced on the incident as a fundraising opportunity.[34] Prior to announcing his intention to resign, then-Senator Al Franken, D-Minn., ranking member of the Senate Judiciary Subcommittee on Privacy, Technology and the Law, called for expanding net neutrality to cover content generated

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[26] Blake Neff, *Video: Is Google Manipulating Searches to be Pro-Hillary?*, DAILY CALLER (June 9, 2016, 6:55 PM), http://dailycaller.com/2016/06/09/video-is-google-manipulating-searches-to-be-pro-hillary/.

[27] *Top Contributors, Federal, Election Data for Hillary Clinton, 2016 Cycle*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/pres16/contributors?cycle=2016&id=n00000019&src=c&type=f (last visited May 3, 2018).

[28] *See* Ian Birnbaum, *YouTube is Leaving Its Creators in the Dark*, OUTLINE (Sept. 18, 2017, 9:23 AM), https://theoutline.com/post/2258/youtube-is-leaving-its-creators-in-the-dark.

[29] *See* Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016, 9:10 AM), https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006.

[30] *See* Cathy Young, *How Facebook, Twitter Silence Conservative Voices Online*, THE HILL (Oct. 28, 2016, 12:55 PM), http://thehill.com/blogs/pundits-blog/media/303295-how-facebook-twitter-are-systematically-silencing-conservative.

[31] *See* Jeremy Carl, *How to Break Silicon Valley's Anti-Free-Speech Monopoly*, NAT'L REV., (Aug. 15, 2017, 8:00 AM), http://www.nationalreview.com/article/450476/silicon-valleys-anti-conservative-bias-solution-treat-major-tech-companies-utilities.

[32] Nick Corasaniti & Mike Isaac, *Senator Demands Answers From Facebook on Claims of 'Trending' List Bias*, N.Y. TIMES (May 10, 2016), https://www.nytimes.com/2016/05/11/technology/facebook-thune-conservative.html.

[33] Kevin Robillard, *Twitter Pulls Blackburn Senate Ad Deemed 'Inflammatory,'* POLITICO (Oct. 9, 2017, 4:59 PM), https://www.politico.com/story/2017/10/09/marsha-blackburn-twitter-ad-243607.

[34] Jessie Hellmann, *Twitter Backs Down, Will Allow Blackburn to Promote Senate Ad*, The Hill (Oct. 11, 2017, 9:00 AM), http://thehill.com/policy/technology/354873-twitter-will-allow-blackburn-to-promote-senate-ad-after-controversy.

by Facebook, Google, and Amazon.[35] While he has not endorsed the proposal, Chairman Pai shared the underlying sentiment that "[l]arge Silicon Valley platforms today pose a far greater threat to a free and open internet[,] than do internet service providers."[36]

Meanwhile, Democratic lawmakers are urging the FEC to develop new rules for political advertising on social media after Facebook disclosed that Russians were purchasing ads on its platform to influence the 2016 presidential election.[37] These tech companies are already facing pressure from European lawmakers to combat terrorism, extremism, "hate speech," and fake news by aggressively curating their users' content.[38] After months of opposition, Facebook and Google granted support to a Senate bill that would subject online entities to liability for facilitating sex trafficking on their websites,[39] and President Trump recently signed its House counterpart into law.[40] The bill, titled Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), makes an exception to Section 230 of the Communications Decency Act.[41] Section 230 allows websites to post third party content without being responsible for it,[42] and it has been instrumental in fostering innovation and protecting free speech online.[43] Critics argue this exception, even for a worthy cause, is a slippery slope that could lead to

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[35] Al Franken, *We Must Not Let Big Tech Threaten Our Security, Freedoms and Democracy*, THE GUARDIAN (Nov. 8, 2017, 2:20 PM), https://www.theguardian.com/commentisfree/2017/nov/08/big-tech-security-freedoms-democracy-al-franken.

[36] Ajit Pai, *Restoring a Light Touch to Internet Regulations*, WASH. TIMES (Dec. 5, 2017), https://www.washingtontimes.com/news/2017/dec/5/restoring-a-light-touch-to-fcc-internet-regulation/.

[37] *See* Kate Conger, *Congress Wants New Rules for Online Political Advertising After Russian Facebook Ads*, GIZMODO (Sept. 20, 2017, 3:00 PM), https://gizmodo.com/congress-wants-new-rules-for-online-political-advertisi-1818591930.

[38] *See* Danica Kirka, *U.S. Tech May Find Their Future Shaped by Europe*, CHI. TRIB. (Oct. 17, 2017, 10:00 AM), http://www.chicagotribune.com/bluesky/technology/sns-bc-eu--europe-controlling-the-internet-20171017-story.html.

[39] *See* Cecilia King, *In Reversal, Tech Companies Back Sex Trafficking Bill*, N.Y. TIMES (Nov. 3, 2017), https://www.nytimes.com/2017/11/03/technology/sex-trafficking-bill.html.

[40] Tom Jackman, *Trump Signs 'FOSTA' Bill Targeting Online Sex Trafficking, Enables States and Victims to Pursue Websites*, WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites/?noredirect=on&utm_term=.bd9607155f2f.

[41] *See* H.R. 1865, 115th Cong. (2017).

[42] 47 U.S.C. § 230(c) (2012).

[43] *See Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited May 3, 2018).

greater online censorship in the future.[44] Considered alongside these developments, the 2016 election may eventually be regarded as a watershed in terms of the Internet's place in American public affairs.

Proponents of greater government control might see their best chance for reshaping the channels of mass communication dependent on a Democratic president in the White House.[45] Naturally, the election and re-election of President Obama worried opponents that agencies would seek to do just that.[46] For example, the appointment of regulatory enthusiast Cass Sunstein, who has previously called for government regulation of online political content,[47] as Administrator of the Office of Information and Regulatory Affairs stoked ongoing worry that the Obama Administration was poised to exert greater control of the Web.[48] President Trump caused consternation while a candidate when he floated the idea of "closing up" the Internet to combat terrorism.[49] Though regulation of online political commentary and rules governing Internet campaigning failed to achieve salience in the 2016 presidential election, candidate Donald Trump's upset had consequences. Commissioner Pai was President Trump's pick for Chairman and, as discussed below, the FCC has

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[44] *See* Elliot Harmon, *Internet Censorship Bill Would Spell Disaster for Speech and Innovation*, ELEC. FRONTIER FOUND. (Aug. 2, 2017), https://www.eff.org/deeplinks/2017/08/internet-censorship-bill-would-spell-disaster-speech-and-innovation.

[45] *See, e.g.*, Berin Szoka, *How Net-Neutrality Advocates Would Let Trump Control the Internet*, WASH. POST (July 19, 2017), https://www.washingtonpost.com/opinions/how-net-neutrality-advocates-would-let-trump-control-the-internet/2017/07/19/52998b58-6bc2-11e7-9c15-177740635e83_story.html?utm_term=.fc468fd12921 (discussing the roles that democratic Presidents Clinton and Obama played in relation to internet regulation: "Democrats should have worked out a legislative deal while they held the White House. It's not too late, but it soon might be."); Mario Trujillo, *How Obama Helped Reshape Internet Rules*, THE HILL (June 6, 2016, 6:00 AM), http://thehill.com/policy/technology/283681-how-obama-helped-reshape-internet-rules.

[46] *See* Lachlan Markay, *Dem Regulators Again Target Protections for Online Political Speech*, WASH. FREE BEACON (Aug. 10, 2016, 3:00 PM), http://freebeacon.com/issues/dem-regulators-target-protections-online-political-speech/.

[47] *See* Cass Sunstein, *The Future of Free Speech*, LITTLE MAG., http://www.littlemag.com/mar-apr01/cass.html (last visited May 3, 2018).

[48] *See* Rudy Takala, *Federal Election Commission to Consider Regulating Online Political Speech*, CNS NEWS (Feb. 11, 2015, 10:15 AM), https://www.cnsnews.com/news/article/rudy-takala/federal-election-commission-consider-regulating-online-political-speech.

[49] John Markoff, *Why Donald Trump's Call to 'Close Up' the Internet is Science Fiction*, N.Y. TIMES: BITS (Dec. 8, 2015, 5:06 PM), https://bits.blogs.nytimes.com/2015/12/08/why-donald-trumps-call-to-close-up-the-internet-is-science-fiction/?_r=0&mtrref=undefined.

embarked on a new direction.[50] Two vacant seats on the FEC to be filled by President Trump appointees portend policy ramifications for that agency as well.[51]

Until recently, attention was fixed on the U.S. Supreme Court's pending decision on whether to grant certiorari to review the U.S. Court of Appeals for the D.C. Circuit's 2016 decision upholding the FCC's 2015 Open Internet Order, commonly known as net neutrality.[52] Given the order's effective repeal by the Commission's recent promulgation of the Restoring Internet Freedom Order,[53] the case will likely be deemed moot. But there is nothing stopping a future administration from reinstating net neutrality.[54] And while most of the net neutrality debate is focused on the rule's technical and economic issues, voices ranging from former FCC Commissioner Robert McDowell[55] to constitutional luminary Lawrence Tribe[56] have alleged that net neutrality runs afoul of the First Amendment for at least two reasons: first, broadband Internet service providers (ISPs) are speakers for First Amendment purposes, and second, net neutrality invites government into decisions about speech.[57] Tribe contends that the First Amendment prohibits government not just from censoring speech, but from forcing private groups to carry or transmit speech.[58] Tribe maintains that net neutrality is based on a mistaken premise that government is empowered to referee private speech, but the First Amendment's purpose is not to ensure audiences equal access to all speakers, and the

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[50] Cecilia Kang, *Ajit Pai, F.C.C. Chairman, Moves to Roll Back Telecom Rules*, N.Y. TIMES (April 17, 2017), https://www.nytimes.com/2017/04/19/technology/ajit-pai-fcc-telecom-deregulation.html.

[51] *See* Trevor Potter, *With 2018 Midterms Approaching, Our Elections are Not Protected*, THE HILL (Mar. 6 2018, 7:00 AM), http://thehill.com/opinion/campaign/376816-with-2018-midterms-approaching-our-elections-are-not-protected.

[52] *See* Giuseppe Macri, *Net Neutrality Lawsuit Heads to the Supreme Court*, GOV'T TECH. (May 2, 2017), http://www.govtech.com/policy/Net-Neutrality-Lawsuit-Heads-to-the-Supreme-Court.html.

[53] *In re* Restoring Internet Freedom, 32 FCC Rcd. 4434 (2017).

[54] *See* Reinhardt Krause, *Why FCC Net-Neutrality Reversal Could Later Be Reversed Again*, INVESTOR'S BUS. DAILY (Nov. 22, 2017), https://www.investors.com/news/technology/why-fcc-net-neutrality-reversal-could-later-be-reversed-again/.

[55] *See* Robert M. McDowell, *Net Neutrality v. Free Speech*, HUDSON INST. (Aug. 28, 2014), https://www.hudson.org/research/10575-net-neutrality-vs-free-speech.

[56] *See generally* Laurence H. Tribe & Thomas C. Goldstein, Proposed "Net Neutrality" Mandates Could Be Counterproductive and Violate the First Amendment, Exhibit A to Comments of Time Warner Cable, Inc., GN Docket No. 09-191, WC Docket No. 07-52 (FCC), Oct. 19, 2009, *available at* http://freestatefoundation.org/images/TWC_Net_Neutrality_Violates_the_First_Amendment_-Tribe_Goldstein.pdf.

[57] *Id.* at 2.

[58] *Id.*

government is not free to second-guess ISPs regarding control of their networks.[59]

Yet the First Amendment debate is far from an academic one, as a casual Internet search will reveal. There is a substantial body of alarmist commentary that net neutrality and/or pressure from lawmakers could open the door for the FCC to regulate online political content just as it did for political content on radio and television under the Fairness Doctrine. This is because much of the rationale for the FCC's regulation of the broadcast spectrum (radio and TV) is that the medium is a public good, a justification that could plausibly be extended to the Internet.[60] As mentioned, the FCC is currently auctioning off much of the broadcast spectrum to wireless broadband providers.[61] Transferring the FCC-controlled broadcast spectrum to the wireless broadband network of the Internet could invite the FCC to regulate the latter as part of its turf.[62] As discussed below, some critics fear the FCC will train its regulatory crosshairs not just on ISPs, companies that provide access to the Internet, but on so called "edge providers," entities that provide content and services to users once they are connected to the Net.[63] What then-Senator Franken called for[64] is already being rolled out in Europe.[65] While net neutrality was about limiting the behavior of ISPs, the concept of platform neutrality encompasses restrictions on software systems.[66] As platform neutrality proponent Professor Frank Pasquale describes it, "[t]he core idea of neutrality is to prevent massive intermediaries from distorting either private

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[59] *Id.*

[60] Commissioner Robert M. McDowell, Remarks at the Media Institute Dinner (Jan. 28, 2009) (transcript available at https://www.rcfp.org/newsitems/docs/20090129_162426_fairness_doctrine.pdf) [hereinafter McDowell, Remarks at the Media Institute].

[61] Matt Hamblen, *FAQ: The FCC's Upcoming Broadcast-TV Spectrum Auction,* COMPUTERWORLD (Oct. 16, 2015, 12:09 PM), http://www.computerworld.com/article/2994217/mobile-wireless/faq-the-fcc-s-upcoming-broadcast-tv-spectrum-auction.html.

[62] Corydon B. Dunham, *We Must Demand Congress Kill Pending Censorship Proposal*, HUFFPOST: THE BLOG (Nov. 20, 2012, 9:53 AM), http://www.huffingtonpost.com/corydon-b-dunham/we-must-demand-congress-k_b_2164804.html.

[63] Anna-Maria Kovacs, *Regulatory Uncertainty: The FCC's Open-Internet Docket*, *in* ECON. POL'Y VIGNETTE (Georgetown Ctr. for Bus. & Pub. Policy ed., 2015), http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Kovacs-regulator-uncertainty-FCCs-open-internet-docket.pdf.

[64] Franken, *supra* note 35.

[65] *See, e.g.*, Kirka, *supra* note 38; Anya Schiffrin, *How Europe Fights Fake News*, COLUM. J. REV. (Oct. 26, 2017), https://www.cjr.org/watchdog/europe-fights-fake-news-facebook-twitter-google.php.

[66] *See* Roslyn Layton, *Net Neutrality Will be Reincarnated as Platform Regulation*, AEI: AEIDEAS (Dec. 20, 2017, 6:00 AM), https://www.aei.org/publication/net-neutrality-will-be-reincarnated-as-platform-regulation/.

commerce or the *public sphere* simply by virtue of their size, network power or surveillance capacities"[67] (emphasis added). The terms "search neutrality" and "app neutrality" have already entered the lexicon.[68]

If the FCC moves to regulate political speech, whether on an "open Internet" or otherwise, then its best-known blueprint would be its so-called Fairness Doctrine, the agency's near-forty-year policy of regulating the political speech of TV and radio stations.[69] The Fairness Doctrine (discussed in more detail below) required broadcast license holders to devote airtime to controversial issues of public importance and to present opposing viewpoints on these issues.[70] While the Fairness Doctrine was abandoned in 1987 and officially wiped from the Code of Federal Regulations in 2011, its resurrection is routinely debated.[71] While proponents of the Fairness Doctrine have failed to reinstitute it in its traditional form, net neutrality has stoked fresh fears that the Doctrine could be applied to the Internet.[72] As former FCC Commissioner Robert McDowell remarks: "That's just Marketing 101: if your brand is controversial, make a new brand.[73] The Doctrine could be intertwined into other communication policy initiatives that are more certain to move through the system, such as localism, diversity or net neutrality."[74]

This Article argues that the FEC and FCC should not move to promulgate rules governing political content on the Internet, because they would be counterproductive and contrary to inviolable First Amendment values, faring no better in promoting robust debate than the Fairness Doctrine did for television or radio. It concludes that the practical and technical challenges of enforcing political content rules would be more trouble than they are worth. Finally, because the Supreme Court has yet to define the permissible scope of government

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[67] Frank Pasquale, *Platform Neutrality, Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES L. 487, 489 (2016).
[68] Karl Bode, *Dear Al Franken: Net Neutrality Is Not a Magic Wand You Can Wave At Any Company*, TECHDIRT (Nov. 10, 2017, 6:11 AM), https://www.techdirt.com/articles/20171109/09552938582/dear-al-franken-net-neutrality-is-not-magic-wand-you-can-wave-any-company.shtml.
[69] *See* Dylan Matthews, *Everything You Need to Know About the Fairness Doctrine in One Post*, WASH. POST (Aug. 23, 2011), https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIQAN8CXZJ_blog.html?utm_term=.d92d695cc239.
[70] *See id.*
[71] *See* Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 GEO. WASH. L. REV. 845, 847–48 (2008).
[72] *See* Jeff Poor, *Fairness Doctrine Could Apply to the Web, FCC Commissioner Warns*, HUFFPOST, https://www.huffingtonpost.com/2008/08/13/fairness-doctrine-could-a_n_118632.html (last updated May 25, 2011).
[73] McDowell, Remarks at the Media Institute, *supra* note 60.
[74] *Id.*

regulation of the medium, this Article culls together the Court's principal rulings on communications law to predict that it would likely strike down FEC and FCC rules that required ISPs and websites to provide certain political content, whether those rules were in the form of a reprised Fairness Doctrine or that of a different regime altogether.

In order to place this debate in its proper context, a brief overview of the FCC's role in regulating broadcast media under its Fairness Doctrine policy is in order.

II. BACKGROUND

A. The Fairness Doctrine's Troubled History Demonstrates the Unintended Consequences of Regulating Communications Technology's Political Content

Former Commissioner McDowell and Chairman Pai have invoked the Fairness Doctrine in debates over the FCC's role in regulating the Internet because many of the arguments both for and against greater government policing of online political content were often made in the public quarrel over the agency's best-known foray into content regulation.[75]

The Fairness Doctrine was a policy of the FCC during the second half of the 20th Century.[76] It was intended to serve the public interest in having robust coverage and debate of public affairs on radio and television.[77] While the goal of this policy was at least initially laudable, controversy later arose as to whether the policy was at best ineffective, or worse, had the opposite effect of diminishing public affairs coverage.[78] Understanding the Fairness Doctrine is crucial to understanding how political content regulations could impact users' online experiences.

There is a limited range of frequencies within the electromagnetic spectrum for transmitting broadcast (TV and radio) communications.[79] The FCC's predecessor, the Federal Radio Commission, was formed to regulate the "free-for-all" caused by too many broadcasters fighting over available frequencies, a situation akin to several people shouting into the

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[75] *See* Brendan Sasso, *Is the FCC Trying to Revive the "~Fairness Doctrine'?*, ATLANTIC (Feb. 12, 2014), https://www.theatlantic.com/politics/archive/2014/02/is-the-fcc-trying-to-revive-the-fairness-doctrine/457251/ (citing an example of Chairman Pai invoking the Fairness Doctrine).

[76] *See* Matthews, *supra* note 69.

[77] *See id.*

[78] *See* Robert Zelnick, *Politics and the Fairness Doctrine*, BOSTON.COM (Mar. 7, 2009), http://archive.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/03/07/politics_and_the_fairness_doctrine/.

[79] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 383 (1969) ("[B]roadcast frequencies are limited and, therefore, they have been necessarily considered a public trust.").

same microphone.[80] The Communications Act of 1934[81] created the FCC and charged the agency with regulating radio,[82] along with cable,[83] telegraph,[84] and telephone systems.[85] The Congressional solution to managing access to radio was to have the Commission grant stations exclusive licenses for specific frequencies, necessarily excluding other speakers from using the "public good" of the airwaves to voice their messages[86] and birthing the concept of spectrum scarcity.[87] Beginning in 1929, the Commission agreed to hear complaints from those denied by stations an opportunity to express their views.[88] This acknowledgement of citizens' standing was the underpinning of the idea that, because airwaves are a public good, those granted licenses had a duty to use their stations in the public interest and should be regulated to ensure they do so.[89] This policy evolved through case law until 1949,[90] when an FCC report—drawing on statutory authorization from Section 326 of the Communications Act of 1934 and its legislative history—established the Fairness Doctrine's two parts. First, broadcasters were required to air issues that were "so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely."[91] Second, broadcasters had an "affirmative duty" to provide an opportunity for dueling positions on these issues.[92] This duty arose from the right of the public to have access to information "rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter," as it is the

[80] McDowell, Remarks at the Media Institute, *supra* note 60.
[81] 47 U.S.C. § 151 (2012).
[82] *Id.*
[83] United States v. Midwest Video Corp., 406 U.S. 649 (1972).
[84] *See* Weiss v. United States, 308 U.S. 321, 328 ("The Government correctly asserts that the main purpose of the Communications Act of 1934 was to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications as well as those by radio.").
[85] *Id.*
[86] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 167 (1973).
[87] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375–76 ("Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.").
[88] *See* McDowell, Remarks at the Media Institute, *supra* note 60.
[89] *See* Dan Fletcher, *The Fairness Doctrine*, TIME (Feb. 20, 2009), http://content.time.com/time/nation/article/0,8599,1880786,00.html.
[90] T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FIFTH ESTATE 183 (7th ed. 2008).
[91] The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 10 (1974).
[92] Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1251 (1949).

"foundation stone of the American system of broadcasting."[93] This report is generally regarded as the moment when the Doctrine took effect, lasting nearly four decades until it was abandoned in 1987.[94]

The Supreme Court upheld the doctrine most famously in the 1969 *Red Lion* decision,[95] finding lawful an FCC order to a radio station to provide a journalist who was attacked by a clergyman/commentator during the station's program an opportunity to respond on air.[96] The Court based its decision on the scarcity principle, holding that because broadcast stations are limited in number by the electromagnetic spectrum, the government had the right to regulate them in the public interest.[97] It added an additional reason a few years later: television and radio users constitute a "captive audience," in that unlike newspaper readers who can actively flip through material and ignore articles and advertisements, broadcast audiences are subject to whatever content is transmitted over the finite number of stations at any given time and therefore have less choice.[98] But the Court stated that constitutional questions would need to be revisited if the Doctrine ever proved to reduce diversity of opinion by stymieing speech rather than promoting a wide range of viewpoints.[99]

In 1985, the FCC issued a report following a study of the Fairness Doctrine's effects on broadcasters.[100] The report found that the rule had a chilling effect on free speech by making broadcasters wary of airing views on many topics, and that it often inadvertently favored corporate interests at the expense of less-financed and less-organized citizen coalitions.[101]

The FCC voted to abolish the Fairness Doctrine in 1987 for three main reasons: it allowed government to question the news judgments of broadcasters, threatening the First Amendment bulwark of a free press; it chilled speech, as broadcasters avoided airing controversial issues that would invite complaints; and finally, emerging technology (think cable

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[93] *Id.* at 1249.
[94] WAYNE OVERBECK & GENELLE BEIMAS, MAJOR PRINCIPLES OF MEDIA LAW 489 (2013 ed. 2013).
[95] Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).
[96] *Id.* at 367.
[97] *Id.*
[98] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1973).
[99] *Red Lion Broad. Co.*, 395 U.S. at 393 ("And if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.").
[100] Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C. 2d 142, 145 (1985).
[101] Dominic E. Madworkdt, *More Folly Than Fairness: The Fairness Doctrine, The First Amendment, and the Internet Age*, 22 REGENT U.L. REV. 405, 419 (2010).

television) rendered the "scarcity" rationale of the court moot.[102] The agency formally erased the policy from the Code of Federal Regulations in 2011.[103] Yet in the interim, the issue was far from settled, a perennial flashpoint. Congress drafted legislation to statutorily reinstate the Doctrine at least three times during four presidential administrations following its demise, most recently within the Media Ownership Reform Act of 2005.[104] In 2007, after several Democratic senators called for reinstatement of the Doctrine in an effort to curb the influence of conservative talk radio, the House of Representatives voted 309-115 to bar the FCC from bringing it back.[105] But except for President Clinton, who lost control of Congress in 1994, and with it any hope of legislating the Fairness Doctrine, every chief executive from President Reagan to President Obama has publicly opposed it. Though he has remained mostly silent on the controversy, a recent pair of tweets[106] from President Trump prompted some to speculate that he was calling for its return.[107] During the campaign, candidate Trump seemed to disparage the Doctrine in linking it to net neutrality,[108] a point of view discussed below.

The Fairness Doctrine remains a perennial issue. While prominent policymakers no longer call for it by name, many fear the objectives of the Doctrine are being pursued through other policies, such as localism. Localism involves a system of community advisory boards that monitor broadcast stations' content and advise the FCC on whether to renew the stations'

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[102] OVERBECK & BEIMAS, *supra* note __.

[103] Brooks Bolieck, *FCC Finally Kills Off Fairness Doctrine*, POLITICO (Aug. 22, 2011, 3:22 PM), http://www.politico.com/story/2011/08/fcc-finally-kills-off-fairness-doctrine-061851.

[104] *See* WAYNE OVERBECK & GENELLE BEIMAS, MAJOR PRINCIPLES OF MEDIA LAW 478 (2012 ed. 2012); Dan Fletcher, *The Fairness Doctrine*, TIME (Feb. 20, 2009), http://content.time.com/time/nation/article/0,8599,1880786,00.html.

[105] Alexander Bolton*, Fairness Doctrine Hammered 309-115*, THE HILL (June 28, 2007, 6:27 PM), http://thehill.com/homenews/news/12435-fairness-doctrine-hammered-309-115.

[106] Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 7, 2017, 7:00 AM), https://twitter.com/realDonaldTrump/status/916634286811435008 ("Late Night host are dealing with the Democrats for their very 'unfunny' & repetitive material, always anti-Trump! Should we get Equal Time?"); Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 7, 2017, 5:04 AM), https://twitter.com/realDonaldTrump/status/916635236238274561 ("More and more people are suggesting that Republicans (and me) should be given Equal Time on T.V. when you look at the one-sided coverage?").

[107] Bernie Kohn, *Trump Raises Possibility of Restoring Fairness Doctrine on TV*, BLOOMBERG (Oct. 7, 2017, 10:02 AM), https://www.bloomberg.com/news/articles/2017-10-07/trump-raises-possibility-of-restoring-fairness-doctrine-on-tv.

[108] Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 12, 2014, 10:58 AM), https://twitter.com/realdonaldtrump/status/532608358508167168?lang=en ("Obama's attack on the internet is another top down power grab. Net neutrality is the Fairness Doctrine. Will target conservative media.").

licenses, potentially compromising the stations' independence by pressuring them to please advisory board members. Then-Commissioner Pai was not alone in expressing concern that the FCC's Critical Information Needs study was a move toward a renewed Fairness Doctrine.[109] In December 2013, sixteen Republican members of the House Committee on Energy and Commerce sent then-FCC Chairman Wheeler a letter blasting the study as a "Fairness Doctrine 2.0."[110] Others allege that Fairness Doctrine proponents, smarting from recent legislative defeats, have backed off broadcast to pursue broadband.[111] Commentators have regarded net neutrality with suspicion, questioning whether the FCC's then-new policy could pave the way for future rules governing online political content.[112] Senator Ted Cruz of Texas has called net neutrality "Obamacare for the Internet."[113] But is it a Fairness Doctrine for the Internet? The idea that net neutrality would be a means toward regulating online political speech has been met with widespread ridicule.

B. The Net Neutrality Debate Is Not Going Away, And Its Implications for Shaping Content Should Not Be Ignored

Most commentary concerning net neutrality deals with how ISPs transmit content, whether Title II, which is discussed below, is the proper framework for regulation, and the economics of net neutrality applied to producers and consumers of Internet service. But there has been a First Amendment aspect to the debate, and its ramifications for how net neutrality could influence online content should not be overlooked.

While the FCC has reversed course on net neutrality by effectively repealing the Open Internet Order, the latter remains important for at least two reasons. First, there is nothing to stop the FCC under a future administration from reprising net neutrality as official U.S. policy, and it is doubtful that its supporters will drop the issue any time soon. Democratic Senators recently introduced a resolution of disapproval under

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[109] *See* Pai, *supra* note 17 and accompanying text.
[110] Letter from Fred Upton, Former Chairman, H. Comm. on Energy & Commerce, et al. to Tom Wheeler, Former Chairman, FCC (Dec. 10, 2013), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20131210FCC.pdf.
[111] BRAD O'LEARY, SHUT UP, AMERICA!: THE END OF FREE SPEECH 96–97 (2009).
[112] Adam D. Thierer, *A Fairness Doctrine for the Internet*, CITY J. (Oct. 18, 2007), http://www.city-journal.org/html/eon2007-10-18at.html.
[113] Ted Cruz (@SenTedCruz), TWITTER (Nov. 10, 2014, 7:43 AM), https://twitter.com/sentedcruz/status/531834493922189313; *see also*, Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 12, 2014, 10:58 AM), https://twitter.com/realdonaldtrump/status/532608358508167168?lang=en ("Obama's attack on the internet is another top down power grab. Net neutrality is the Fairness Doctrine. Will target conservative media.").

the Congressional Review Act to override the Restoring Internet Freedom order.[114] Though one vote shy of the required 51 needed in the Senate and bereft of any chance it will pass the House or be signed by President Trump, the gesture sets up an election issue many Democrats see as a winning one.[115] State attorneys general have announced lawsuits against the new order,[116] while state lawmakers have introduced net neutrality legislation.[117] Second, if net neutrality were to make a comeback, it could arrive in something very similar to the Open Internet Order. The latter was a product of trial and error, the FCC's third attempt after losing twice to court challenges. Net neutrality could also open the door to, or be a step toward, platform, app, search and/or content neutrality.

If the substance of the Open Internet Order were to be reinstated by a future administration, the FCC would be the new referee of the Internet. While that may not affect users' online experiences in the short term, it could have consequences for the Internet in the future.[118] Net neutrality, a term coined by Tim Wu, a Columbia Law professor and advocate for greater government control of online political content, refers to the principle that ISPs must transmit all online content in a 'neutral' fashion.[119] This means that ISPs cannot block content from reaching their users, cannot speed up or slow down content, or enter into "paid prioritization" arrangements with content providers to give them preferential treatment. Net neutrality supporters believe these rules will best protect users from potential abuses by ISPs.[120] They seem to fear ISPs' control over the Internet more than control by government.[121] Net neutrality critics, by contrast, fear government intrusion into the Internet more than unfettered ISPs. They argue that FCC control of the Net will drive up

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[114] John Hendel & Ashley Gold, *Democrats Introduce Resolution to Reverse FCC Net Neutrality Repeal*, POLITICO (Feb. 27, 2018, 11:38 AM), https://www.politico.com/story/2018/02/27/democrats-fcc-reverse-net-neutrality-426641.

[115] *Id.*

[116] Klint Finley, *After FCC Abandons Net Neutrality, States Take Up The Fight*, WIRED (Dec. 15, 2017, 6:00 AM), https://www.wired.com/story/after-fcc-abandons-net-neutrality-states-take-up-the-fight/.

[117] Cecilia Kang, *States Push Back Against Net Neutrality Repeal*, N.Y. TIMES (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/technology/net-neutrality-states.html.

[118] Brian Fung, *Net Neutrality Takes Effect Today. Here's How it Affects You*, WASH. POST (June 12, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/06/12/net-neutrality-takes-effect-today-heres-how-it-affects-you/.

[119] Tim Wu, A Proposal for Network Neutrality (2002) (unpublished proposal), http://www.timwu.org/OriginalNNProposal.pdf.

[120] Daniel Lyons, *Net Neutrality: A Primer*, AEI: AEIDEAS (Nov. 28, 2017, 6:00 AM), http://www.aei.org/publication/net-neutrality-a-primer/.

[121] *Id.*

costs, stifle innovation, and perhaps compromise Internet speeds.[122] Most of the public debate over net neutrality has been about its effects on the cost and quality of Internet service, and whether the free market or government regulation is better able to maximize the Internet's potential while protecting its consumers. But Tribe and others have questioned the Order's accordance with the First Amendment rights of ISPs.[123]

The FCC attempted to promulgate net neutrality in a binding rule in 2014, but the U.S. Court of Appeals for the District of Columbia Circuit struck it down.[124] The court held that the FCC lacked jurisdiction over the Internet because the medium was then classified under Title I of the Communications Act of 1934 as an information service.[125] In March 2015, the FCC issued its Open Internet Order, which attempted to resolve its lack of authority by reclassifying the Internet as a telecommunications service covered under the Act.[126] This essentially put the Internet on par with telephone networks and empowered the FCC to exert comparable oversight. Because many telephone regulations would be ill-suited if applied to the Web, the FCC exercised forbearance in issuing the Order by exempting the Internet from many of the Title II regulations applicable to telecommunications services, and instead applying only fourteen sections from Title II—at least at the time.[127] In June 2016, the D.C. Circuit upheld the new order.[128] Recently, however, the FCC voted 3-2 in favor of a proposed rule, "Restoring Internet Freedom," that scraps the Open Internet Order altogether, or at least until a future administration reinstates it.[129] Now published in final form, the order awaits approval by the Office of Management and Budget.[130] Writing a day after Chairman Pai unveiled the proposed rule, Tim Wu predicted a court would strike it down, presumably because the rule lacked sufficient evidentiary support for such a significant departure from the Open Internet Order.[131] In any case, these developments underscore an

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[122] *Id.*
[123] Tribe & Goldstein *supra* note 56.
[124] Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).
[125] *Id.* at 638.
[126] *In re* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5603 (2015).
[127] *Id.*
[128] U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).
[129] *In re* Restoring Internet Freedom, 32 FCC Rcd. 4434 (2017).
[130] Restoring Internet Freedom, 83 Fed. Reg. 7852 (Feb. 28, 2018) (to be codified at 47 C.F.R. pts. 1, 8, and 20).
[131] Tim Wu, *Why the Courts Will Have to Save Net Neutrality*, N.Y. TIMES (Nov. 22, 2017), https://www.nytimes.com/2017/11/22/opinion/courts-net-neutrality-fcc.html?_r=0; *see also* 5 U.S.C. § 706(2)(E) (2012) (directing the reviewing court to

underlying reality: that absent a Supreme Court ruling, the net neutrality debates will likely endure in perpetuity, perhaps as a political struggle played out every time a new president is elected.

In an era of media convergence, when TV, radio, print, and cable content are consolidated on the single medium of the Internet, it is at least plausible that Fairness Doctrine proponents would abandon the unsuccessful strategy of reimposing the rule on broadcast in order to pursue the much more enticing prospect of regulating political content on the Internet.[132] Tech scholar Brent Skorup has drawn attention to Wu's own admission before Congress that Wu's ideal role for the FCC goes beyond that of a mere traffic cop monitoring transmission speeds: net neutrality is needed so that the FCC has the ability to shape "media policy, social policy, oversight of the political process, [and] issues of free speech."[133]

Because the Open Internet Order granted the FCC greater purview over ISPs by reclassifying them as common carriers, it afforded the FCC the familiar rationale of regulating a public utility (broadband access) for a public good. This good may become even more "public" as government invests taxpayer resources in developing the nation's broadband infrastructure to promote access,[134] as well as by reallocating broadcast frequencies for wireless broadband channels. As Rep. Marsha Blackburn, R-Tenn., Chairman of the House Committee on Energy and Commerce's Subcommittee on Communications and Technology, noted: "I've been very concerned about net neutrality turning out to be the Fairness Doctrine of the Internet, and having that applied to websites."[135] She echoes observers' concerns that European Union advisory boards have called for a "Web fairness doctrine" requiring websites from those of small blogs to big news organizations to

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"set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence").

[132] Thierer, *supra* note 112.

[133] Brent Skorup, Comment Letter on Proposed Rule Restoring Internet Freedom (Aug. 30, 2017), https://www.mercatus.org/system/files/skorup-restoring-internet-freedom-mercatus-comment-v1.pdf (citing *Net Neutrality: Is Antitrust Law More Effective Than Regulation in Protecting Consumers and Innovation?*, *Hearing Before the Subcomm. on Reg. Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 70 (2014) (statement of Tim Wu, Professor of Law, Columbia Law School)).

[134] U.S. GOV'T ACCOUNTABILITY OFFICE,GAO-09-751, TELECOMMUNICATIONS: BROADBAND DEVELOPMENT PLAN SHOULD INCLUDE PERFORMANCE GOALS AND MEASURES TO GUIDE FEDERAL INVESTMENT (2013).

[135] Rudy Takala, *Lawmaker Warns That FCC Rules Could Crush Political Websites*, WASH. EXAM'R (Nov. 17, 2015, 12:01 AM), http://www.washingtonexaminer.com/lawmaker-warns-that-fcc-rules-could-crush-political-websites/article/2576503 .

post opposing viewpoints or face fines.[136] That regulation of ISPs, entities that provide Internet access, could lead to regulation of "edge providers," entities that provide online content and services, is a prospect mulled by many experts who see ISPs and edge providers as part of an inseparable virtuous-cycle ecosystem.[137] Because the line between what constitutes a telecommunications service versus an information service is blurry, the FCC could parse the nature of the services offered by edge providers to eventually classify them as telecommunications services subject to Title II regulation.[138] The intentions of the 2015 order's drafters and their decision to exercise forbearance in applying other provisions of Title II would not bar a future FCC from going further.[139] In doing so, they could affect the speech of edge providers. Former FCC Chairman Tom Wheeler reflects the view of many that such concerns are misplaced and that net neutrality would have little effect on Internet political speech. "This is no more a plan to regulate the Internet than the First Amendment is a plan to regulate free speech."[140]

In any event, developments in Europe, calls for regulation of online platforms, and protests of those suspended or banned from online services promise to keep net neutrality, platform neutrality, and their underlying First Amendment implications front and center in the public debate.

C. Whether the FCC Could Hatch a Fairness Doctrine 2.0 Depends on Both its Statutory and Constitutional Authority.

Judging whether critics of net neutrality are justified in their concern for free speech requires determining first whether the FCC could interpret its governing statutes as authorizing it to regulate the substance of content in addition to how it is transmitted, and whether it could regulate edge providers in addition to ISPs. Though it has been superseded, one could scour the 400-page Open Internet Order for express grounds to establish a web-based Fairness Doctrine, or for a rationale that could support a future content-based rule. If it does not, then the next question is whether that Order's reclassification of the Internet from an information service to a telecommunications service, by itself, empowers the FCC more broadly to create a

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[136] Brian C. Anderson, *Hands off the Net*, CITY J. (June 28, 2006), http://www.city-journal.org/html/eon2006-06-28ba.html.
[137] Kovacs, *supra* note 63.
[138] *Id.*
[139] *Id.*
[140] Cecilia Kang & Brian Fung, *The FCC Approves Net Neutrality Rules*, WASH. POST (Feb. 26, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/02/26/the-fcc-set-to-approve-strong-net-neutrality-rules/.

Fairness Doctrine down the road. Absent new telecommunications legislation, a future FCC would need both a statutory basis and an interpretation of that basis that passes constitutional muster.

III. ANALYSIS

A. The FCC Could Rely on a Reclassification of the Internet as a Title II Telecommunications Service, along with Authority Derived from Section 706 of the Telecommunications Act of 1996, as a Blueprint for Regulating the Content of Edge Providers in the Future.

In his statement dissenting from the 2015 Open Internet Order, then-Commissioner Pai warned that the rule "gives the FCC the power to micromanage virtually every aspect of how the Internet works."[141] If the Restoring Internet Freedom order is struck by a court or the Open Internet Order's provisions are reinstated by a future FCC, the Commission will need to pass three tests before exercising any authority over edge providers or the content of online speech: it must act pursuant to a valid rule, properly derived from lawful statute, within the bounds of the Constitution. At first glance, the 2015 Order does not appear to govern edge providers or the substance of online content. It referred specifically to ISPs in the "last-mile" of Internet service, so it seemed to exclude edge providers from the ambit of its express provisions.[142] While ISPs theoretically could, and often do, provide content at points of access (think start-up pages), the Order did not appear to include explicit expressive restrictions or requirements pertaining to ISPs. As part of its reclassification, the Order applied fourteen Title II sections to the Internet.[143] But aside from proscribing "unjust and unreasonable" practices[144] in the context of speeding up, slowing down, blocking, or entering into paid prioritization agreements with content providers, there is nothing spelled out in the Order that directly involves the FCC in regulating speech or expression.

But if there was a Trojan horse in the Order, it was the so-called "General Conduct Rule" which read as follows:

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[141] *In re* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5921 (2015) (Pai, Comm'r, dissenting).
[142] *Id.* at 5611, 5915 (2015); *see also* Marguerite Reardon, *13 Things You Need to Know About the FCC's Net Neutrality Regulation*, CNET (Mar. 14, 2014, 5:00 AM), http://www.cnet.com/news/13-things-you-need-to-know-about-the-fccs-net-neutrality-regulation/.
[143] *Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5603.
[144] *Id.* at 5726–27.

> Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.[145]

As possibly the most controversial provision of the Order, the General Conduct Rule drew criticism from both supporters and opponents of net neutrality.[146] It purported to supplement three bright-line rules (no blocking, throttling, or paid prioritization) with a fourth and more flexible tool for preventing ISPs from engaging in unforeseen conduct deemed harmful to an "open" Internet.[147] This rule was explained by reference to a list of seven "non-exhaustive" factors: (1) end-user control; (2) competitive effects; (3) consumer protection; (4) effects on innovation, investment, or broadband deployment; (5) free expression; (6) application on an agnostic basis (nondiscrimination against end-users); and (7) standard practices.[148] Each factor was described in a short paragraph.[149]

Given that one of seven factors was the impact on free speech and expression, at least one commentator asserted that the FCC could use the General Conduct Rule to decree something very close to the Fairness Doctrine: finding websites too one-sided as to threaten free speech by not providing sufficient coverage to contrary views.[150] Even among those who did not go so far, critics complained that the rule created too much uncertainty.[151] They argued that ISPs would be dissuaded

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[145] *Id.* at 5609.
[146] Alina Seyukh, *On U.S. Net Neutrality Rules, 11th-Hour Push Against Vague Rule*, REUTERS (Feb. 20, 2015, 4:51 PM), https://www.reuters.com/article/usa-internet-neutrality/on-u-s-net-neutrality-rules-11th-hour-push-against-vague-rule-idUSL1N0VU01W20150220.
[147] *Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5659–60.
[148] *Id.* at 5661–64.
[149] *Id.*
[150] Jonathan Hauenschild, *How the Obama Administration Tried to Use Bureaucrats to Crack Down on Free Speech*, THE HILL (June 14, 2017, 8:40 AM) http://thehill.com/blogs/pundits-blog/technology/337718-how-the-obama-administration-tried-to-use-bureaucrats-to-crack.
[151] Seyukh, *supra* note 146.

from innovation and investment;[152] companies with deep pockets[153] and close ties to the Commission would have an unfair advantage;[154] consumers would not know when they had a valid complaint;[155] and the FCC would have a blank check to ban practices it did not like.[156] Even then-Chairman Wheeler was unsure of the boundaries cabining the FCC's new authority. When asked at a press conference to outline the General Conduct Rule's parameters, he replied, "We don't really know. We don't know where things go next."[157]

The petitioners in *United States Telecom* challenged the General Conduct Rule as unconstitutionally vague, but the D.C. Circuit was not persuaded.[158] It found the seven factors and the paragraphs explaining them provided enough context to satisfy due process concerns, writing "we can never expect mathematical certainty from our language."[159]

It is possible, though not entirely probable, that a future FCC would rely on something very similar to the General Conduct Rule to police edge providers. Consider the language of the free expression factor:

> Practices that threaten the use of the Internet as a platform for free expression would likely unreasonably interfere with or unreasonably disadvantage consumers' and edge providers' ability to use BIAS to communicate with each other, thereby causing harm to that ability. Further, such practices would dampen consumer demand for broadband services, disrupting the virtuous cycle, and harming end user and edge provider use of the Internet under the legal standard we set forth today.[160]

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[152] Corynne McSherry, *Dear FCC: Rethink The Vague "General Conduct" Rule*, ELEC. FRONTIER FOUND. (Feb. 24, 2015), https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules.
[153] Allen Gibby, *The Internet Conduct Rule Must Die*, TRUTH ON THE MARKET (May 18, 2017), https://truthonthemarket.com/2017/05/18/the-internet-conduct-rule-must-die/.
[154] McSherry, *supra* note 152.
[155] Seyukh, *supra* note 146.
[156] Gibby, *supra* note 153.
[157] *February 2015 Open Commission Meeting*, FED. COMMC'N COMM'N, https://www.fcc.gov/news-events/events/2015/02/february-2015-open-commission-meeting (last visited Apr. 5, 2018).
[158] U.S. Telecom Ass'n v. FCC, 825 F.3d 674,734–36 (D.C. Cir. 2016).
[159] *Id.* at 736.
[160] *In re* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5663 (2015).

The sixth factor's description also provides empowering language for a more activist FCC:

> Application-agnostic (sometimes referred to as use-agnostic) practices likely do not cause an unreasonable interference or an unreasonable disadvantage to end users' or edge providers' ability to use BIAS to communicate with each other. Application-agnostic practices do not interfere with end users' choices about which content, applications, services, or devices to use, nor do they distort competition and unreasonably disadvantage certain edge providers. As such, they likely would not cause harm by unreasonably interfering with or disadvantaging end users or edge providers' ability to communicate using BIAS.[161]

While these provisions were crafted in the context of regulating ISPs, the positions expressed are similar to France's Conseil National du Numérique's rationale for implementing a policy of platform neutrality, which is set off in bold type in the commission's report: "The goals behind the neutrality principle should also be factored into the development of digital platforms: while extremely useful and innovative, their growth must not be allowed to hamper the use of Internet as a forum for creation, free expression and the exchange of ideas."[162]

These factors suggest that online entities that prevent Internet users from transmitting and receiving the content of their choice could be in violation of the Order's substance, illustrating that other types of neutrality are not as far removed as a cursory reading of the rule may indicate. The Order was directed at companies who provide access to the Internet, so a future FCC would likely need a more expansive rule to apply these conduct standards to platforms and other edge providers.

But a reclassification under Title II of the Communications Act of 1934 essentially makes ISPs common carriers that must act in the public interest. One prevailing interpretation is that ISPs are like public utility companies providing electricity.[163] As such, they have been granted

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[161] *Id.* at 5663–64.

[162] CONSEIL NATIONAL DU NUMÉRIQUE, PLATFORM NEUTRALITY: BUILDING AN OPEN AND SUSTAINABLE DIGITAL ENVIRONMENT 6 (2014), https://ec.europa.eu/futurium/en/system/files/ged/platformneutrality_va.pdf.

[163] Neil Irwin, *A Super-Simple Way to Understand the Net Neutrality Debate*, N.Y. TIMES (Nov. 10, 2014), http://www.nytimes.com/2014/11/11/upshot/a-super-simple-way-to-understand-the-net-neutrality-debate.html?_r=1.

government permission to harness and provide the public good of the Internet, and as a condition of such permission, they must adhere to government rules of conduct.[164]

The common carrier interpretation carried the day with the D.C. Circuit.[165] It found the Commission's reclassification under Title II permissible and dismissed arguments that broadband service was distinguishable from other forms of common carriage.[166] The court held that, like telephone and telegraph networks, ISPs facilitate a neutral platform for speech purposes.[167] But it went on to acknowledge a hypothetical: ISPs that went beyond providing access to the entire Internet to instead offer less than "substantially all" websites would be engaging in content curation, thereby exercising First Amendment speech.[168] Brent Skorup points out that this might actually encourage ISPs to engage in censorship or content discrimination in order to escape the ambit of what was in the Open Internet Order.[169] Under those circumstances, the curating ISP would be cloaked with Section 230 of the Communications Decency Act,[170] which Skorup notes is inconsistent with the Title II rationale that ISPs are mere conduits in the same way that telephone networks are.[171] This suggests that at a minimum, net neutrality has the potential to shape content indirectly by encouraging ISPs to curate or restrict content, a form of indirect censorship. Recall that this was a criticism of the Fairness Doctrine—that stations would refuse to publish some content altogether to avoid running afoul of the FCC. Because profit-seeking companies will respond to popular preferences and pressure, ISPs would likely ban unpopular speech as part of any efforts at content curation. But unpopular speech is precisely the sort of speech the First Amendment was designed to protect.[172]

Title II of the Communications Act of 1934 is not the only possible statutory justification for this paradigm. During the net neutrality debates, advocates differed over how the FCC was to respond to the D.C. Circuit's 2014 decision[173] denying

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[164] *Id.*
[165] *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740 (D.C. Cir. 2016).
[166] *Id.* at 740–42.
[167] *Id.* at 742.
[168] *Id.* at 743.
[169] Skorup, *supra* note 133.
[170] 47 U.S.C. § 230(c) (2012).
[171] Skorup, *supra* note 133.
[172] FCC v. Pacifica Found., 438 U.S. 726, 745 (1978).
[173] Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

the agency's second attempt at net neutrality.[174] While most proponents saw Title II as the way forward, then-Chairman Wheeler favored two paragraphs from Section 706 of the Telecommunications Act of 1996 as the appropriate source of FCC authority.[175] The Open Internet Order relied on both statutes.[176]

Opponents of the rule argue the FCC could potentially wield much of the power it held over broadcast stations against ISPs by relying on Section 706.[177] The section reads in pertinent part that the FCC:

> Shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, *in a manner consistent with the public interest*, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[178]

Such authority suggests, that at the very least, the FCC may rely on the public interest rationale that undergirded the Fairness Doctrine. Harold Feld, senior vice president of Public Knowledge, a nonprofit that supports net neutrality, said the FCC's authority could even extend to edge providers who use the Internet to distribute their content.[179] Judge Silberman of the U.S. Court of Appeals for the D.C. Circuit warned in the 2014 *Verizon v. FCC* decision that the FCC's reclassification under Section 706 "would virtually free the Commission from its congressional tether" by giving it "virtually unlimited power to

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[174] Fran Berkman, *Title II is the Key to Net Neutrality—So What is it?* DAILY DOT (May 20, 2014, 7:04 AM), http://www.dailydot.com/politics/what-is-title-ii-net-neutrality-fcc/.
[175] John Healey, *FCC's Wheeler Tries New Sales Pitch for Net Neutrality Proposal*, L.A. TIMES (May 12, 2014, 4:06 PM), http://www.latimes.com/opinion/opinion-la/la-ol-net-neutrality-fcc-wheeler-backpeddle-20140512-story.html.
[176] *In re* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5603 (2015).
[177] Marguerite Reardon, *Worried about Net Neutrality? Maybe it's the FCC that Should Really Concern You*, CNET (Jan. 23, 2014, 4:00 AM), http://www.cnet.com/news/worried-about-net-neutrality-maybe-its-the-fcc-that-should-really-concern-you/.
[178] Telecommunications Act of 1966, Pub. L. No. 104-104, § 706(a), 110 Stat. 56, 153 (codified as amended at 47 U.S.C. § 1302(a) (2012)) (emphasis added).
[179] Reardon, *supra* note 177.

regulate the Internet."[180] Though the Order seems to rely more on Title II of the 1934 Act, Section 706 could provide additional cover for future FCC control of the Internet, and it might even prove more resilient in withstanding a court challenge.

In a sense, Title II reclassification relies on a public *utility* theory based on the *duties* of ISPs,[181] while the 706 approach focuses on a public *interest* theory emphasizing the FCC's *responsibilities* as a steward of the public good. While the Internet's infrastructure is largely the product of private investment, one can regard the "ether" of the World Wide Web as a public *good*, perhaps even as *public property* justifying FCC regulation, albeit without it being a scarce resource in the same way the electromagnetic spectrum is.

That this public good or public property is a public *forum* is a short step from a statutory interpretation into a constitutional argument. Professor Dawn Nunziato laments the lack of truly public spaces on the Internet, arguing that the medium has become indispensable for the exercise of meaningful First Amendment rights.[182] She surveys alternative views of First Amendment protection.[183] The more widely recognized, and perhaps more generally accepted, view is that the First Amendment is a check against government encroachment on speech—that it enshrines a negative liberty.[184] Another take regards the First Amendment as a positive right, as a facilitator of free speech.[185] This view is reflected in the Supreme Court's public forum doctrine, which holds the state responsible for setting aside public spaces where First Amendment rights can be exercised free of censorship.[186] Nunizato argues that courts and policymakers must ensure that adequate public forums exist on the Internet.[187] Professor Noah Zatz concurs, calling for government to play an active role not only in providing public forums, but in ensuring that the ever-expanding Web is organized in a way that achieves diversity of opinion.[188] Such a right to speak online is arguably closely

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[180] Verizon v. FCC, 740 F.3d 623, 662 (D.C. Cir. 2014) (Silberman, J., concurring in part, dissenting in part).
[181] Though the Order imposes common carrier obligations on ISPs, it reflects the nascent view that providing Internet access is an essential public service.
[182] Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH L.J. 1115, 1117–18 (2005).
[183] *Id.* at 1117.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.* at 1171.
[188] Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 210–12 (1998).

related to a right of association, a Fourteenth Amendment Due Process protection most famously enunciated by the Supreme Court in *NAACP v. Alabama*.[189] Along this line of reasoning, individuals have a right to connect with one another online, in chat rooms, on social media, or on domain-name registered sites.

Indeed, these are exactly the arguments that Prager University makes in its lawsuit against YouTube.[190] Prager University is "a nonprofit that produces short educational videos from conservative perspectives," usually featuring computer animations and a professor or expert who seeks to counter a popular liberal or media narrative.[191] More than three dozen Prager University videos have been placed in restricted mode within the last year, depriving the nonprofit of advertising revenue and of much of its targeted audience, university students.[192] In its complaint, Prager University makes a First Amendment claim, alleging that YouTube violated both its right to speak and its right to assemble within the public forum of the Internet.[193] It goes on to state that, because YouTube held itself out as a public forum on the Internet, it became a state actor in regulating speech on its site and engaged in viewpoint discrimination by censoring Prager University videos.[194] Such lawsuits are likely to be increasingly common so long as platforms censor or ban particular users based on their politics.

One need not subscribe to the public good or public forum view of the Internet to recognize that the public utility/common carrier rationale of the Title II approach suggests that ISPs are merely conduits of broadband service, not independent entities with the right to decide what content reaches their users. This directly conflicts with the view that ISPs are First Amendment speakers with the right to make editorial decisions about the content they transmit. Such an interpretation could invite the FCC (and perhaps the FEC) to ensure that ISPs engaging in content curation—and perhaps platforms and other edge providers—do not discriminate against certain speakers, setting up a fight over free speech.

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[189] 357 U.S. 449, 466 (1958).
[190] Complaint at 34, Prager University v. Google, No. 5:17-cv-06064-LHK (N.D. Cal. filed Oct. 23, 2017), http://www.bgrfirm.com/wp-content/uploads/2017/10/PRAGER_U-_v_GOOGLE-YOUTUBE_complaint_10-23-2017_FILED.pdf.
[191] Ian Lovett & Jack Nicas, *PragerU Sues YouTube in Free Speech Case*, WALL ST. J. (Oct. 23, 2017, 10:24 PM), https://www.wsj.com/articles/prageru-sues-youtube-in-free-speech-case-1508811856.
[192] *Id.*
[193] *See* Complaint, *supra* note 190, at 35.
[194] *Id.* at 32.

Former Chairman Wheeler stated in 2014 that while the Commission is not going to take over the Internet, it would not "abandon its responsibility to oversee that broadband networks operate in the public interest" and that it was "committed to maintaining our networks as conduits" "for channels of all of the forms of speech protected by the First Amendment."[195] Though the implications of this pledge can be debated, the reference to the First Amendment portends a powder-keg of a controversy that may erupt in future net neutrality skirmishes, particularly if future commissioners have more ambitious regulatory goals.

Since the early days of dial-up service, prominent voices have called for government regulation of speech on the Internet. For example, Cass Sunstein challenged the very precept of the Web as a "marketplace of ideas," arguing that democracy will be disserved by a free Internet, because users will seek only websites that reinforce their existing viewpoints.[196] His solutions include taxpayer subsidized speech and rules that require websites to carry viewpoints opposed to the statements expressed on those sites.[197]

Sunstein's proposal raises the following question: What exactly would be regulated, and by whom? His policy prescriptions, along with those of other proponents of increased Internet content regulation like Professor Andrew Chin, have been directed at websites.[198] Former FEC Commissioner Ravel's proposed rules would apply to individual campaign websites and creations like videos.[199] The Fairness Doctrine applied to radio and TV stations and their broadcasts, which principally entailed news and public access programming.[200] But would an Internet Fairness Doctrine apply to all edge providers, every website, to news-focused websites, or only those of broadcast license holders that publish their TV or radio content online? Initially, the First Amendment-based net neutrality debates focused almost exclusively on ISPs, large companies that provide access to the content of individual websites. These companies include AT&T, Comcast, Cox, Verizon, and Spectrum. The Open Internet Order specifically

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[195] Press Release, Tom Wheeler, Former Chairman, FCC, Ensuring an Open Internet Now and for the Future (Jan 14, 2014), https://www.fcc.gov/news-events/blog/2014/01/14/ensuring-open-internet-now-and-future.
[196] Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1780 (1995).
[197] *Id.* at 1798–99.
[198] Andrew Chin, *Making The World Wide Web Safe for Democracy: A Medium-Specific First Amendment Analysis*, 19 HASTINGS COMM. & ENT. L.J. 309, 330–31 (1996).
[199] *See* Statement of Vice Chair Ann M. Ravel Encouraging Public Comments, *supra* note 10.
[200] *See* Matthews, *supra* note 69 (providing an explanation of the Fairness Doctrine).

referred to Broadband Internet Access Service (BIAS).[201] Aside from access to simple websites, ISPs provide access to content-providing companies like Amazon and Netflix that create and/or distribute videos and programs.[202] Many ISPs are also content providers. For instance, Comcast owns NBCUniversal and delivers TV shows, news, and movies through its Xfinity Internet service.[203]

Today, however, it is large platforms, not ISPs, that are drawing ire from tech observers and regulators, and not just because of their anticompetitive behavior. During a one-month span in 2017, Google (along with Apple) banned the social media app Gab from its Android app store, because it did not censor its users' speech[204] and was alleged to be a haven for the alt-right.[205] It demonetized several videos it considered too controversial, and it threatened to ban publishers from using its advertising services for violating Google's ban on hate speech.[206] As Professor Adam Candeub noted, "Android and Apple's mobile app stores often practice political censorship, as have domain name and website hosting services. Kicking a website off its domain name or excluding an app from all [i]Phones restricts content creators far more than any ISP could."[207] Chairman Pai, who agrees with this assessment of the power/influence differential, recently wrote that there are questions worth raising about Silicon Valley companies' lack of transparency in the way they manage content.[208]

A challenge to any future FCC rule establishing some form of an Internet Fairness Doctrine would invite the Supreme Court to establish whether content regulations on the Internet are constitutional, and in answering this question, might

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[201] *In re* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5609–10 (2015).
[202] Mike Snider, Roger Yu & Emily Brown, *What is Net Neutrality and What Does it Mean for Me?*, USA TODAY (Feb. 27, 2015, 8:04 PM), http://www.usatoday.com/story/tech/2015/02/24/net-neutrality-what-is-it-guide/23237737/.
[203] *Id.*
[204] Hal Singer, *What To Do About Google*?, FORBES: WASH. BYTES (Sept. 8, 2017, 6:15 AM), https://www.forbes.com/sites/washingtonbytes/2017/09/08/what-to-do-about-google/#1c6dc9547001###.
[205] April Glaser, *The Internet of Hate*, SLATE (Aug. 30, 2017), https://slate.com/technology/2017/08/the-alt-right-wants-to-build-its-own-internet.html.
[206] *See* Singer, *supra* note 204.
[207] Adam Candeub, *Net Neutrality for the Broadband Goose and the Silicon Valley Gander*, FORBES: WASH. BYTES (Dec. 18, 2017, 4:26 PM), https://www.forbes.com/sites/washingtonbytes/2017/12/18/net-neutrality-for-the-broadband-goose-and-the-silicon-valley-gander/#298c101a34f1.
[208] Ajit Pai, *Restoring a Light Touch to Internet Regulations*, WASH. TIMES (Dec. 5, 2017), https://www.washingtontimes.com/news/2017/dec/5/restoring-a-light-touch-to-fcc-internet-regulation/.

establish whether ISPs are speakers for First Amendment purposes. The latter would have implications for net neutrality, as this was a key argument made by Verizon in its 2014 case. But the Court might also be faced with the constitutional status of platforms and individual websites, as well as for web-based entities somewhere in between, such as open-source software, search engines, browsers like Mozilla's Firefox, and digital-media services like Apple's iTunes. This raises three questions: (1) Would a Fairness Doctrine or some form of FCC content regulation be desirable?; (2) Would it be feasible?; and (3) Would it be constitutional?

B. The FCC Should Refrain from Regulating Political Speech on the Net

The first question is a normative one: Should the FCC exert greater influence over the Internet's political content? For the same reasons listed in the 1985 report on the Fairness Doctrine, the answer is no.[209] Most importantly, not only was the Fairness Doctrine unsuccessful in promoting a variety of opinion, but it actually had the opposite effect of hindering diverse viewpoints.[210] The Commission found that by 1985, the "multiplicity of voices in the marketplace" did a better job of giving audiences a wide range of issue perspectives than the Doctrine ever did.[211] Today, cable and the Internet have multiplied this 'multiplicity of viewpoints' many-fold beyond what the 1985 Commission could have envisioned. Secondly, the Commission decided that the Doctrine intruded too far into the journalistic freedom of broadcasters.[212]

Finally, the potential for abuse by the Fairness Doctrine is hard to ignore. Former Commissioner McDowell cites the scholarship of former CBS News president and former Columbia University professor Fred Friendly in arguing that both Democratic and Republican presidential administrations have viewed the Fairness Doctrine as a potential political weapon.[213] Gearing up for his reelection against Senator Barry Goldwater, and chagrined by talk radio opposition to his Nuclear Test Ban Treaty, President Kennedy directed aides to

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[209] *In re* Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 145, 147–48 (1985).

[210] *See id.* at 147 ("[W]e find that the fairness doctrine, in operation, actually inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists.").

[211] *Id.*

[212] *Id.* at 148.

[213] McDowell, Remarks at the Media Institute, *supra* note 60 (discussing Fred Friendly's The Good Guys, The Bad Guys and the First Amendment).

leverage the FCC against stations critical of his policy.[214] This involved an Administration operative listening to broadcasts in the basement of his Bethesda home, tape recording programming, and demanding transcripts from the stations.[215] Later, the Democratic National Committee provided kits for left-leaning advocacy groups to "harass" radio stations with threats of Fairness Doctrine litigation into providing airtime to respond.[216] Such an artifice would not be lost on the Nixon Administration.[217] Officials who were later implicated in the Watergate cover-up referred to the *Red Lion*-bulwarked Fairness Doctrine as a way to "eliminate once and for all" programs critical of the Administration.[218] Imagine future presidents resorting to a reprised Fairness Doctrine to undermine the opposition party by discouraging ISPs or websites from discussing political issues lest they be sued or fined.

C. Several Approaches to Regulating Political Speech Online Have Been Proposed, But Each is Problematic, Making Such Regulation a Bad Idea

If some form of a Fairness Doctrine were to be implemented online, at least two questions would need to be answered. First, to what would the policy apply: ISPs and edge providers alike? Second, what requirements or restrictions would it entail, a simple ban on censoring content or an affirmative duty to offer opposing viewpoints?

To avoid confusion in terminology, it must be acknowledged that net neutrality discussions frequently focus on the dichotomy of what is often called "content neutrality" and "packet neutrality."[219] Used in this sense, "content neutrality" has a viewpoint neutral connotation and instead means requiring ISPs to treat categories of data the same (videos, emails, audio clips, etc.) without discriminating within those categories based on the opinions or substance expressed, while packet neutrality means treating all categories of data the same.[220] This section discusses "content" in terms of the substance of what is conveyed rather than referring to file types or categories of data.

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[214] FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT 32–33 (1976).
[215] *Id.* at 35.
[216] *Id.*
[217] *Id.* at 131.
[218] *Id.*
[219] Sasha Leonhardt, *The Future of "Fair and Balanced": The Fairness Doctrine, Net Neutrality, and the Internet*, 8 DUKE L. & TECH. REV. 1, 13 (2009).
[220] *Id.* at 13–14.

The dichotomy between ISPs that provide connection to the Internet and edge providers that supply the content of the Net is not entirely clear-cut. Line drawing is difficult, as almost all ISPs provide sponsored content on start-up pages or through software or web-based tools, thereby engaging in some form of content curation. "Edge providers" run the gamut from powerful social media platforms like Facebook to simple webpages. Policymakers would first need to decide what to regulate.

One rationale for regulating ISPs is the noncompetitive nature of the telecommunications industry in most markets.[221] Seventy-five percent of the public has only one choice of broadband provider.[222] In contrast, a user blocked by Google can theoretically select a rival service. But is there really another search engine on par? There certainly is no comparable alternative to Facebook and Twitter, and an app booted from both the Apple and Google Play stores is effectively doomed. This suggests regulators might focus on entities with disproportionate control, influence, or market share. This might be something akin to an antitrust approach to policymaking and enforcement; albeit one focused on issues of speech and expression and less on economics and innovation. One must be mindful of the distinction between regulating based on First Amendment values and regulating based on antitrust concerns, as there are different considerations involved.[223] The latter is a topic unto itself and not the subject of this Article. Here also, whether from an antitrust or free speech focus, line drawing is a fraught issue.

If Congress and/or the FCC were to heed calls for platform regulation, it is possible policymakers could adopt the definition "interactive computer service" from Section 230 of the Communications Decency Act[224] as its standard. This would give it broad authority to regulate ISPs, platforms, and perhaps smaller entities. This standard would help define the principal actors by capturing the major online entities and essentially reverse Section 230 in a principal way: it would remove platforms' immunity and subject them to liability for their curation choices. Enforcement discretion could fill in gaps.

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[221] Bode, *supra* note 68.
[222] *Id.*
[223] *See* Singer, *supra* note 204.
[224] 47 U.S.C. § 230(f)(2) (2012) ("The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.").

The FCC (and perhaps even the FEC in regard to campaigns and elections) would then need to flesh out a new Fairness Doctrine. The more modest and incremental approach would be to prohibit major platforms from censoring speech, essentially imposing common carrier duties on them. As Professor Candeub notes,[225] the Supreme Court has defined a "common carrier" as a "company that makes a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."[226] The FCC could rely on Title II net neutrality principles as legal justification to extend common carrier principles from ISPs to edge providers.[227] Social media companies often hold themselves out as *de facto* common carriers by describing themselves in terms similar to the Court's definition.[228] Candeub points[229] to Twitter's mission statement, which is to "[g]ive everyone the power to create and share ideas and information instantly, without barriers."[230] Aggrieved parties who are suspended or banned could then call Twitter's bluff.

The more sweeping alternative would be to establish an affirmative duty to carry content that expresses opposing views. This would be more in the spirit of the Fairness Doctrine that governed television and radio. Aside from an obligation to carry all content transmitted by users, certain entities, like platforms or chief news sources, would have a duty to actively curate content from varying perspectives. Not only could they not refuse to carry certain speech, but they would also be required to promote content that might not otherwise have reached their platforms or websites. However, a Fairness Doctrine of this persuasion would arguably have less legal support or precedent than a Title II-inspired common carrier regime that merely restricted censorship. Establishing a balanced content requirement would also pose greater problems of administration.

If ISPs or edge providers were subject to a Fairness Doctrine that required them to provide "balanced content," they would face a technically daunting task due to the decoupling between transmission and content.[231] Unlike

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[225] *See* Candeub, *supra* note 207.
[226] FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979).
[227] *See* Candeub, *supra* note 207.
[228] *Id.*
[229] *Id.*
[230] Company Mission & Values Page, TWITTER, https://about.twitter.com/en_us/company.html (last visited May 3, 2018).
[231] *See* Leonhardt, *supra* note 219, at 9.

broadcast stations which control both the transmission and content of what they produce, ISPs mostly transmit others' content, and by connecting users to the Internet, grant them access to other ISPs over which they have no control.[232] This would seem to provide a rationale for a Fairness Doctrine that applied only to individual websites. Individual websites, like broadcast stations, create their own content, and would thus seemingly bear greater responsibility for providing balanced political discussion. Somewhere in the middle lie many larger platforms, like Facebook. These platforms provide their own content, but they also rely on algorithms to generate personalized content based on the browsing behavior of their end-users. The values of public forum doctrine for speakers on the Net could conflict with the right of users to remain in their own echo chambers. Thus, the question of what to regulate again evades an easy answer.

Several models have been floated, many dating back to the years when America Online reigned. Academic Andrew Chin has proposed must-carry regulations for the most popular websites, determined by the number of hits over a given period, perhaps weekly.[233] The most popular sites would be required to reserve space for websites participating in a voluntary public exchange.[234] This exchange would consist of websites that agree to post links to one another's sites based on an automated, rotating basis.[235] Chin argues this would be a content-neutral regulation that could survive the tier of intermediate scrutiny applied by the Supreme Court to the medium of cable TV in *Turner*,[236] in which the Court upheld must-carry rules on cable companies.[237] Of course, Chin's system favors some content by default, as it is likely that only less-popular sites would participate in the exchange to increase visits to their pages. Such must-carry regulations would disproportionately direct Web traffic to these less popular Web pages than they would receive in the absence of being featured on the exchange. One question is how the FCC or other regulatory body would successfully monitor such traffic. Sunstein has also argued for must-carry provisions in addition to public funding for the posting of contrary viewpoints.[238] Professor Noah Zatz envisions a system in which any party that wants to offer an

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[232] *Id.*
[233] Chin, *supra* note 198, 330–31 (1997).
[234] *Id.* at 330.
[235] *Id.* at 311.
[236] *Id.*
[237] *See* Turner Broad. Sys. v. FCC, 520 U.S. 180, 185, 224–25 (1997); *see also* discussion *infra* Part III.D.
[238] Sunstein, *supra* note 196, at 1780.

opposing view to an existing webpage can petition a government agency like the FCC or an authorized third party to encode a pop-up window or additional browser tab into the Web page's code.[239] The argument is that this would not impact the First Amendment rights of the Web page owner or operator, because it would not change the page at all, but merely trigger an additional tab to appear in the site visitor's browser.[240] This would address the concerns of those like Nunziato who argue that online public forums often must be "interstitial" to be meaningful.[241]

Of course, the administrative feasibility of an agency responding to an incalculable number of requests for individual Web page encoding, for an ever-expanding Internet, seems doubtful. Even if a third party contracted for this work in a public-private partnership, the FCC or some agency would still need to conduct effective oversight. Zatz's proposal seems dated given how much the Internet has developed in the last two decades.

More modern proposals include those of Public Knowledge Vice President Harold Feld to develop different rules for different entities.[242] Building on a concept of a "right to reach an audience" through major search engines, Professor Jennifer Chandler has proposed mandates that search engines publicly disclose how they index and rank search results.[243] She contends that search engines should be required to publicly list any websites they exclude from searches, along with advertisements or results that the search engines receive payment for.[244] Like then-Senator Franken, D-Minn.,[245] Professor Pasquale has called for a more expansive definition of net neutrality, pushing "neutrality beyond the 'pipes' of the internet, to hardware, critical software, dominant search engines, social networks, and apps."[246] This reflects a prevalent

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[239] Zatz, *supra* note 188, at 210–12.
[240] *Id.*
[241] Nunziato, *supra* note 182, at 1148. Building on Zatz's thematic analogy of "Sidewalks in Cyberspace," Nunziato offers the example of protestors using a sidewalk outside a company's headquarters to protest its employment practices: without the sidewalk or an area nearby, the protesters could not effectively address the subject of their speech. *Id.*
[242] Harold Feld, *My Insanely Long Field Guide to Common Carriage, Public Utility, Public Forum—And Why the Differences Matter.*, WETMACHINE: TALES OF THE SAUSAGE FACTORY (Sept. 5, 2017), http://www.wetmachine.com/tales-of-the-sausage-factory/my-insanely-long-field-guide-to-common-carriage-public-utility-public-forum-and-why-the-differences-matter/.
[243] Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1117 (2007).
[244] *Id.*
[245] Franken, *supra* note 35.
[246] Pasquale, *supra* note 67, at 498.

European perspective delineated by the French advisory commission Conseil National du Numérique in its national report on platform neutrality.[247] Identifying Apple, Amazon, Expedia, Facebook, Google, Microsoft, Netflix, Twitter, and Yahoo! as examples, the commission calls for disclosure requirements on the companies' content-management systems, such as the workings of their algorithms.[248] It urges development of "interventions and penalties,"[249] establishment of "neutrality rating agencies,"[250] and legal remedies for aggrieved users.[251] In perhaps its most activist language, the commission echoes Chandler's invocation of a "right to reach an audience"[252] by arguing for neutrality that both protects the liberty to speak, and advances an "offensive angle aimed at developing user power in the long term, promoting economic and social progress."[253] If the commission means empowering users by ensuring their voices would be heard in a balanced public forum, this sounds a lot like a Fairness Doctrine for the Twenty-first Century. It is also possible that either the FEC or FCC could resort to a variation of the filtering software already being applied to 95 percent of citizens' content in the United Kingdom, a development that amounts to prior restraint.[254] Rather than censoring content outright, the software could be used to flag content for fairness concerns.

The common thread among these proposals is the dual problem of line-drawing and administrability. As former Commissioner McDowell points out, the FCC simply does not have enough staff to scrutinize the countless editorial choices made by ISPs, platforms, and websites every day.[255] Even if it did, it would be forced to analyze public affairs issues of varying novelty and complexity to determine the contrasting viewpoints on any given issue (often more than a binary choice between opposing sides).[256] It would need to decide who should present those opposing views, as well as when and how they should be presented.[257] Although technically complying with the requirement of providing balanced perspectives, "interactive

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[247] CONSEIL NATIONAL DU NUMÉRIQUE, *supra* note 162.
[248] *Id.* at 4–5.
[249] *Id.* at 7.
[250] *Id.*
[251] *Id.* at 8.
[252] *See* Chandler, *supra* note 243, at 1098.
[253] CONSEIL NATIONAL DU NUMÉRIQUE, *supra* note 162, at 6.
[254] Dawn C. Nunziato, *The Beginning of the End of Internet Freedom*, 45 GEO. J. INT'L L. 383, 387 (2014).
[255] McDowell, Remarks at the Media Institute, *supra* note 60, at 9.
[256] *Id.*
[257] *Id.*

computer services" if we borrowed the Section 230 definition,[258] could present extreme positions that distort viewpoints, make opposing perspectives seem ridiculous, or create "straw man" arguments.[259]

Perhaps the most promising is Hal Singer's answer to the problem inherent in applying antitrust remedies to free speech challenges.[260] Singer argues that antitrust agencies may overlook Internet developments, like effects on speech or content, that are not reflected in price or other market variables.[261] He also argues that the consumer-welfare standard that plaintiffs must satisfy in antitrust cases to recover is too high to make lawsuits practical, because it is difficult to prove the concrete harm required for standing.[262] Finally, he contends that the slow pace of lawsuits is ill-suited to the rapidly evolving ecosystem of the Internet.[263]

Singer proposes a tribunal loosely modeled after the one used to adjudicate discrimination complaints under the Cable Television Consumer Protection and Competition Act of 1992.[264] However, unlike the tribunal under the Cable Act, which was overseen by the FCC, Singer's body would function like an Article I court, independent of the agency's influence.[265] While it would serve an antitrust function, "there is no reason why the tribunal could not accommodate complaints against dominant Internet intermediaries, such as Google and Facebook."[266] This would be a complaint-based system of regulation, which would depend on private-party-initiated litigation to bring the conduct of online entities to regulators' attention.

However, the potential for incessant litigation, unfairness in levying penalties among Internet entities, and the prospect of constitutional infringement all caution against the FCC enforcing such a doctrine.

A more modest proposal would be for the government to provide its own versions of search engines, platforms, and directories in line with public access stations on local radio and

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[258] 47 U.S.C. § 230(f)(2) (2012).
[259] McDowell, Remarks at the Media Institute, *supra* note 60, at 10.
[260] *See generally* Hal J. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About*, *in* ANTITRUST SOURCE (Am. Bar Ass'n ed., 2017), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf.
[261] *See id.*
[262] *See id.* at 2, 6.
[263] *Id.* at 2.
[264] 47 U.S.C. § 535(j)(3) (2012).
[265] Singer, *supra* note 260, at 2.
[266] *Id.* at 3.

TV, and in the same spirit of such long-held, widespread agreement as that of supporting public libraries for books and postal subsidies for newspapers.[267] Government subsidizes public broadcast stations PBS (TV) and NPR (radio), so perhaps it could do likewise for an Internet platform. Of course, that could result, at least to some degree, in government making its own decisions about which speech to carry. It is also doubtful that government would create platforms that are comparable to entities like Google and Facebook in popularity or influence. There is a reason why the "invisible hand" of a market-oriented Internet has thrived without heavy-handed regulation for more than two decades: no government agency could possibly regulate speech efficiently or fairly across so vast a dimension. While there might be some merit in these proposals, regulators should proceed cautiously given the potential for unintended consequences and the government's difficulty in keeping abreast of the rapidly developing Internet.

D. Courts Would Likely Strike Down Any Attempt by the FCC to Regulate Political Speech on the Internet as an Unconstitutional Infringement of First Amendment Protection

Irrespective of the wisdom in a Fairness Doctrine for the Internet, the FCC's authority would likely be challenged as to whether it is properly derived from Title II of the Communications Act of 1934 and/or Section 706 of the Telecommunications Act of 1996. If the answer to this administrative law inquiry was yes, then a revived Fairness Doctrine would likely invite the Supreme Court to decide whether FCC regulation of Internet content violates the First Amendment. In doing so, its ruling would potentially have consequences for any FEC attempt to regulate online campaign speech beyond what it does now. Both proponents and opponents of government regulation of political speech can draw encouragement from the absence of any single, all-encompassing guideline as to the emerging medium of the Internet. Both sides can make plausible arguments from scattered case law.

Generally, content-based laws are presumptively unconstitutional and can only be upheld if the government proves they are narrowly tailored to serve compelling state interests.[268] In reviewing content-based laws, courts are to apply the highest level or "tier" of judicial review: strict scrutiny.[269]

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[267] Chin, *supra* note198, at 329–30.
[268] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2222 (2015).
[269] GREGORY MAGGS & PETER SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH, 929 (3d ed. 2015).

Strict scrutiny is distinguished from less-searching forms of judicial review, like rational basis review and intermediate scrutiny, by two requirements that a law must meet: (1) it must be necessary to serve a "compelling" state interest and (2) it must be "narrowly drawn" to achieve that interest.[270] Still, the court has not treated all communications media the same, affording some more protections than others. As Justice Jackson observed, "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself."[271] Thus, it is difficult to say conclusively what the Court may decide for the Internet.

As discussed above, the Court has upheld FCC regulation of broadcast content based on the scarcity[272] and captive audience[273] rationales: There are only so many TV and radio stations, and people are forced to watch or listen to whatever comes across those channels. While suggesting broadcast stations were speakers for First Amendment purposes, the Court essentially held that their First Amendment rights could be curtailed in the public interest, e.g. for the sake of the broadcast medium. But the Court has not stopped at allowing government regulation of broadcast stations for the sake of the broadcast medium. It has done so for the sake of the stations themselves. While conceding that cable programmers and cable operators are likewise speakers entitled to First Amendment protection,[274] the Court has upheld FCC must-carry provisions that require cable companies to include broadcast TV channels in their packages to keep broadcast stations from going out of business.[275] Despite emergent technologies like cable, the Court held that broadcast was still "demonstrably a principal source of information and entertainment for a great part of the Nation's population."[276] It found that an important government interest justified must-carry rules, namely "promoting the widespread dissemination of information from a multiplicity of sources."[277] With broadcast media being transferred to the Internet, would a similar rationale extend FCC regulation to license holders of the wireless broadband spectrum, emboldening the agency to impose must-carry rules or a Fairness Doctrine of some form?

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[270] *Id.*
[271] Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).
[272] Red Lion Broad. v. FCC, 395 U.S. 367, 400–01 (1969).
[273] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1973).
[274] Turner Broad. Sys. v. FCC, 512 U.S. 622, 636 (1994).
[275] Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997).
[276] *Id.* at 190.
[277] *Id.* at 189.

When the must-carry cable TV issue was first before the Court, it distinguished the medium from content-based rules on newspapers addressed in *Miami Herald Publishing Co. v. Tornillo*, holding that cable providers play a "bottleneck," "gatekeeper" function in terms of providing subscribers access in the home.[278] Given that cable providers have control over such a "critical pathway of communication" and can silence the speech of others with a "mere flick of the switch," government was justified in treating them differently.[279] Thus, regulation of cable triggered only intermediate scrutiny.[280] If the issue were before the Court today, would the contemporary ISP that provides cable/Internet access to consumers fare likewise? What about dominant platforms?

Professor Noah Zatz argues that they should.[281] Zatz urges application of public forum doctrine, calling for government to address the issue of Internet access bottlenecks by designating areas of the Internet as public forums and actively structuring the Web in a way that achieves viewpoint diversity.[282] There are no doubt parallels among cable television providers, ISPs, and large platforms. Lawsuits, like the one filed by Prager University, advocate for a more scopious interpretation of public forum doctrine that encompasses online platforms.[283] The scholarship of Zatz[284] and Nunziato[285] has become the substance of litigation.[286]

There is reason to suspect that the Court's view on the issue is evolving. Jeremy Carl[287] and Professor Mark Grabowski[288] point to *Packingham v. North Carolina*.[289] There, the Court unanimously decided that a North Carolina law barring registered sex offenders from accessing social media violated

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[278] *Turner Broad. Sys.*, 512 U.S. at 656.
[279] *Id.* at 656–57.
[280] *Id.* at 657.
[281] Zatz, *supra* note 188, at 206–07.
[282] *Id.* at 210–12.
[283] *See, e.g.*, Complaint, *supra* note 190. For discussion of additional lawsuits initiated after users have been banned by social media giants from using their platforms, see Mike Masnick, *Chuck Johnson Sues Twitter, Copying Dennis Prager's Lawsuit Against Youtube*, TECHDIRT (Jan. 10, 2018, 1:33 PM), https://www.techdirt.com/articles/20180109/02374038965/chuck-johnson-sues-twitter-copying-dennis-pragers-lawsuit-against-youtube.shtml, and Abrar Al-Heeti, *White Nationalist Jared Taylor Sues Twitter Over Account Ban*, CNET (Feb. 22, 2018, 2:22 PM), https://www.cnet.com/news/white-nationalist-jared-taylor-american-renaissance-sues-twitter-for-account-suspension/.
[284] Zatz, *supra* note 188.
[285] Nunziato, *supra* notes 182, 254.
[286] *See* Complaint, *supra* note 190.
[287] Carl, *supra* note 31.
[288] Mark Grabowski, *Twitter's Censorship May be Unconstitutional*, WASH. EXAM'R (Mar. 14, 2017, 8:00 AM), http://www.washingtonexaminer.com/twitters-censorship-may-be-unconstitutional/article/2617261.
[289] 137 S. Ct. 1730 (2017).

the First Amendment. Recognizing this was the first case taken by the Court "to address the relationship between the First Amendment and the modern Internet,"[290] Justice Kennedy wrote that social media "websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[291] While it may be tempting to read the holding striking down a flawed statute too broadly, the case is certainly fodder for champions of a robust public forum doctrine. Grabowski also notes an implication[292] when the case is read alongside the Court's holding in *Pruneyard Shopping Center v. Robins*.[293] The decision in the latter case affirmed that state constitutions could go further than the Bill of Rights in protecting a right to speak, so long as they do not violate other provisions of the U.S Constitution.[294] It upheld a California Supreme Court decision that extended public forum doctrine to a private shopping mall.[295] Rejecting a First Amendment claim that the shopping mall's owner was being forced to carry the speech of students who were trying to get petition signatures on the premises, the Court distinguished the mall owner from the newspaper editor in *Tornillo*, holding that while an editor would be liable under the statute in that case for the content of what was published in his newspaper, the owner would not be identified with, nor responsible for, the expressive activities of the mall-going students.[296] As Grabowski recognizes, today's students would post a petition on social media,[297] now arguably more critical as a public forum than a shopping mall was to the California Supreme Court,[298] and the Golden State, where most—if not all—Silicon Valley companies reside, might require these private companies to make their forums public.[299] As California goes so goes the nation? Its legislature, like those of other states, is considering bills to make net neutrality state policy.[300] Whatever happens in court with the FCC over the issue of preemption, it could move for other types of neutrality. Advocates for a right to speak in the Internet's dominant public forums voice the First Amendment theory that freedom of

[290] *Id.* at 1732.
[291] *Id.* at 1737.
[292] Grabowski, *supra* note 288.
[293] 447 U.S. 74 (1980).
[294] *Id.* at 81.
[295] *Id.* at 79.
[296] *Id.* at 88.
[297] Grabowski, *supra* note 288.
[298] *See* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979).
[299] Grabowski, *supra* note 288.
[300] Kang, *supra* note 117.

speech executes a truth-seeking function by fostering a "marketplace of ideas."[301]

On the other hand, in *Reno v. ACLU*,[302] the Court affirmed singular protection for the Internet as a medium "of unlimited, low-cost capacity for communication of all kinds" in striking down an anti-indecency law, despite the much lesser protection afforded to obscenity than other categories of speech.[303] The Court held that the captive audience rationale behind regulating broadcast stations was inapplicable because Internet users must take affirmative steps to access content and seldom arrive at a given web page by accident.[304] This suggests that a core rationale for broadcast regulation could not be invoked in favor of an Internet Fairness Doctrine.

Print media, such as newspapers and magazines, enjoy the strongest First Amendment protection, as the Court struck down a must-carry-analogous statute that required newspapers to provide political candidates free space to respond to editorial criticism in *Tornillo*.[305]

Because the Fairness Doctrine has hitherto applied only to television and radio stations, the Court would need to determine whether ISPs, platforms, websites, and perhaps everything in between, are more like radio and television stations, as in *Red Lion*, or more like newspapers or magazines, as in *Tornillo*. While the Court relied on the rationale of spectrum scarcity in the former case and not in the latter, suggesting that while there are only so many radio frequencies, there is enough tree pulp for anyone to publish a newspaper or pamphlet, an alternative argument is that there are far more broadcast stations in certain areas of the country than there are viable newspapers.[306] The year *Tornillo* was decided, the newspaper at issue, the *Miami Herald*, had a circulation of 396,797 and was the regional print hegemon.[307] The six radio stations and three television stations in the same area had much more to fear from competition than the *Herald*, a virtual monopoly in the region.[308] Practically speaking, the effect on the public is the same.[309] In a time of media consolidation that threatens to reduce the number of major ISPs, could a similar rationale be extended to regulate how Spectrum and AT&T—

[301] MAGGS & SMITH, *supra* note 269, at 928.
[302] 521 U.S. 844 (1997).
[303] *Id.* at 870.
[304] *Id.* at 867.
[305] 418 U.S. 241 (1974).
[306] FRIENDLY, supra note 214, at195–96.
[307] *Id.* at 196 (citing an internal audit of the Miami Herald from July 1, 1974 to June 30, 1975).
[308] *Id.*
[309] *Id.*

who often have monopolies in particular markets—provide Internet content to consumers?

That the modern Internet aggregates content from radio, broadcast television, cable television, and print media onto a single platform only underscores the uncertainty around this question.[310] The traditional view of the First Amendment is that it is a restriction on government interference with speech and does not apply to the decisions of private actors as to whether to create speech or carry the speech of others.[311] The use of "the," a definite article before "freedom of speech" in the First Amendment,[312] lends support to the view that the freedom had a specific meaning and scope that predated the Constitution.[313] Constitutional experts note[314] Justice Scalia's take that, the "core abuse" the First Amendment guarded against was "the scheme of licensing laws implemented by the monarch and Parliament to contain the evils of the printing press in 16th- and 17th-century England."[315] Under Professor Tribe's views, ISPs are like newspapers with a right to exclude speech:

> The Constitution applies equally even outside traditional print or electronic media, so that, for example, the government cannot require an individual to open his doors and turn his home into a forum for protesters. Further, like a newspaper, a BSP [ISP] has a limited capacity to distribute information and accordingly enjoys the right to decide how to apportion that space. And as noted, BSPs make decisions about the delivery of particular content as they continue to innovate in the products, services, and business models they employ.[316]

For constitutional purposes, is there a distinction between ISPs that provide access to the Internet, like Comcast and Verizon; platforms, like Google and Apple that provide services once connected to the Net; and individual websites like

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[310] *See* Alexander Owens, *Protecting Free Speech in the Digital Age*: *Does the FCC's Net Neutrality Order Violate the First Amendment?*, 23 TEMP. POL & CIV. RTS. L. REV. 209, 216–17 (2013).
[311] Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 699–700 (2010).
[312] U.S. CONST. amend. I.
[313] MAGGS & SMITH, *supra* note 269, at 926.
[314] *Id.* at 927.
[315] Thomas v. Chi. Park Dist., 534 U.S. 316, 320 (2002) (internal quotation marks omitted).
[316] Tribe & Goldstein, *supra* note 56, at 3.

CNN and Drudge Report that provide content? Would an Internet Fairness Doctrine apply to all three categories? ISPs, search engines, and news sites all provide links to other webpages. And in choosing which links to include on their interface, they make expressive choices about which speech to convey. In one sense, they are no different than more traditional 'speakers' like newspapers, books, and pamphlets in quoting, citing, or referring to other speakers.[317] On the other hand, they provide a direct, immediate connection to these other speakers through publicly available hyperlinks, essentially providing a public forum consistent with the Zatz school of thought that subjects them to some modicum of government regulation.[318] An Internet Fairness Doctrine becomes more tenable under Title II when the Web is viewed as a public good or public forum. However, these web-based entities make editorial decisions about which speech to transmit, making them more like broadcast stations and newspapers, and less like mere common carriers or conduits for the speech of others.

It is for just this reason that the Court would likely strike down content-based regulations as unconstitutional. Recall that in *Red Lion*, the Court based its decision on spectrum scarcity while reserving the option of reevaluating the Fairness Doctrine if conditions changed or it proved counterproductive in promoting viewpoint diversity.[319] Today, the *Red Lion* Court would barely recognize the media landscape and could hardly fault it for failing to provide a robust exchange of conflicting opinion. That proponents of a reprised Fairness Doctrine or government regulation of online content mean well is of no import. "Innocent motives do not eliminate the danger" that laws created for a benign purpose may one day be used to censor.[320]

IV. CONCLUSION

Whether the Fairness Doctrine is restored in familiar form or incorporated into new Internet policy, the debate over government's role in regulating online political speech will likely continue. Though the specter of net neutrality that roiled fears of a more interventionist FCC has been rolled back, the Open Internet Order was neither necessary nor sufficient for a new regulatory regime. As the goings-on of the FEC have illustrated, proponents of a more activist government in shaping

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[317] *See* Chin, *supra* note 198, at 311.
[318] *See generally* Zatz, *supra* note 188.
[319] Red Lion Broad. Co. v. FCC., 395 U.S. 367, 395–400 (1969).
[320] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2229 (2015).

Internet content have multiple ends, and multiple means for achieving such policy goals. If anything, frustration over the state of campaign finance law, both online and offline; political censorship on platforms; fake news, extremism and even crime like sex trafficking, have galvanized academics, policymakers, and politicians toward exploring different approaches to the prevailing hands-off policy that is the legacy of the modern Internet.

But the Fairness Doctrine provides a cautionary tale of unintended consequences. It rested on a shaky constitutional promontory that has since been swept away by a new tide of technology. Though noble in purpose, its aims and means are ill suited to today's Internet, and policymakers should take note. For the foregoing reasons, greater regulation of Internet political content will chill free speech, prove impractical to implement as a policy matter, and ultimately, is likely to be ruled unconstitutional.