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For an Anti-discrimination Act for Cyberspace: Two-Sided Pricing, Walled Gardens, and the Depletion of the Marketplace of Ideas

Julien Mailland

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For an *Anti-discrimination Act for Cyberspace*: Two-Sided Pricing, Walled Gardens, and the Depletion of the Marketplace of Ideas

JULIEN MAILLAND*

ABSTRACT

In the wake of renewed policy interest for the regulation of Internet gatekeepers, I argue that the U.S. Congress should pass a sweeping net neutrality regulation, an Anti-Discrimination Act for Cyberspace. Breaking with the tradition of siloed research which has seen similar proposals grounded in economics, computer science, history, political philosophy, and administrative and constitutional law, as separate matters, I offer a multi-disciplinary approach which combines these fields to draw new insights for Internet law and policy. I argue, with reference to leading Supreme Court cases, including Pruneyard Shopping Center v. Robins, that such a law would most likely pass First and Fifth Amendment constitutional muster, despite Internet service providers' assertions to the contrary.

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I. INTRODUCTION

The freedom of the mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased ... by bringing [men] together in activities of communication and mutual understanding. And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends. On the contrary, in that positive field the Congress of the United States has a heavy and basic responsibility to promote the freedom of speech.

Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, 1948¹

It will be up to federal and state policy makers ... to reconcile the competing corporate interests and to create a network that maximizes the benefits enjoyed by all Americans... Adequate federal ... leadership will give us the power to leverage the millions of dollars into something greater than the sum of its parts.

Al Gore, *Infrastructure for the Global Village*, 1991²

A lot of [Internet freedom] has to be enforced by the government, and conservative types and libertarian types say “government shouldn’t have any say and control over that, that takes away our freedom.” Wrong! It takes away the freedom of the companies that are taking away the freedom from us.

Steve Wozniak, interview by Russia Today, 2012³

On July 9, 2021, President Joe Biden signed an Executive Order encouraging the Federal Communications Commission (“FCC”) to restore the net neutrality rules adopted by the FCC in 2015 under the Obama administration and undone in 2017 by Chairman Ajit Pai’s FCC under the

1. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), reprinted in ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 19-20 (1948) (1960).

2. Al Gore, *Infrastructure for the Global Village*, 265 SCI. AM. 111 (1991).

3. Steve Wozniak Interview, *Web crackdown coming, freedom failing*, RUSSIA TODAY (Aug. 14, 2012, 7:27-8:57), <https://www.youtube.com/watch?v=LJnghGBBP2Q> (transcript by author).

Trump administration.⁴ The 2015 Open Internet Order (the “2015 Order”)⁵ had classified Internet service providers (ISPs) as common carriers under Title II of the Telecommunications Act of 1996, and, on this basis, imposed on them no blocking, no throttling, and no paid prioritization rules. In practice, this prevented ISPs from implementing two-sided pricing models: a model where the ISP charges not only the end-user in order to access the Internet, but also the sender of content which the user is trying to access. Where the content provider refuses to pay, or otherwise is disfavored by the ISP for business, political reasons, or others, the ISP simply blocks or throttles (slows down) the disfavored content, making it either impossible or very difficult for the user to access the content at stake. At the heart of this model is discrimination: a sender of content which is disfavored by the ISP is blocked. Two-sided pricing models, then, are referred to as “non-neutral,” and are incompatible with an open Internet. Despite the fact that net neutrality violations before the 2015 Order had been numerous and well documented,⁶ and that an overwhelming and bipartisan majority of Americans opposed repealing net neutrality regulations,⁷ in 2017, the FCC repealed the net neutrality regulations that outlawed two-sided pricing models, and, generally, blocking, throttling, or paid prioritization, in an order hypocritically named the Restoring Internet Freedom Order (the “2017 Order”).⁸ At the time the Biden Executive Order was released in July 2021, the FCC was deadlocked at two Democratic and two Republican votes. A

4. Specifically, “the Chair of the Federal Communications Commission is encouraged to work with the rest of the Commission, as appropriate and consistent with applicable law, to consider: (i) adopting through appropriate rulemaking ‘Net Neutrality’ rules similar to those previously adopted under title II of the Communications Act of 1934 (Pub. L. No. 73-416, 48 Stat. 1064 (codified as 47 U.S.C. §151 et seq.), as amended by the Telecommunications Act of 1996, in ‘Protecting and Promoting the Open Internet,’” 80 Fed. Reg. 19738 (Apr. 13, 2015); Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>. See also FACT SHEET: Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>. See also Timothy Karr, *Biden Executive Order Calls on the FCC to Restore Net Neutrality and Promote Broadband Competition*, FREE PRESS (July 9, 2021), <https://www.freepress.net/news/press-releases/biden-executive-order-urges-fcc-restore-net-neutrality-and-promote-broadband-competition>.

5. See generally *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015), <https://www.fcc.gov/document/fcc-releases-open-internet-order>.

6. Timothy Karr, *Net Neutrality Violations: A Brief History*, FREE PRESS (July 9, 2021), <https://www.freepress.net/our-response/expert-analysis/explainers/net-neutrality-violations-brief-history>.

7. *Overwhelming Bipartisan Majority Opposes Repealing Net Neutrality*, UNIVERSITY OF MARYLAND PROGRAM FOR PUBLIC CONSULTATION (Dec. 12, 2017), <https://publicconsultation.org/united-states/overwhelming-bipartisan-majority-opposes-repealing-net-neutrality/>.

8. See generally *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108 (2017), Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2017), <https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order>.

fifth commissioner being confirmed by the Senate in the months to come would give the Democrats the advantage they need to successfully, one more time, reclassify ISPs as common carriers under Title II and impose net neutrality regulations on that basis. However, it is likely that yet another reversal of FCC classification would lead to what an attorney for the NCTA, the ISPs and cable television trade association, had already dubbed in 2014 “‘World War III’ and years of litigation.”⁹ This article, then explores another path towards net neutrality, that of federal legislation. I argue that Congress should break the Gordian Knot created by layers of legislation, administrative regulations, and years never-ending litigation, and pass a sweeping net neutrality law from a blank slate: an *Anti-Discrimination Act for Cyberspace*.¹⁰

There is significant momentum for such legislation. Seven states have already adopted their own net neutrality legislation (California, Colorado, Maine, New Jersey, Oregon, Vermont, and Washington). Several others are set to discuss bills during the 2021 legislative session (including Connecticut, Kentucky, Missouri, New York, and South Carolina).¹¹ Further, issues of Internet governance and of the possible regulation of gatekeepers have found renewed interest in the public eye when former President Trump, in July 2021, sued Facebook, Twitter, and YouTube, over the suspension of his social media accounts. Trump, in his own words, asked the court “to order an immediate halt to social media companies’ illegal, shameful censorship of the American people We’re demanding an end to the shadow banning, a stop to the silencing and a stop to the blacklisting, banishing and canceling that you know so well.”¹² Meanwhile, a flurry of new state legislation and of lawsuits, from Florida to Ohio, is seeking to prevent “Big Tech,” read, content companies such as Google or Facebook, from banning users or banning certain content, from “fake news” to certain flavors of political speech.¹³ At first glance, the constitutional legal issues

9. Kery Murakami, *Section 706 or Title II Debated at net neutrality discussion*, COMMUNICATIONS DAILY, July 25, 2014, at 5-6. For an in-depth discussion of the various administrative and constitutional law arguments being made in favor of and against imposing net neutrality regulations under Title II, see Barbara Cherry & Julien Mailland, *Toward Sustainable Network-Openness Obligations on Broadband in the U.S.: Surviving Providers First Amendment Challenges*, TELECOMMUNICATION POLICY RESEARCH CONFERENCE (TPRC), George Mason University School of Law, Arlington, VA (Sept. 13, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417758.

10. I refer here not just to the Greek legend, but to the telecommunications policy staple. See generally W. RUSSELL NEUMAN, LEE MCKNIGHT & RICHARD SOLOMON, *THE GORDIAN KNOT: POLITICAL GRIDLOCK ON THE INFORMATION HIGHWAY* (1997).

11. *State Net Neutrality Laws May Lead to Federal Legislation*, THE NATIONAL L. REV. (Mar. 1, 2021), <https://www.natlawreview.com/article/state-net-neutrality-laws-may-lead-to-federal-legislation>.

12. *Donald Trump Sues Facebook, YouTube And Twitter For Alleged Censorship*, NPR (July 7, 2021), <https://www.npr.org/2021/07/07/1013760153/donald-trump-says-he-is-suing-facebook-google-and-twitter-for-alleged-censorship>.

13. See, e.g., Ari Cohn, *Trading Big Tech For Big Government Will Backfire For Conservatives*, DAILY CALLER (June 2, 2021), <https://dailycaller.com/2021/06/02/cohn-trading-big-tech-for-big->

raised by the “big tech” discussion are the same as that of the net neutrality debate: can the government lawfully prevent the suppression of speech by Internet gatekeepers through no blocking, no discrimination, or must-carry legislation? In reality, however, an Internet gatekeeper is only afforded First Amendment protection if they have “engaged in a form of protected expression,” that is, if their activity is “sufficiently imbued with elements of communication to fall within the scope [of the First Amendment]” (*Spence v. Washington*).¹⁴ Unfortunately, this crucial preliminary question of determining the scope of First Amendment protection of a gatekeeper is too often overlooked, including by proponents of net neutrality regulation.¹⁵ In the case at hand, social media companies and Internet service providers are in two completely different situations. Social media companies are in the business of creating and curating content, just like newspapers did in an analog age, and, as such, are afforded the utmost First Amendment protections, something which will most likely doom any effort to impose anti-discrimination rules upon them. As a commentator for Wired Magazine noted, “[t]he whole value proposition for Google is that it discriminates between different possible results in order to return what it thinks will be most relevant to the person doing the search. To ask the court to force Google ‘to carry search result information reliably, neutrally,’ as the Ohio lawsuit does, is sort of nonsensical.”¹⁶ In contrast, ISPs, whose business model is simply to carry the speech of others, are no more speakers, from a First Amendment perspective, than the post office that carries letters.¹⁷ Therefore, the body of case law that applies to ISPs as conduits, and not speakers, is entirely different from the one that applies to content creators or

government-will-backfire-for-conservatives/; Gilad Edelman, *No, Facebook and Google Are Not Public Utilities*, WIRED (July 15, 2021), <https://www.wired.com/story/no-facebook-google-not-public-utilities/>.

14. *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

15. Nicholas Bramble, *Ill Telecommunications: How Internet Infrastructure Providers Lose First Amendment Protection*, 17 MICH. TELECOMM. & TECH. L. REV. 67, 68 (2010).

16. Gilad Edelman, *No, Facebook and Google Are Not Public Utilities*, WIRED (July 15, 2021), <https://www.wired.com/story/no-facebook-google-not-public-utilities/>.

17. As the FCC noted in the 2015 Order, “Consistent with our determination in the 2010 *Open Internet Order*, we find that when broadband providers offer broadband Internet access services, they act as conduits for the speech of others, not as speakers themselves.” 2015 FCC Open Internet Order at 268, 30 FCC Rcd 5601 (2015), <https://docs.fcc.gov/public/attachments/FCC-15-24A1.pdf> (citing Reply Comments of Professor Barbara A. Cherry & Assistant Professor Julien Mailland, Before the Federal Communications Commission Washington, D.C. 20554, Re: In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Service, GN Docket No. 10-27; Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices, WC Docket no. 07-52 (September 2013)). See generally Nicholas Bramble, *Ill Telecommunications: How Internet Infrastructure Providers Lose First Amendment Protection*, 17 MICH. TELECOMM. & TECH. L. REV. 67, 68 (2010); see also an acknowledgment by Verizon’s lawyers that ISPs are conduits and not speakers: “the Internet service provider performs a pure transmission or “conduit” function This function is analogous to the role played by common carriers in transmitting information selected and controlled by others. Traditionally, this passive role of conduit for the expression of others has not created any duties or liabilities under the copyright laws.” Brief for Appellant at 23, Recording Indus. Ass’n of Am. v. Verizon Internet Serv., 351 F.3d 1229 (D.C. Cir. 2003) (Nos. 03-7015 & 03-7053).

curators. This article focuses on net neutrality regulations that would apply to ISPs, not to the regulation of content platforms such as Google or Facebook. But the fact that policy issues such as the potential regulation of Internet gatekeepers, in general, have gained the renewed interest of legislators and interest groups on both sides of the political spectrum, makes the present argument in favor of a federal net neutrality legislation applicable to ISPs all the more timely.

I am certainly not the first to argue for such legislation. But as we have just noted, complex legal issues are too often conflated, and oversimplified, in order to fit political agendas or even simply to surf the hype and keep up with the speed of the news cycle. As a few net neutrality researchers from the field of computer science have noted, policymakers often “prefer a simple answer to what amounts to a difficult and complicated, *multidisciplinary*, set of questions.”¹⁸ And here lies the complexity of creating sound net neutrality policy: the fact that the issue is, at its core, multidisciplinary, whereas research on the topic tends to be siloed: in electrical engineering and computer science journals, in economic journals, in historical societies, and in law reviews. In contrast, this article grounds a legal argument, that a federal Anti-Discrimination Act for Cyberspace is desirable and would pass constitutional muster, in computer science, economics, history, political theory, and, of course, constitutional law, and draws new insights for Internet law and policy by combining lessons learned from these fields. In Part I, I draw from the economics literature to provide an overview of what one-sided v. two-sided pricing models are, and how they apply to the information industry, both traditional and in an Internet setting. I show how and why the Internet industry has bloomed under a one-sided pricing model, and how for ISPs to apply a two-sided model would create a radical shift in economic paradigm for the entire Internet ecosystem. In Part II, I tie the economic literature on net neutrality to that of the computer science field, and draw insights with regard to freedom of speech. I demonstrate how the systematic implementation of two-sided pricing models by ISPs would drastically affect how the Internet works and be incompatible, as a matter of principle, with an open Internet. I debunk ISPs’ claims that two-sided pricing model would not impact any speaker negatively because the ISPs would always leave open a free slow lane, and demonstrate how such models actually incentivize ISPs to degrade service rather than invest in network upgrade. The very logic of two-sided pricing, as applied to data networks, is to block data, by default, from entering the receiver’s local network, because senders of data are only incentivized to pay an end-user’s local ISP if that ISP implements censorship by default, which

18. Steven Bauer, David D. Clark & William Lehr, *The Evolution of Internet Congestion* 29, TPRC 2009 (Aug. 15, 2009), <https://ssrn.com/abstract=1999830> (emphasis added).

can only be lifted in exchange for payment. This, in turn, will have an impact on the wealth of ideas available in the marketplace, lest strong net neutrality protections banning two-sided pricing models in the open Internet be put in place. I take this idea further in Part III, where I show what has happened, in history, to the ability of users to access content, and the ability of independent content providers to distribute their creations, when barriers have been erected around last-mile networks. Drawing from industry publications of the 1980s and early 1990s, and giving specific attention to walled gardens such as AOL, Compuserve, and Prodigy, I demonstrate that the walled gardens model led to a balkanized online market and a paucity of content, which in turn explained the extremely low penetration of online services in the U.S. retail market, roughly 1% by the time the World Wide Web was invented, in contrast to countries such as France, which, with their relatively-open Minitel system, was the most connected country in the world at the time. As Sir Tim Berners Lee, inventor of the Web, once put it, “when you erect a wall around the garden, we know now all the flowers bloom outside the wall, not inside.”¹⁹ A reversal towards those walled gardens model, caused by the very logic of two-sided pricing models, creates a depletion of the marketplace of ideas, both in terms of sheer volume of information being able to pass through to users, and in terms of plurality of views. This issue is exacerbated by the fact that a significant part of the rhetoric around Internet policy in the past twenty years has revolved around for-profit uses of the Internet. In Part IV, I show through rhetorical analysis how we have lost track of “the little guy,” users/content creators who use the open network of networks as an electronic soap box. The empowering nature of the Internet has largely been reduced to “consumer empowerment” in the dominant Internet policy narratives, both against and in favor of net neutrality. Where in 1997, the *Reno* court had focused on the role of the Internet as for anyone, including educational institutions, commercial entities, advocacy groups, and individuals to publish information,²⁰ the 2010,²¹ 2015, and 2017 Orders oppose “users” to commercial “edge providers,” the latter being presented as *the* source of content that matters. This section sets the stage for Part V. I draw from the political philosophy of Alexander Meiklejohn, whose interpretation of the meaning of the First Amendment is a controlling force in positive law and underpins leading Supreme Court cases that have expanded the freedom of political speech for

19. John Cox, *Tim Berners-Lee Warns of ‘Walled Gardens’ for Mobile Internet*, N.Y. TIMES (Nov. 15, 2007), https://archive.nytimes.com/www.nytimes.com/idg/IDG_002570DE00740E1800257394004818F5.htm.

20. *Reno v. Am. C. L. Union*, 521 U.S. 844, 853 (1997).

21. See generally *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191 & WC Docket No. 07-52, Rep. and Order, 25 FCC Rcd. 1834 (2010), <https://www.fcc.gov/document/preserving-open-internet-broadband-industry-practices-0>.

Americans, from *Terminiello v. Chicago*,²² to the so-called *Skokie* case where neo-nazis were allowed to march on a public square,²³ to *Pruneyard Shopping Center v. Robins*,²⁴ where a state constitutional provision which permitted individuals to exercise free speech rights on the property of a privately-owned shopping center passed constitutional muster under both the First and the Fifth Amendment. I make detailed comparisons between the locus of the old soap box, the shopping center, to that of the electronic soap-box, the ISPs facilities, to show that a net neutrality law that would protect the right of all speakers, on a content-neutral basis, to pass their speech through the last-mile ISP, would most likely pass constitutional muster under the *Pruneyard* three-prong test. I conclude that in an age where the digital public forum is controlled by private entities, an Act of Congress that would ensure net neutrality by prohibiting the implementation of two-sided pricing models by ISPs, an *Anti-Discrimination Act for Cyberspace*, is desirable and legitimated by controlling political philosophy rhetoric in the field of free speech and Supreme Court precedent.

II. WHAT IS 2-SIDED PRICING, AND HOW DOES IT DIFFER FROM THE TRADITIONAL PRICING MODEL IN A NEUTRAL, OPEN INTERNET?

Two-sided *pricing* generally refers to a model where the operator of a two-sided *market* charges a fee to participants at both ends of the market. A two-sided *market* can itself be defined as “one in which 1) two sets of agents interact through an intermediary or platform, and 2) the decisions of each set of agents affect the outcomes of the other set of agents, typically through an externality.”²⁵ A typical example in the economics literature is that of a straight-singles bar, where two sets of agents (straight single males and females) interact through a mating platform (the bar), and where the number of participants in each side of the market affects the outcomes of the other set of participants: the more females are present in the bar, the greater the benefits – externalities - for males, and vice-versa. Other typical examples include video game consoles (where players and game makers interact through the console acting as a platform),²⁶ newspapers, and credit card systems.²⁷ The existence of a two-sided *market* does not in itself imply two-sided *pricing*. For example, a broadcast television station, as a platform that

22. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

23. *Smith v. Collin*, 439 U.S. 916 (1978).

24. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

25. Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. OF ECON. PERSPS. 125 (2009).

26. Note that the literature on video game consoles and online systems as platforms is also extensive in the academic field of Science and Technology Studies and has in particular been the focus of MIT Press' Platform Studies book series. See, e.g., DOMINIC ARSENAULT, *SUPER POWER, SPOONY BARDS, AND SILVERWARE: THE SUPER NINTENDO ENTERTAINMENT SYSTEM* (2017) (discussing the economic model of the Nintendo platform); see also JULIEN MAILLARD & KEVIN DRISCOLL, *MINITEL: WELCOME TO THE INTERNET* (2017) (discussing the economic models of the Minitel platform).

27. Rysman, *supra* note 25, at 128.

delivers programming to viewers (also known as “eyeballs” in that industry) at the bottom side of the market, and eyeballs to advertisers at the top side of the market, only charges a dollar fee to participants at the top side of the market (the advertisers) but not at the bottom side of the market (although viewers are donating their time and attention to the platform, which is technically a fee, they are not charged a dollar amount). A straight-singles bar can choose to apply a one-sided pricing model by not charging one class of participants (usually females) to prime the pump, reach critical mass, enter a positive feedback loop and attract paying participants at the other side of the market (males), and succeed over a competing straight-singles bar that might have applied a two-sided pricing model by charging both males and females an entry fee, therefore creating barriers to entry on both ends of the market rather than just one. Other examples of one-sided pricing models in two-sided markets include free newspaper models, and yellow pages directories,²⁸ where advertisers, but not readers, are charged a dollar fee. However, the information industry and a number of other industries also offer plenty of examples of two-sided markets where two-sided pricing models involving exchanges of dollars on both ends are applied. A traditional newspaper charges both readers and advertisers; a credit card company often charges both a yearly fee to the cardholder and a transaction fee to the merchant.

Internet access facilities are themselves two-sided markets because, referring to the earlier definition, 1) they provide a platform (a transmission service) through which two sets of agents (the sender and the receiver of information), interact, and 2) the decisions of each set of agents affect the outcomes of the other set of agents through an externality. In this particular case, the more end-users connect to the Internet, the more people content providers can reach, and the more content providers connect and spread data through the networks, the more informational value each end-user will derive from their respective Internet connection. From a pricing standpoint, the Internet has historically functioned as a one-sided pricing model, where ISPs only charge end-users at the level of the last mile,²⁹ that is, the local network the ISP controls, irrelevant of whether the end-user is mainly a receiver of information or a sender of information, but do not charge outside senders of incoming content for entering that last mile and reaching the end-user.³⁰

28. Rysman, *supra* note 25, at 129.

29. John Musacchio, Galina Schwartz & Jean Walrand, *A Two-Sided Market Analysis of Provider Investment Incentives with an Application to the Net-Neutrality Issue*, 8 REV. OF NETWORK ECON., no.1, 2009, at 1-2. See also Nicholas Economides & Joachim Tag, *Network Neutrality on the Internet: A Two-Sided Market Analysis*, 24 INFO. ECON. & POL'Y 91, 91-92 (2012).

30. See, e.g., Nicholas Economides & Benjamin E. Hermalin, *The Economics of Network Neutrality*, 43 THE RAND J. OF ECON. 613 (2012) (“Since its commercialization in the mid-1990s, a party (*website or household*) connecting to the Internet pays only its direct provider of access.”). Note, in the added

Under this traditional model, then, “[w]hile users and content providers each pay their own ISPs for connectivity, neither need pay other ISPs in order to reach their customers.”³¹ One of the key implications of this model is that it has enabled the implementation of the “‘end-to-end principle’ that has governed the Internet since its inception,” under which “computers attached to the Internet that are sending and receiving information packets did not need to know the structure of the network and could just interact end-to-end.”³² In this particular case, the sender’s computer does not need to have a direct relationship with the receiver’s ISP to communicate with the receiver’s computer, because the receiver’s ISP is not implementing a two-sided pricing model and charging the sender of data. Conversely, interference with the flow of data, for example in the form of a two-sided pricing model, puts the end-to-end principle in jeopardy.³³ Let us examine a visual representation of a traditional Internet architecture and data flow to grasp the import of this one-sided pricing implementation.

emphasis, how the authors do not oppose websites or households, but rather treat them as the same type of agent, in this case, an entity that connects to a direct provider of access.

31. Nicholas Economides, *Why imposing new tolls on third-party content and applications threatens innovation and will not improve broadband providers’ investment*, in NET NEUTRALITY: CONTRIBUTIONS TO THE DEBATE 86, 88 (Jorge Perez Martinez ed., 2010). See also John Musacchio, Galina Schwartz & Jean Walrand, *A Two-Sided Market Analysis of Provider Investment Incentives with an Application to the Net-Neutrality Issue*, 8 REV. OF NETWORK ECON., no. 1, 2009, at 1, 3 (“[I]n a model with one-sided pricing, end users and content providers pay only for their direct access Thus, with one-sided pricing, content provider C1 pays only ISP T1 for its access to the Internet but does not pay any of the other ISPs.”).

32. Nicholas Economides & Joachim Tag, *Network Neutrality on the Internet: A Two-Sided Market Analysis*, 24 INFO. ECON. & POL’Y 2012, at 88. See generally the seminal papers on the end-to-end principle: J.H. Saltzer, D. P. Reed, and D. D. Clark, *End-to-End Arguments in System Design*, PROCEEDINGS OF THE SECOND INTERNATIONAL CONFERENCE ON DISTRIBUTED COMPUTING SYSTEMS 509, PARIS, FRANCE, APR. 8–10, 1981, IEEE COMPUTER SOCIETY (1981); J.H. Saltzer, D. P. Reed & D. D. Clark, *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS ON COMPUT. SYS. 277 (1984).

33. See, e.g., Joint Comments of Internet Engineers, Pioneers, and Technologists on the Technical Flaws in the FCC’s Notice of Proposed Rule-making and the Need for the Light-Touch, Bright-Line Rules from the Open Internet Order at 21, 82 Fed. Reg. 105 (proposed May 18, 2017) (to be codified at 47 CFR pt. 8 and 20), WC Docket No. 17-108 (2017), <https://www.eff.org/document/internet-engineers-commentsfcc-nn> (“Given the end-to-end principle, any service that appears on the Internet will be available to ISP customers. However, the end-to-end principle depends on noninterference by ISPs. If the FCC reclassifies BIAS providers as information services and is unable to enforce light-touch rules against ISP interference with customer traffic, many new capabilities the FCC has not envisioned will never come to be.”).

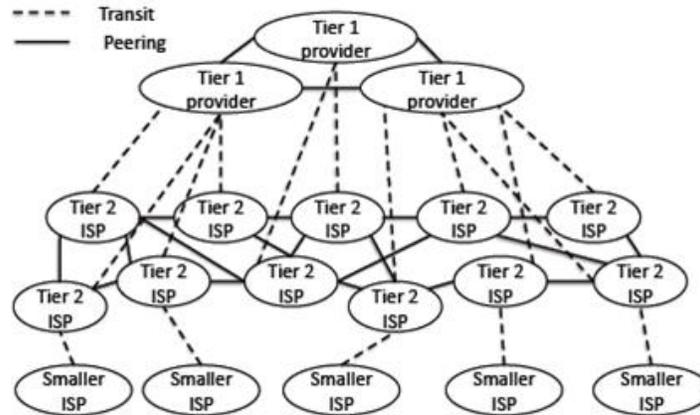


Figure 1: Physical representation of Internet interconnection³⁴

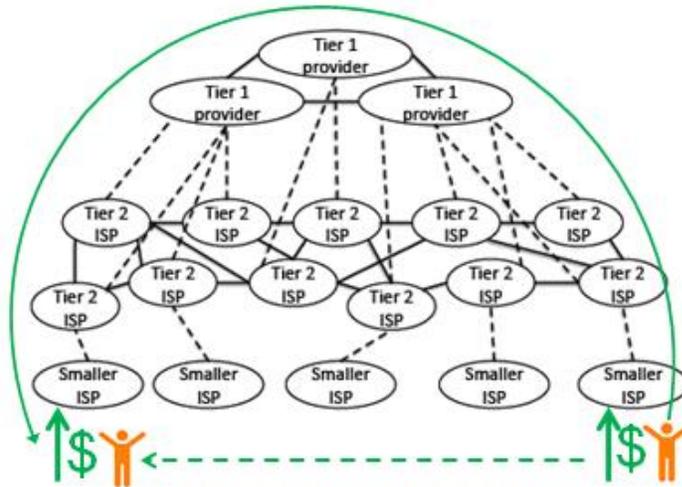
The Internet is not one network but a network of networks, managed by a number of different entities in different countries, which hand data off to each other, so that data moves from one end-user connected through her last mile, local ISP, to another end-user connected through his own local ISP, which is often a different ISP from the first one. In this model, each end-user pays a fee to her local ISP, and only to that ISP. In turn, she can either receive information, send information, or both. Typically, the more information the user wants to send or receive, the bigger the “pipe” that user will want to connect to, and the more the last-mile ISP will charge. A person who only wants to connect to the Internet to read text-only email should be satisfied with a 56k dial-up service. A casual Netflix viewer only needs a half a megabit per second connection, 5 Mbps for HD streaming.³⁵ A gamer who has no tolerance for latency will require a faster connection, and a large corporation such as Netflix sending a tremendous amount of information through the ether will want to connect directly to a T1 backbone provider that can provide large enough bandwidth for Netflix to push its content out to many different receivers connected to many different local ISPs.³⁶ The

34. kc claffy and D. Clark, *Platform Models for Sustainable Internet Regulation*, TPRC 41: THE 41ST RESEARCH CONFERENCE ON COMMUNICATION, INFORMATION AND INTERNET POLICY (2013) (noting that the Internet is constantly in flux, and, in particular, that the traditional model has “flattened” over the years, particularly with the introduction of content delivery networks (CDNs), something that is discussed in detailed in the article cited herewith – this point, however, is besides the scope of the present article, and the traditional representation of the Internet interconnection model suffices for the arguments at hand).

35. *Internet Connection Speed Recommendations*, NETFLIX, <https://help.netflix.com/en/node/306> (last visited Aug. 13, 2021).

36. Or they might instead want to use content delivery networks (CDNs) close to locales where it operates. See, e.g., kc claffy and D. Clark, *Platform Models for Sustainable Internet Regulation*, TPRC

more the bandwidth, whether upstream (data being sent) or downstream (data being received), the more the user will be charged by its last-mile Internet access facility operator. Also note that in the early days of the public Internet, price differentiation through versioning in this one-sided pricing model was implemented by using minutes, rather than bandwidth, as the measurement unit.³⁷ But in either case, even when it implemented price-discrimination schemes, the network operator only ever charged end-users at one end of the market, that is, at the end of the last mile that it itself controls. The way the data is handed off between operators at the core of the network of networks is of no concern to either the sender or the receiver. In other words, a user in Germany wanting to send an email to his cousin in the US only needs to pay a fee to his local German ISP for the message to be received by the cousin who is likewise paying a fee to his local US ISP. The process is the same if the German cousin, instead of using his Internet access to send out emails, uses it to hook a blog, a personal webpage, or a small business webpage it hosts on his local computer, to the Internet at large. In both cases, communication is established between the German sender of content and the US receiver of content through a single payment by the sender to his ISP and a single payment by the receiver to his ISP (Figure 2).



41: THE 41ST RESEARCH CONFERENCE ON COMMUNICATION, INFORMATION AND INTERNET POLICY (2013).

37. For example, in 1996 AOL dialup subscribers paid \$19.95 for the first 20 hours, and \$2.95 for each additional hour. See Steven Bauer, David D. Clark and William Lehr, *The Evolution of Internet Congestion* 14, TPRC 2009 (Aug. 15, 2009), <https://ssrn.com/abstract=1999830>.

Figure 2: Data flows from one user to the other by being handed off from one another by the various operators (ISPs) located at the core of the network, with whom the end users have no relationship. The one-sided pricing implementation enables virtual communication between end-users connected to the Internet through separate ISPs and who pay a fee only to their local ISP.³⁸

In other words, applying a one-sided pricing model to a two-sided market has enabled anyone in the world at the bottom side of their local two-sided market, by paying one single fee to their local ISP, to exchange information with anyone else in the world who has also connected to the Internet by paying one single fee to their local ISP. This was a major departure from previous online models, where subscribers to services such as AOL or CompuServe could only access content produced by other market participants who had a *direct* contractual relationship with AOL or CompuServe. We will return to the discussion of AOL and CompuServe being walled gardens, and the implications of such models on the marketplace of ideas and democratic discourse, in Part III. For now, let us examine how a shift in pricing models from one to two-sided impacts Internet architecture and data flow, and what the consequences of such a shift are, in turn, for the end-users.

III. TWO-SIDED PRICING AFFECTS INTERNET ARCHITECTURE AND OPERATIONS IN MORE THAN A FINANCIAL WAY

In this section, I demonstrate how the systematic implementation of two-sided pricing models by ISPs would drastically affect how the Internet works. This, in turn, would have an impact on the wealth of ideas available in the marketplace. The very logic of two-sided pricing, as applied to data networks, is to block data, by default, from entering the receiver's local network, because senders of data are only incentivized to pay an end-user's local ISP if that ISP implements censorship by default, which can only be lifted in exchange for payment. Two-sided pricing models, therefore, are by definition incompatible with net neutrality. This explains why the economic literature sometimes explicitly refers to one-sided pricing models as "neutral" networks, and pits them against two-sided pricing models, referred to as "non-neutral" networks.³⁹ More broadly, two-sided pricing models, by their very logic, are incompatible with an open Internet.

38. Figure based on the "Physical representation of Internet interconnection" by kc claffy and D. Clark, *Platform Models for Sustainable Internet Regulation*, TPRC 41: THE 41ST RESEARCH CONFERENCE ON COMMUNICATION, INFORMATION AND INTERNET POLICY (2013).

39. See, e.g., John Musacchio, Galina Schwartz & Jean Walrand, *A Two-Sided Market Analysis of Provider Investment Incentives with an Application to the Net-Neutrality Issue*, 8 REV. OF NETWORK ECON., no. 1, 2009, at 23.

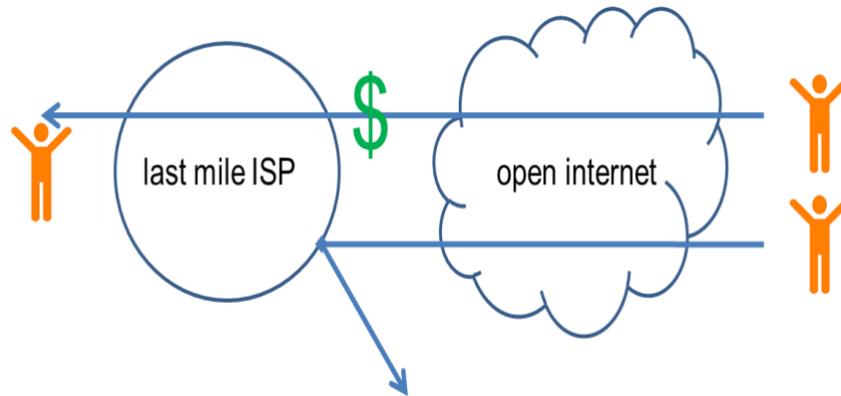


Figure 3: the logic of two-sided pricing applied to data flow: senders of contents who enter into “data pass-through” contracts with last-mile ISPs can reach last-mile users (top flow); senders do not pay the last-mile ISPs have their content blocked at the edge of the last-mile network (bottom flow)

There are thousands of ISPs around the world.⁴⁰ It is therefore impossible for a sender of content to have a direct relationship with them all. As a coalition of 190 among the most celebrated of Internet engineers, pioneers, and technologists have noted in a move to oppose the recall of net neutrality regulation by Chairman Ajit Pai’s FCC in 2017, under a two-sided pricing model, “[d]evelopers would have to ensure that their new application or protocol would work under different specifications on each of the thousands of networks that make up the Internet. Some networks might decide to handle data differently depending on whether it represents webpages or video. Others might decide to prioritize certain data. Such a haphazard mishmash of different specifications and engineering conditions would have made the growth of the Internet as we know it utterly impossible. Instead, it would have resulted in a balkanized Internet—one in which each ISP was its own private fiefdom, where edge providers had to negotiate with the gatekeeper in order to get access to the end users.”⁴¹ And these comments only referred to large, professional content producers. In an open-Internet world where every end-user is also a sender of content, nobody can

40. No recent and specific data seems available, but as of 2014, the U.S. Central Intelligence Agency estimated the total number at over 10,000, with 7,000 in the U.S. alone. CIA WORLD FACTBOOK (2014), <https://www.nationsencyclopedia.com/WorldStats/CIA-Internet-Service-Providers-ISPs.html>.

41. Joint Comments of Internet Engineers, Pioneers, and Technologists on the Technical Flaws in the FCC’s Notice of Proposed Rule-making and the Need for the Light-Touch, Bright-Line Rules from the Open Internet Order at 32, 82 Fed. Reg. 105 (proposed May 18, 2017) (to be codified at 47 CFR pt. 8 and 20), WC Docket No. 17-108 (2017), <https://www.eff.org/document/internet-engineers-commentsfcc-nn>.

realistically expect that the average Internet user casually sending data to the world in the form of emails, blog posts, or a personal web page, would have the language skills, the legal skills, the time, or the financial resources to set-up “data-pass-through” contracts with these thousands of ISPs. If all of these ISPs implemented two-sided pricing models, then, the average sender of content would be declined access to most of them, while a receiver would only be able to access content created by those very few senders who have a direct relationship with his particular last-mile ISP. Such an implementation, then, would turn local ISPs into mere equivalents of the walled gardens of the 1980s, *à la* AOL or CompuServe, where the receiver could only access content vetted by the guardians of that community’s gate.

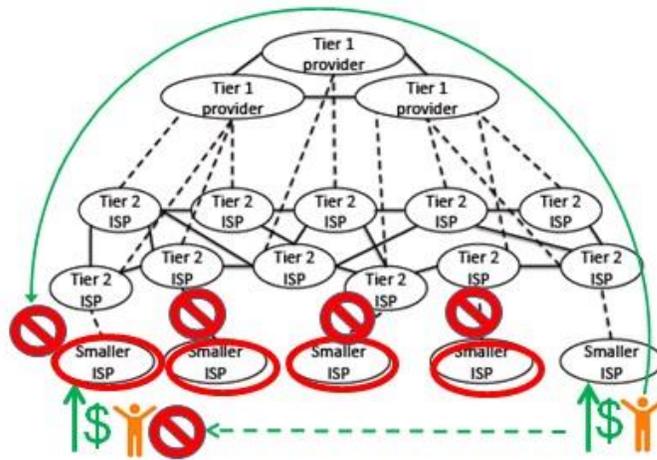


Figure 4: In this two-sided pricing internetworking implementation, virtual communication between sender and receiver is denied, because the sender does not have a direct contractual relationship with, and does not pay, the receiver’s ISP. Each local ISP effectively acts as a gated community/walled garden.⁴²

So, while two-sided pricing models have “the possibility of increasing efficiency of packet transfers over the Internet, such that more time-sensitive packets are given prioritized access,” they “can also effectively exclude access to non-paying firms’ content and applications.”⁴³ To reassure the public that small senders of content would never be shut out by the receiver’s

42. Figure based on the “Physical representation of Internet interconnection” by kc claffy and D. Clark, *Platform Models for Sustainable Internet Regulation*, TPRC 41: THE 41ST RESEARCH CONFERENCE ON COMMUNICATION, INFORMATION AND INTERNET POLICY (2013).

43. Nicholas Economides & Joachim Tag, *Network Neutrality on the Internet: A Two-Sided Market Analysis*, 24 INFO. ECON. & POL’Y 91, 92 (2012).

last mile ISP, ISPs have resorted to the argument of the “dirt road,” which consists in saying that while certain high importance / high bandwidth packets would be prioritized for the benefit of the consumer in exchange for a fee applied to the sender, the ISPs would always leave a slow lane open for traffic that is not bandwidth hungry, therefore not impacting at all the average sender of content.⁴⁴ In other words, fear not, all is well. This argument is reminiscent of a scene in the infamous 1978 comedy *Animal House*, where an ROTC cadet, tasked with controlling the flow of attendants at a parade gone awry, repeatedly yells “Remain calm, all is well!”, before being trampled by a mad crowd.⁴⁵ Indeed, suggesting that the dirt road will ensure that all content can continue going through even when the sender has not entered into a premium contract with the receiver’s ISP is what Washington D.C. politicians call an “alternative fact,” as we now demonstrate using well-established economic principles and evidence.

Starting in the mid-19th century, the economic literature on tiered pricing has clearly shown that when multiple levels of pricing are introduced for a good or service, the quality does not necessarily actually go up from a base 100 level (the status quo) as the tiers of service go up; rather, service is oftentimes actively degraded from a base 100 level (the status quo now being called “top tier,” “premium tier,” or, in the present case, “fast lane”) to create new, lower tiers of service. In other words, the status quo, the “old normal,” is *not* now the lower tier, from which one could get a new and improved service for a higher price; rather, the “old normal” is all of a sudden dubbed premium, which now costs more, and service is actively degraded from that starting place, to create “standard,” or “basic” service. Airlines have been industrious in exploiting this pricing scheme. For example, in 2012, Delta Airlines introduced a fourth class of service, called “Basic Economy.” Basic Economy is the old coach class (3rd class), now made even worse by preventing the traveler from reserving his seat number before check-in, meaning that the traveler is more likely to get a less desirable seat, and precluding upgrades even for travelers who would otherwise be eligible because of their previously-acquired VIP status.⁴⁶ Coach, now called “Main

44. See, e.g., Verizon’s statement: “The Commission should allow flexibility for providers to negotiate differentiated arrangements or experiment with different service models if they see a customer benefit in doing so, *even as customers can continue to go anywhere using their selected tier for Internet access service and edge providers can rely on that service to reach their customers without the need for negotiating with broadband providers for access to end-users.*” Reply Comments of Verizon and Verizon Wireless, *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127(Sept. 15, 2014), https://www.verizon.com/about/sites/default/files/09_15_14_VZ_VZW_Open_Internet_Remand_reply_comments.pdf (emphasis added).

45. ANIMAL HOUSE (Universal Pictures 1978).

46. Delta’s New ‘E’ Basic Economy Fare – No Seat Assignments, Even For Medallions, THE POINTS GUY (Mar. 22, 2012), <https://thepointsguy.com/2012/03/deltas-new-e-basic-economy-fare-no-seat-assignments-even-for-medallions/>; Katie Genter, *How to Survive Basic Economy on Delta Air Lines*,

Cabin,” has all of a sudden become more expensive, but not better, than it used to be; rather, the premium which one now pays to fly coach is simply used to maintain the old level of service and avoid having to suffer through the inconvenience of the degraded new service class. The classical example of such a tiered pricing system dates back to 1844 France. In the seminal paper “On the measurement of the utility of public works,” Jules Dupuit discusses tiered pricing strategies in French railways, at the time divided in 3 classes. He shows how “first class” is not actually a normal class which has been improved (the improvement justifying the premium price), but, rather, *is* the normal class; in turn, classes 2 and 3 are simply class 1 which has actively been degraded. Dupuit writes:

“It is not because of the few thousand francs which would have to be spent to put a roof over the third-class carriages or to upholster the third class seats that some company or other has open carriages with wooden benches. What the company is trying to do is to prevent the passengers who can pay the second class fare from traveling third class; it hits the poor, not because it wants to hurt them, but to frighten the rich. And it is again for the same reason that the companies, having proved almost cruel to the third-class passengers and mean to the second-class ones, become lavish in dealing with first-class passengers. Having refused the poor what is necessary, they give the rich what is superfluous.”⁴⁷

Still in the *transportation* industry, a modern iteration of this system is provided by car manufacturer Tesla. In April 2019, the New York Times investigated the differences between the “standard” Tesla Model 3 car, which retailed for \$35,000 and the “Standard Plus” model, which retailed for an extra \$4,500. It found that this set-up allowed “the company to produce one version of the Model 3 and use software to *limit* the battery range and turn *off* features such as heated seats for customers who wanted the \$35,000 model.”⁴⁸ In other words, Tesla did not build one car (the Standard) and upgraded it (the Standard Plus) by physically adding more features to it. No, it built one car in large quantities and then artificially downgraded some of them to obtain a lesser model. Tesla itself admitted that “the ‘standard’ Model 3 was actually a *software-limited* version of the more expensive car... That means the range of the [“standard”] car on a full charge is restricted, for example, not by battery physics but by software that aims to keep it that

THE POINTS GUY (Aug. 6, 2018), <https://thepointsguy.com/guide/how-to-survive-basic-economy-on-delta-air-lines/>.

47. Arsène Jules Étienne Juvénal Dupuit, *De la mesure de l'utilité des travaux publics*, ANNALES DES PONTS ET CHAUSSEES 8, (2d series, 1844), translated in R.H. Barback, *On the measurement of the utility of public works*, 2 INTERNATIONAL ECONOMIC PAPERS 83 (1952), reprinted in Kenneth J. Arrow & Tibor Scitovsky, eds., READINGS IN WELFARE ECONOMICS 255 (1969).

48. Neal E. Boudette, *Tesla Ends Online Sales of \$35,000 Model 3, Creating New Hurdle for Buyers*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/business/tesla-model-3.html/> (emphasis added).

way.”⁴⁹ But, thanks to Tesla’s over-the-airwaves update system which can enable or disable functionalities in one’s car remotely, one who gets the cheaper version can always “pay the difference for a more capable version at a later date,”⁵⁰ i.e. get Tesla to press a button to *un-disable* existing functions for \$4,500. One now easily sees how ISPs can implement a similar set-up, by letting customers “upgrade” to a fast lane by simply removing artificial road blocks installed on the dirt road. In fact, evidence indicates that this is the most likely scenario going forward, if ISPs are allowed to implement two-sided pricing models. The *information* industry is already rife with examples of what Deneckere and McAfee call “damaged goods,”⁵¹ a practice also known among marketing professionals as “crimping the product.”⁵² Consider the Intel 486 SX processor, which “was initially produced in a curious way. Intel began with a fully functioning 486 DX processor, then *disabled the math coprocessor*, to produce a chip that is strictly inferior to the 486 DX but more expensive to produce. Nevertheless, in 1991, the 486 DX sold for \$588, and the 486 SX for \$333, a little over half the price of the chip that is less expensive to produce.”⁵³ Or consider the IBM LaserPrinter E, a low cost alternative to the IBM LaserPrinter: introduced in 1990, the LaserPrinter E printed 5 page-per-minute, instead of the 10 page-per-minute for the more expensive LaserPrinter. But, as noted by PC Magazine, the LaserPrinter E is otherwise exactly similar to the LaserPrinter; in fact, it *is* the LaserPrinter, to which chips have been *added* to actively *slow down* printing: “PC Lab’s testing of numerous evaluation units indicated that the Laser Printer E firmware in effect insert wait states to slow print speed...IBM has gone to some expense to slow the LaserPrinter in firmware so that it can market it at a lower price.”⁵⁴ In other words, “throughout history and across a broad variety of different industries, manufacturers damage some of their production solely for the purpose of enhancing their discriminatory abilities.”⁵⁵ Today, ISPs claim that being allowed to apply two-sided pricing models combined with tiered pricing to the Internet will lead to increased infrastructure investment on their part.⁵⁶

49. Zach Wichter, *Buying a Tesla Seems Pretty Easy, But There Are a Few Things to Know*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/business/buy-tesla-model-3.html/>.

50. *Id.*

51. Raymond J. Deneckere & R. Preston McAfee, *Damaged Goods*, 5 J. ECON. AND MGMT. STRATEGY 149 (1996).

52. *Id.* at n.1.

53. *Id.* at 149 (citing G. Frenkel, *For Intel, A 486 Chip by Any Other Name is Still the Same*, 8 PC WK. S37(Supp. 1991)).

54. *Id.* at 153-154 (citing M Jones, *Low Cost IBM LaserPrinter E Bears HP LaserJet IIP on Performance and Features*, 8 PC MAG. 33 (1990)).

55. Deneckere & McAfee *supra* note 52, at 151.

56. See generally Reply Comments of Free Press, *In the Matter of Restoring Internet Freedom*, 82 Fed. Reg. 105 (proposed May 18, 2017) (to be codified at 47 CFR pt. 8 and 20), WC Docket No. 17-108

Such reasoning was heavily relied upon by FCC Chairman Ajit Pai in his successful drive to repeal net neutrality.⁵⁷ But the economic literature clearly shows how the concept of paid prioritization, in a two-sided-pricing Internet model, instead of incentivizing ISPs to upgrade existing networks to create fast toll roads (the so-called fast lanes), actually reduces the incentive of ISPs to upgrade networks, and instead provides ISPs with an incentive “to create artificial congestion in the ‘slow lane.’”⁵⁸ ISPs own behavior seems to corroborate economic theory: their investments in wireline broadband infrastructure have actually decreased since the 2015 Open Internet Order was repealed in 2017. In contrast, they had increased in the 2015-2017 period, even though ISPs had warned that net neutrality regulations would lead to a decrease in investment.⁵⁹

It is also worth noting that if ISPs continuously improved all three lanes, the slow lanes would theoretically become good enough that users would not have an incentive to pay for the fast lane anymore. So, just like the French train companies in 1844, or Delta Airlines or Tesla automobiles in 2019, ISPs instead need to scare customers in order to capture revenue from users able to pay a higher price. ISPs’ incentive is to create a slow lane, not by making the fast lane faster, but by artificially congesting the regular lane, the degraded result now aptly named “dirt road.” This is no different than Tesla degrading its Model 3 by artificially lowering its top speed with the help of a piece of software to extract an extra \$4,500 from customers willing to pay that extra to get the “fast Tesla,” which actually is the base, unmodified Model 3. That the ISP’s fast lane would likely be the regular lane, and the “dirt road” the regular lane artificially congested through software

(2017), <https://ecfsapi.fcc.gov/file/10831280772298/Free%20Press%2017-108%20Reply%20Comments.pdf> (discussing ISP’s claims).

57. See generally Restoring Internet Freedom Notice of Proposed Rulemaking, 82 Fed. Reg. 25,568, 25,570 (to be codified at 47 C.F.R. pts. 8, 20), WC Docket No. 17-108 (2017), <https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order/> (discussing how Pai’s FCC in fact went suggested that the 2015 Open Internet Order “has put at risk online investment an innovation, threatening the very open Internet it purported to preserve.”).

58. Nicholas Economides, *Why Imposing New Tolls on Third-Party Content and Applications Threatens Innovation and will not Improve Broadband Providers’ Investment*, in NET NEUTRALITY: CONTRIBUTIONS TO THE DEBATE 86, 94, 99 (Jorge Perez Martinez ed., 2010).

59. Cory Doctorow, *After Net Neutrality Repeal, Comcast, Charter and Verizon Cut Investment in Their Networks*, BOINGBOING (Jan. 23, 2019), <https://boingboing.net/2019/01/23/3pct-lower-in-18.html>; Cory Doctorow, *New York Attorney General Expands Law-Enforcement Investigation into the Bots that Killed Network Neutrality*, BOINGBOING (Oct. 17, 2018), <https://boingboing.net/2018/10/17/fcc-v-ny-ag.html>; *Comcast Reports 4th Quarter and Full Year 2018 Results*, COMCAST (Jan. 23, 2019), <https://www.cmcsa.com/news-releases/news-release-details/comcast-reports-4th-quarter-and-full-year-2018-results>; Jon Brodtkin, *Sorry, Ajit: Comcast Lowered Cable Investment Despite Net Neutrality Repeal*, ARS TECHNICA (Jan. 23, 2019), <https://arstechnica.com/information-technology/2019/01/sorry-ajit-comcast-lowered-cable-investment-despite-net-neutrality-repeal/>; Reply Comments of Free Press at 86-208, *In the Matter of Restoring Internet Freedom*, 82 Fed. Reg. 105 (proposed May 18, 2017) (to be codified at 47 CFR pt. 8 and 20) (Aug. 30, 2017), WC Docket No. 17-108 (2017), <https://ecfsapi.fcc.gov/file/10831280772298/Free%20Press%2017-108%20Reply%20Comments.pdf>.

intervention, is not mere speculation. Not only is it supported by economic theory as we have just observed, but ISPs have at times been explicit about such strategy.⁶⁰ For example, Bill Smith, Chief Technology Officer for BellSouth, stated that “his company should be allowed to charge a rival voice-over-Internet firm so that its service can operate with the same quality as BellSouth’s offering.”⁶¹ In other words, pay a premium to get the same quality as before, or get your bits slowed down. James Boyle offers a witty analogy for such a process of discrimination “between favored and disfavored content, giving the former preferential access;” it would be akin “to letting the phone company say, ‘we will delay your call to Pizza Hut for sixty seconds, but if you want to be put through our featured pizza provider immediately, hit nine now!’”⁶² Jon Peha, noting that “[e]quipment is already being deployed to *degrade* [quality of service] for this purpose,” provides a data-based in-depth discussion of technical variations around this broad theme,⁶³ and provides examples where a service that is sufficiently degraded cannot in practice compete with others even where the data is not fully blocked.⁶⁴ As if this was not enough, one more crucial issue with such an incentive system is that unlike actual freeways where cars will always end up getting to their destination, even if it takes longer than the driver wishes for, in data transmission, when a network (a road) becomes too congested (slow), packets “drop,” that is, get discarded.⁶⁵ This can lead to “congestion

60. Dawn Nunziato, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE 11 (2009)(emphasis added)(“[S]everal broadband providers have ... publicly expressed their intentions to sell preferential Internet access speed to the highest bidder, or to reserve the same for their own (or affiliated) content, and to (respectively) *degrade* Internet access for those unwilling to pay for this privilege”).

61. *Internet Freedom and Innovation at Risk: Why Congress Must Restore Strong Net Neutrality Protection*, ACLU, <https://www.aclu.org/other/Internet-freedom-and-innovation-risk-why-congress-must-restore-strong-net-neutrality> (last visited Sep. 25, 2021); see also Jon Brodtkin, *Comcast Deleted Net Neutrality Pledge the Same Day FCC Announced Repeal*, ARS TECHNICA (Nov. 29, 2017), <https://arstechnica.com/tech-policy/2017/11/comcast-deleted-net-neutrality-pledge-the-same-day-fcc-announced-repeal/> (Comcast deleted its previous “no-paid-prioritization pledge” on the same day FCC Chairman Ajit Pai announced its plan to repeal net neutrality rules, and Comcast has subsequently use subtle rhetoric to dance around the idea of introducing paid-prioritization).

62. JAMES BOYLE, *THE PUBLIC DOMAIN* 235 (2008).

63. John M. Peha, *The Benefits and Risks of Mandating Network Neutrality, and the Quest for a Balanced Policy*, at the 34TH TELECOMM. POL’Y RSCH. CONF. 9-10 (Sep. 2006) (emphasis added); http://users.ece.cmu.edu/~peha/balanced_net_neutrality_policy.pdf.

64. See, e.g., *id.* at 9 (“It is relatively simple to degrade quality of service of VOIP to the point that it cannot seriously compete with traditional telephony.”).

65. See, e.g., Steven Bauer, David D. Clark & William Lehr, *The Evolution of Internet Congestion*, at the TELECOMM. POL’Y RSCH. CONF. 9 (Aug. 15, 2009), <https://ssrn.com/abstract=1999830> (discussion of the “networking text book definition,” according to which congestion is a “situation in which a switch or router has so many packets queued for transmission that it runs out of buffer space and must start dropping packets if more arrive”); see also Joint Comments of Internet Engineers, Pioneers, and Technologists on the Technical Flaws in the FCC’s Notice of Proposed Rule-making and the Need for the Light-Touch, Bright-Line Rules from the Open Internet Order at 6, 82 Fed. Reg. 105 (proposed May 18, 2017) (to be codified at 47 CFR pt. 8 and 20), WC Docket No. 17-108 (2017), <https://www.eff.org/document/internet-engineers-commentsfcc-nn>.

collapse' i.e. periods of time when the network [is] busy sending packets but most of the packets [are] duplicates of previous packets that had already been sent" and dropped along the way.⁶⁶ In practice, this means that if the slow lane is slow enough to create enough congestion, the content never reaches its destination, and the sender is left resending the same packet over and over again, to no avail because the packets keep getting dropped. In practice, such effect is similar to being blocked.

Because the poor are less likely to be able to pay the premium to get the base service, small content producers are more likely to be blocked than large corporate players. This causes an issue when it comes to the Internet's contribution to the marketplace of ideas, both in terms of sheer volume of information being able to pass through, and in terms of plurality of views. We will return to this problem in Parts IV and V. For now, let us examine through historical examples what happens to the ability of users to access content, and the ability of independent content and service providers to distribute their creations, when barriers are erected around last-mile networks, which is what would happen if two-sided pricing schemes were implemented by last-mile ISPs.

IV. BACK TO THE 80S: TWO-SIDED PRICING TURNS THE INTERNET INTO A SERIES OF WALLED GARDENS

Commercial online systems, in the 1980s United States, were organized as "walled gardens" (also known as "gated communities"), a series of closed platform ecosystems, where users could only access the content offered by that walled garden. The three main walled gardens were AOL, CompuServe, and Prodigy.⁶⁷ This organization mirrored early time-sharing systems used at universities, where a researcher at Berkeley could only use the Berkeley computer, the researcher at MIT the MIT computer, etc. Bob Taylor, who in 1966 headed the Information Processing Techniques Office at the Advanced Research Projects Agency (ARPA), remembers that to access time sharing computers in Santa Monica, Berkeley, and MIT, from his office in the Pentagon, he needed three different terminals, and three different sets of user commands. As a reaction, "I said, oh, man, it's obvious what to do: If you have these three terminals, there ought to be one terminal that goes anywhere you want to go where you have interactive computing. That idea is the ARPAnet."⁶⁸

66. Bauer, Clark & Lehr, *supra* note 65, at 22.

67. AOL's *Walled Gardens*, WALL ST. J. (Sept. 4, 2000), <https://www.wsj.com/articles/SB968104011203980910?mg=prod/com-wsj>.

68. John Markoff, *An Internet Pioneer Ponders the Next Revolution*, N.Y. TIMES (Dec. 20, 1999), <https://archive.nytimes.com/www.nytimes.com/library/tech/99/12/biztech/articles/122099outlook-bobb.html>.

This idea was further developed by Taylor with his ARPA predecessor J.C.R. Licklider, known in particular for his “Galactic Network” concept, “a globally interconnected set of computers through which everyone could quickly access data and programs from any site.”⁶⁹ Together, they worked on creating a networked “supercommunity,”⁷⁰ in other words, a network of networks: “you don’t have to be half smart to see this thing ought to be designed such that you have just one terminal and you can go wherever you want to go.”⁷¹ These ideas, which many others in the US and elsewhere contributed to shaping, are the foundations of the open Internet. As a result, and from a practical standpoint, in an open Internet, “[t]he typical contract of an Internet service provider (ISP) with a customer gives the customer access to the whole Internet through a physical or virtual pipe of a certain bandwidth.”⁷² This is what enables virtual communication between senders and receivers of content connected locally via separate ISPs, as we have just discussed in the first two sections. From a pricing and contractual standpoint, this exchange of data across separate, interconnected networks is possible because each last-mile ISP implements a one-sided pricing model, and does not charge outside senders of content or impose on them contractual terms before they let the outside content enter their local network. In contrast, an Internet subject to a two-sided pricing model only gives the local ISP’s customer access to whatever content that ISP has decided to let into its network. The results of this “enclosure movement of the mind,” to borrow from James Boyle,⁷³ is to turn the once-open network of networks into something akin to the non-interconnected walled gardens of the 1980s, and, therefore, radically changes the nature of the Internet and what users can do with it. Indeed, “[t]he way the Internet has operated so far [was itself] a radical departure from the operating principles of the traditional digital electronic networks predating it, such as CompuServe, Prodigy, AOL, AT&T Mail, MCI Mail and others. These older electronic networks were centralized with very little functionality allowed at the edge of the network.”⁷⁴ In fact, “ISPs like AOL, Compuserve, or Prodigy differentiated themselves based on the different information services each provided—services like chat rooms, bulletin board systems, email, and specialized

69. Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts & Stephen Wolff, BRIEF HIST. INTERNET (1997), <https://www.Internetsociety.org/Internet/history-Internet/brief-history-Internet/>.

70. J.C.R. Licklider & Robert W. Taylor, *The Computer as a Communication Device*, SCI. AND TECH. 21, 32 (1968).

71. Leslie Berlin, TROUBLEMAKERS 49 (2017) (citing interview by John Markoff, Senior Writer, N.Y. Times, with Bob Taylor (Dec. 8, 2008)).

72. Nicholas Economides & Joachim Tag, *Network Neutrality on the Internet: A Two-Sided Market Analysis*, 24 INFO. ECON. AND POL’Y 91 (2012).

73. JAMES BOYLE, THE PUBLIC DOMAIN xii (2008).

74. Economides & Tag, *supra* note 72, at 92.

content only available to an ISP's own subscribers. In other words, ISPs competed on what information services they actually provided themselves.⁷⁵ Let us delve into the historical record to appreciate the practical import of this last observation for the flow of ideas.

Most online access providers in the US in the 1980s implemented not just time-based but also content-based price discrimination schemes on the receiver-side of the market. That is, they made the receiver pay differently for different types of content, in what can be considered an early form of zero-rating. For example, Esther Dyson's leading industry newsletter *Release 1.0* reported in 1993 that America Online (AOL) was one of the few providers "left that haven't created a two-tier price structure, separating services such as email or airline reservations from others."⁷⁶ In contrast, while Prodigy had historically provided its service on a flat-fee model (except for email), in July 1993, it was to "institute hourly charges (after two cumulative free hours) for bulletin boards, Easy Sabre, Dow Jones News Retrieval and stock quotes."⁷⁷ This is not different from zero-rating models, where certain content is treated preferentially by the network operator on the user side of the market (for example, T-Mobile treats Spotify better than other music services such as Pandora by not counting the use of that service towards the end-user's data cap, and Facebook launched a mobile Internet service in India that zero-rated... Facebook, until the practice got banned by the local regulator).⁷⁸ But what made these systems so different from the open Internet was not so much the treatment of the *receiver* of content, but, rather, the discrimination they implemented on the *content-provider* side of the market. Content accessible to customers was curated by the platform operator, without due process, and with business considerations dominating considerations of user interest. This led to a paucity of content for users. For example "Prodigy has no chat feature, partly because its network is

75. Joint Comments of Internet Engineers, Pioneers, and Technologists on the Technical Flaws in the FCC's Notice of Proposed Rule-making and the Need for the Light-Touch, Bright-Line Rules from the Open Internet Order at 22, 82 Fed. Reg. 105 (proposed May 18, 2017) (to be codified at 47 CFR pt. 8, 20), WC Docket No. 17-108 (2017), <https://www.eff.org/document/internet-engineers-commentsfcc-17-108>; see also CARL SHAPIRO AND HAL VARIAN, INFORMATION RULES 186-187(1999).

76. Jerry Michalski, *Community, Part I*, RELEASE 1.0, June 21, 1993, at 16.

77. *Id.* at 14.

78. *Unlimited video streaming with Bing On*, T-MOBILE, <https://www.t-mobile.com/offers/binge-on-streaming-video> (last visited Sept. 29, 2021); James Vincent, *Facebook's Free Basics Service has Been Banned in India*, THE VERGE (Feb. 8, 2016), <https://www.theverge.com/2016/2/8/10913398/free-basics-india-regulator-ruling>; see generally Devin Coldewey, *WTF is zero rating?*, TECHCRUNCH (Apr. 16, 2017), <https://techcrunch.com/2017/04/16/wtf-is-zero-rating/> (reviewing issues raised by zero rating); see also Corynne McSherry, Jeremy Malcolm, & Kit Walsh, *Zero Rating: What It Is and Why You Should Care*, ELECTRONIC FRONTIER FOUNDATION (Feb. 18, 2016), <https://www.eff.org/deeplinks/2016/02/zero-rating-what-it-is-why-you-should-care>; Davide Banis, *How 'Zero-Rating' Offers Threaten Net-Neutrality In The Developing World*, FORBES (Feb. 18, 2019), <https://www.forbes.com/sites/davidebanis/2019/02/18/how-zero-rating-offers-threaten-net-neutrality-in-the-developing-world/#75f4ac083b41> (reviewing issues raised by zero rating in the developing world).

centralized, partly because of its policy of censoring content: Every message goes through a software filter; borderline postings are reviewed by staff, who return offensive ones to their originators.”⁷⁹ Community Link Minitel, a joint venture of France Telecom and US West, did provide users access to the services available on the French Minitel network, under one caveat: “US West censors [the “rose” (adult) services] before they reach the US audience.”⁸⁰ Likewise, 101 Online, another attempt by France Telecom to market Minitel in the US, implemented a system where the third-party content providers had to bring their content, on a floppy disk, to a downtown San Francisco office where 101 Online would upload said content on their mainframe. This was one of the reasons that led to a paucity of content on that platform, which in turn led to a paucity of users. As Alan Lundell, editor of Byte Magazine and Mondo 2000, would later put it, “I didn’t know anyone using it.”⁸¹ This historical fact is what led the *Internet Engineers, Pioneers, and Technologists* to comment that absent net neutrality regulations, “the result could be a disastrous decrease in the overall value of the Internet”⁸²...If ISPs could engage in this sort of blocking, throttling, and interference ..., it would transform the Internet from a permission-less environment (in which anyone can develop a new app or protocol and deploy it confident that the Internet treats all traffic equally) into one in which developers would first need to seek approval from or pay fees to ISPs before deploying their latest groundbreaking technology. Developers and engineers would no longer be able to depend on the core assumption that the Internet will treat all data equally. The sort of rapid innovation the Internet has fueled for the past two decades would come to a sudden and disastrous halt.”⁸³ Let us again consider the situation of non-neutral retail online services in the U.S. in the 1980s. The Source, a Readers’ Digest subsidiary, based its selection of curated content “based on likely long-term usage rates, as opposed to ‘attention –getter qualities.’ This relatively new policy,” an industry report noted in 1983, “has led to decisions to drop a number of previously anticipated new products, such as an electronic encyclopedia.”⁸⁴ Likewise, in 1983, the online version of the twenty-volume World Book Encyclopedia

79. Michalski, *supra* note 76, at 15.

80. *Id.* at 11.

81. Julien Mailland, *101 Online: American Minitel Network and Lessons from its Failure*, 38 IEEE ANNALS HIST. COMPUTING 6, 8-9 (2016).

82. Joint Comments of Internet Engineers, Pioneers, and Technologists on the Technical Flaws in the FCC’s Notice of Proposed Rule-making and the Need for the Light-Touch, Bright-Line Rules from the Open Internet Order at 43, 82 Fed. Reg. 105 (proposed May 18, 2017) (to be codified at 47 CFR pt. 8, 20), WC Docket No. 17-108 (2017), <https://www.eff.org/document/internet-engineers-commentsfcc-nn>.

83. *Id.* at 33.

84. ROBERT E. WIDING II & W. WAYNE TALARZYK, ONLINE COMPUT. LIBR. CTR. INC, VIDEOTEX PROJECT REVIEWS II. 75 (Oct. 28, 1983).

was removed from the walled garden and replaced with the Grolier electronic encyclopedia. Overnight, CompuServe users lost access to the World Book content.⁸⁵ The result of these policies of restricting the inflow of content onto these platforms was a paucity of content, and, mechanically, a lack of value for users. This disincentivized users from subscribing to online services. Good data are not available for retail online penetration in the United States in the 1980s and 1990s, mostly because they are self-reported, but a variety of estimates can be recouped.⁸⁶ In 1991, a U.S. Bureau of Census study on computer use in the United States for 1989 did not even mention online activities.⁸⁷ Still in 1991, Al Gore suggested that “services like Prodigy, Genie and CompuServe are now in use in almost half a million homes,”⁸⁸ meaning roughly half of one percent of the population in a country of then-93 million households.⁸⁹ In 1993, Esther Dyson estimated that “some 3 million people are already paying to be in virtual piazzas such as CompuServe, Prodigy, and America Online,” meaning roughly 1.15% of a population of then-260 million.⁹⁰ In contrast, Dyson continued, “at 6 million low-rent terminals in use ... [the French Minitel networks] dwarfs the commercial online services.”⁹¹ Note the difference in scale: in 1993, the 6M French *terminals* (most of which were shared in households or workplaces) served a population of 59M, whereas the 3M U.S. *users* are out of a population of 260M, that same year.⁹² One of the keys to Minitel’s success was that the network was not a walled garden. Instead, it was relatively open. Although there were some administrative hurdles to jump that did create some barriers to entry and some chilling effects on speech, in practice, anyone determined to do so could attach a server to the network and provide lawful content. When the service provider (France Telecom) pulled the plug

85. *Id.* at 21.

86. See Kevin Driscoll, *Demography and Decentralization: Measuring the Bulletin Board Systems of North America*, 23 WIDERSCREEN 2 (2020) (discussing challenges of measuring the penetration of online services); see also JULIEN MAILLAND & KEVIN DRISCOLL, MINITEL: WELCOME TO THE INTERNET 9-13 (2017).

87. Robert Kominski, U.S. DEP’T COM., *Computer Use in the United States: 1989* (1991), <https://www2.census.gov/library/publications/1991/demographics/p23-171.pdf>.

88. Al Gore, *Infrastructure for the Global Village*, 265 SCI. AM. 108, 111 (Sept. 1991).

89. Kominski, *supra* note 88, at 2.

90. Jerry Michalski, *Community, Part I*, RELEASE 1.0, June 21, 1993, at 4.

91. *Id.*

92. Compare INSEE, FRANCE, DEMOGRAPHIC INDICATORS, Google Public Data Explorer, https://www.google.com/publicdata/explore?ds=z7ebrb577a0414_&ctype=l&strail=false&bcs=d&nselm=h&met_y=population&scale_y=lin&ind_y=false&rdim=country&idim=country:FR&ifdim=country&tstart=402044400000&tend=1569654000000&ind=false (last visited Sept. 29, 2021) (French terminals, most of which were shared in households or workplaces, served a population of 59M in 1993), with U.S. CENSUS BUREAU, Population in the US, Google Public Data Explorer, https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&ctype=l&strail=false&bcs=d&nselm=h&met_y=population&scale_y=lin&ind_y=false&rdim=country&idim=country:US&ifdim=country&tstart=622969200000&tend=938502000000&ind=false (last updated Apr. 3, 2020) (The U.S. users made up 3M of a 260M population in 1993).

on certain services based on allegations of illegal content being provided, such decision could be challenged through administrative and judicial institutions. Indeed, for French policymakers, it was clear from the start that the creation of content over the Minitel network would not reach critical mass if the access provider (in this case, the state-run telephone company) imposed restrictions on potential senders of content through personality, financial, or content-based contractual restrictions. In one formulation drafted by the prime minister's office in 1980, the "*neutrality* of the public service of communications" means that "freedom of access to the profession of online publisher is the rule, which conversely means that that any restrictions [imposed at this level] ... would be illegal;" that "there is no legal basis upon which [the network operator] could impose ... [rules] related to the content of the data being transmitted;" and that "[t]o ensure *neutrality* of the public service of telecommunications, it is necessary that the [content providers] be in an objective situation vis a vis [the network operator], as defined by a law or regulation and not through a contract between the [content providers] and [the network operator]. Likewise, the [network operator] will be responsible to ensure the freedom ... of relationships between the user and the information provider."⁹³ In other words, in this early European version, network neutrality means that the network *access* provider (the equivalent of today's ISP) could not interfere with the communication between the receiver and the *content* provider, and could not restrict access to the network to content providers based on the content being transmitted or through contractual arrangements.⁹⁴ Although some easily-circumventable restrictions were eventually put in place to appease a fledging press industry as to who could transmit content over the network, by and large, Minitel was open to any content provider, and the access service provider did not discriminate between content providers, neither based on content, not on ability to pay. As a result, a relatively uncensored Minitel quickly reached critical mass, entered a positive feedback loop, and afforded its users with access to over 25,000 services at its peak in the mid-nineties,⁹⁵ making France then the world's most wired country.⁹⁶ In contrast, referring to the state of the retail online market in the US, Al Gore noted in 1991 that there were "valid worries that existing laws do not adequately

93. F. Froment Meurice, *Principes Généraux Applicables au Videotex: Premiers Eléments*, PREMIER MINISTRE : SECRETARIAT GENERAL DU GOUVERNEMENT (June 30, 1980) (FR) (underline in original) (italics added).

94. Julien Mailland, *Building Internet Policy on History: Lessons of the Forgotten 1981 Network Neutrality Debate*, 2 INTERNET HIST. 6 (2018) (showing that the oft-repeated urban legend that Tim Wu invented net neutrality is factually incorrect).

95. JULIEN MAILLAND & KEVIN DRISCOLL, MINITEL: WELCOME TO THE INTERNET 13-14 (2017).

96. JAMES GILLIES & ROBERT CAILLIAU, HOW THE WEB WAS BORN 111 (2000).

protect the rights and liberties of computer users to express themselves in the new medium.”⁹⁷

Another factor that limited the availability of content on online platforms in the United States in the 1980s and early 1990s was not just that they were censored, walled gardens, but that they were by and large not connected to each other. So, a CompuServe subscriber could not get access to the content available on the AOL platform (let them subscribe to both services), and could only get access to content that had received a prior stamp of approval by CompuServe. A subscription to one of these gated communities gave the user access to the content available within that particular walled garden only. This led to a balkanized market (it was estimated that over 100 ventures competed in 1986)⁹⁸ and a paucity of online content within each individual platform. As a result, online penetration in the US was lagging behind countries such as France, where a universal and rather open and neutral platform made the country the most wired in the world.⁹⁹ Al Gore recognized the cause of the problem (censored, non-interconnected walled gardens), and stressed the importance of the free flow of information for the US: “[r]epresentative democracy relies on the still revolutionary assumption that the best way for a nation to make political decisions is for all its citizens to process the information relevant to their lives and to express their conclusions in free speech and in votes that are combined with those of millions of others to guide the system as a whole. Communism, by contrast, attempted to bring all the information to a large and powerful central processor, which collapsed when it was overwhelmed by even more complex information.”¹⁰⁰ Critiquing corporate censorship and the lack of interconnection of online platforms, and speaking of the need for a general purpose, open, national network, he continued: “Without federal funding for this national network, we would end up with a balkanized system, consisting of incompatible parts. The strength of the national network is that it will not be controlled or run by a single entity. Hundreds of different players will be able to connect their own networks to this one... It will be up to federal and state policy makers to determine how best to build a universal, high-speed network, to reconcile the competing corporate interests and to create a network that maximizes the benefits enjoyed by all Americans... Adequate federal investment and leadership will give us the power to leverage the

97. Al Gore, *Infrastructure for the Global Village*, 265 SCI. AM. 108 (Sept. 1991).

98. JEROME AUMENTE, *NEW ELECTRONIC PATHWAYS: VIDEOTEX, TELETEX, AND ONLINE DATABASES* 44-74 (1987); Christopher Sterling, *Pioneering Risk: Lessons from the US Teletext/Videotex Failure*, 28 IEEE ANNALS HIST. COMPUTING 41, 42 (2006); see also *A Virtual Counter-Revolution*, ECONOMIST, Sept. 4, 2010, at 75.

99. GILLIES & CAILLIAU, *supra* note 96.

100. Gore, *supra* note 97.

millions of dollars into something greater than the sum of its parts.”¹⁰¹ Al Gore understood that interconnection and openness would create network effects that would increase the value of going online for users because availability of information would be maximized. Indeed, as noted by the *Internet Engineers, Pioneers, and Technologists*, it is that “openness and neutrality that have contributed to the Internet’s explosive growth over the past several decades.”¹⁰² As the Internet became privatized under the open and neutral framework theorized by Gore, users flocked the open Internet and abandoned their walled gardens.¹⁰³ The companies that operated walled gardens for the retail market and that nevertheless survived past 1995 were those, notably AOL and CompuServe, that opened their gates and switched their business model to providing access to the open Internet.¹⁰⁴ In doing so, they enabled their users to benefit from the explosion of creation and content linked to the open nature of the Internet.¹⁰⁵ Vint Cerf concurs with Gore: “you want to adopt rules that will allow for innovative, new uses of the net to come about. You wouldn’t want to have a rule which says that the tel-cos [telecommunications companies] can decide what applications you’re allowed to put up on the net. I like this permission-less network idea, which has allowed companies like Amazon and eBay and Google and Yahoo and Skype and others, to exist, as opposed to somebody trying to decide which ones should be allowed on I would say that the walled garden notions of AOL, for example, are clear instances of attempts to control content and access and to bring people into a place where they only see what you want them to see. And the general public has said, ‘We don’t want that.’ The trouble here is that a privatized network can’t create—it cannot keep up with the creativity of the open net. That’s really the issue.”¹⁰⁶ Cerf

101. *Id.* at 111.

102. Joint Comments of Internet Engineers, Pioneers, and Technologists on the Technical Flaws in the FCC’s Notice of Proposed Rule-making and the Need for the Light-Touch, Bright-Line Rules from the Open Internet Order at 31, 82 Fed. Reg. 105 (proposed May 18, 2017) (to be codified at 47 CFR pt. 8, 20), WC Docket No. 17-108 (2017), <https://www.eff.org/document/internet-engineers-commentsfcc-nn>.

103. In fact, Minitel use started collapsing at about the same time, both because it was more expensive than the Internet, but also because access to a now-worldwide network of networks made available a lot more content to users than a domestic, albeit relatively open, network.

104. Consider this 1995 AOL commercial, which, while touting the content of AOL’s walled garden to do things such as researching dinosaurs for your kid’s class presentation, ordering flowers for your mom, or researching the stock market, also pitches some open-Internet interconnection features: “you know, I can even send email on the Internet!” says one character to the other. mycommercials, *Early AOL Commercial (1995)*, YOUTUBE (Nov. 16, 2009), <https://youtu.be/1npzZu83AfU?t=93>.

105. See, e.g., MONICA HORTEN, *THE CLOSING OF THE NET* 9 (2016) (“The Internet was a general-purpose network open to all Its open character led to an explosion in innovation and in content, which in turn is why the openness is considered to be worth protecting as something that has an intrinsic public-interest value.”).

106. Donald Nielson, *Oral History of Vinton (Vint) Cerf*, COMPUTER HISTORY MUSEUM, Nov. 7, 2007, at 37-38, CHM Lot No. X4308.2008.

concluded that “the walled garden notion has disintegrated.”¹⁰⁷ Unfortunately, that notion is back, and is at the heart of two-sided pricing models. As demonstrated in Part II, two-sided pricing models can only be implemented if the last-mile is, by default, a walled garden that blocks outside content and whose door will open only in exchange for payment or another discrimination mechanism. The enclosure necessary to make two-sided pricing models viable for ISPs in an Internetworking context, that is, a system where local ISPs block or throttle incoming content by default in order to incentivize outside content providers to pay them a fee to get on the fast lane, does reverse the trend towards openness and has the potential to take us back to the 1980s.¹⁰⁸

This enclosure of online worlds is detrimental to large corporate content and service providers such as Netflix. But Netflix, with its 229 billion dollars market cap (as of August 2021), can afford paying a toll to a myriad of last-mile ISPs, and can afford the lawyers necessary to negotiate such agreements or bring lawsuits against oligopolistic ISPs for wrongdoing. Smaller, for profit, content providers, in contrast, have been raising red flags. Etsy, for example, has warned that “[w]e have a small legal team of just four attorneys, none of whom are experts in telecommunications law. To bring a case, we would have to spend considerable money on outside counsel to advise us on the merits of our complaint and marshal expert witnesses. Meanwhile, if we chose to proceed, we would be up against the broadband providers’ expert lawyers and unfathomably deep pockets.”¹⁰⁹ If Etsy, with its 23 billion dollars market cap (as of July 2021) and its “team of just four attorneys,” is indeed at risk of being shut out of the marketplace by the implementation of two-sided pricing models, it is not hard to imagine the impact of such models on small, not-for-profit content providers, including end-users, who actually cannot afford to pay either a toll or the lawyers needed to negotiate such toll agreements, and whose packets are at significant risk of being dropped from the dirt road.¹¹⁰ These end-users are

107. *Id.* at 38.

108. *See, e.g.*, HORTEN, *supra* note 105, at 71 (“[N]et neutrality is concerned with interference with Internet traffic and restrictive practices by network operators which have negative externalities.”).

109. Comments of Etsy, Inc., *In the Matter of Open Internet Remand* (July 8, 2014), 81 Fed. Reg. 3967; Preserving the Open Internet, 25 FCC Rcd. 1834 (3), <https://blog.etsy.com/news/files/2014/07/Etsy-Open-Internet-Comments-7.8.14.pdf>.

110. *See* April Glaser, *Comcast Wants You to Think It Supports Net Neutrality While It Pushes for Net Neutrality to Be Destroyed*, SLATE (Nov. 28, 2017), <https://slate.com/technology/2017/11/comcast-wants-you-to-think-it-supports-net-neutrality-while-it-pushes-for-net-neutrality-to-be-destroyed.html> (With respect to Comcast’s position on paid-prioritization, “Comcast’s line has changed in an important way. In a comment to the FCC from earlier this year, the company said it is time for the FCC to adopt a ‘more flexible’ approach to paid prioritization, and noted in a blog post at the time that the FCC should consider net neutrality principles that prevent ‘no anti-competitive paid prioritization.’ In other words, not necessarily all paid prioritization. The inclusion of ‘anti-competitive’ could signal that the company does in fact hope to offer fast-lane service, but at the same price for all. *And it might be a price that say, Fox News and the New York Times can afford, but one that smaller outlets can’t.*”) (emphasis added).

no less content providers than Netflix and Etsy. As the U.S. Supreme Court noted as early as 1997 in *Reno v. ACLU*, “[f]rom the publishers’ point of view, [the open Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can “publish” information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.”¹¹¹ Notice how “commercial entities” and “buyers” are only one element in the Supreme Court’s analysis, and how the Court focuses on the Internet’s role as an electronic marketplace *of ideas*. In this context, I will now argue, the FCC made a mistake in opposing “users” to “edge-providers” in the 2010, 2015, and 2017 Orders, because this opposition reduces the Internet to a commercial marketplace for goods and services, and eludes the historic role of the network of networks as a marketplace of ideas.¹¹² This risk is exacerbated by the fact that a significant part of the rhetoric around Internet policy in the past twenty years has revolved around for-profit uses of the Internet. In the next section, I refocus the policy debate on “the little guys,” users/content creators who use the open network of network a as an electronic soap box.

V. WE HAVE LOST SIGHT OF THE ELECTRONIC SOAP BOX

When and how the shift in rhetoric happened deserves a study onto itself. But one can already trace a key inflection point at the privatization of the Internet in 1995 and the short-lived, yet incredibly disruptive and fruitful dot.com era. The “Internet” the Supreme Court described in *Reno* was what Lawrence Lessig called “Net 95,” a short window of time when “[a]ccess was open and universal, not conditioned upon credentials. It was, in a narrow sense of the term, an extraordinary democratic moment. Users were fundamentally equal. Essentially free.”¹¹³ With the dot.com era comes the tale of the Internet as a new frontier for the maverick entrepreneur. The hero is no longer a user who creates a web page to share his knowledge, or her political insights, with the world, but a hot head who homesteads on the new frontier to both change the world *and* make money doing so. That new

111. *Reno v. Am. C.L. Union*, 521 U.S. 844, 853 (1997).

112. See *Preserving the Open Internet*, 25 FCC Rcd. 1834 (3) (2010), <https://docs.fcc.gov/public/attachments/FCC-10-201A1.pdf> [hereinafter *2010 Order*]; see *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (7) (2015), <https://www.govinfo.gov/content/pkg/FR-2015-04-13/pdf/2015-07841.pdf> [hereinafter *2015 Order*]; see *Restoring Internet Freedom*, 33 FCC Rcd. 311 (1) (2017), <https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order> [hereinafter *2017 Order*].

113. Lawrence Lessig, *The Laws of Cyberspace* presented at the Taiwan Net ‘98 conference 7 (Mar. 1998) (transcript available at https://cyber.harvard.edu/works/lessig/laws_cyberspace.pdf).

rhetoric was captured with gusto by Po Bronson, in his Silicon-Valley-culture masterpiece *The Nudist on the Late Shift*:

BY CAR, BY PLANE, THEY COME. They just show up. They've given up their lives elsewhere to come here. They come for the tremendous opportunity, believing that in no other place in the world right now can one person accomplish so much with talent, initiative, and a good idea. It's a region where who you know and how much money you have have never been less relevant to success. They come because it does not matter that they are young or left college without a degree or have dark skin or speak with an accent. They come even if it is illegal to do so. They come because they feel that they will regret it the rest of their lives if they do not at least give it a try. They come to be a part of history, to build the technology that will reshape how people will live and work five or ten years from now. They come for the excitement, just to be a part of it. They come because they are competitive by instinct and can't stand to see others succeed more than they. They come to make enough money so they will never have to think about money again.

They are the new breed, Venture Trippers, who get off on the dizzying adventure of bloodwork. It is a mad, fertile time. Working has become nothing less than a sport here in Superachieverland: people are motivated by the thrill of the competition and the danger of losing, and every year the rules evolve to make it all happen more quickly, on higher margins, reaching ever more amazing sums.

And rather than choosing not to work hard, the Venture Trippers are taking the opposite approach from the Slackers. They're saying, If I'm going to have to make that trade-off, then hell, why the fuck not? I'm young, let's raise the stakes. Let's up the bet. Let's make it exciting. Let's put it all on black. Let 'em roll.¹¹⁴

In this context, the average Internet user is no longer an active participant in “a vast platform from which to address and hear from a worldwide audience of millions” (*Reno*).¹¹⁵ Instead, roles revert to a traditional professional-media-world dichotomy: content creators on one hand driven by profit, and receivers on the other, passive, mere pairs of eyeballs sitting on their couches at the confines of networks, receiving content pre-packaged by the new heroes of the Internet, the Venture Trippers. It is not surprising then, given this rhetorical shift, that when in 2004, FCC Chairman Powell laid out its Guiding Principles for the Industry for Preserving Internet Freedom, and paid lip service to the little guy in a heading that on its face sounded almost like a manifesto for a socialist revolution (*Achieving the Vision: Power to the People*), he concomitantly reduced the empowering nature of the Internet to “consumer empowerment.” Those who do not create financial value on

114. PO BRONSON, *THE NUDIST OF THE LATE SHIFT* 1 (1999).

115. *Reno*, 521 U.S. at 111.

the networks are no longer recognized as content creators at all, they are now mere consumers of the commercial content created by others:

We must ensure that the various capabilities of these technologies are not used in a way that could stunt the growth of the economy, innovation and consumer empowerment. . . . Broadband networks are impressive generators of economic growth, innovation and empowerment. But generators don't work unless they have fuel to burn. Broadband networks are fueled by consumers' hunger for an ever-expanding array of high-value content, applications and devices that run over these networks. Easy access to this content and technology is bringing more power to the people. . . . the possibilities for consumer empowerment extend beyond devices. These possibilities arise from the Internet's open architecture, which allows consumers to freely interact with anyone around the globe. Musicians and writers, who could never have landed a contract with a major record label or publisher, can find - or create - audiences for their work. Small town radio stations can reach people who have moved to the big city. E-Bay is another good example: gone are the days when each of us had only a small group of potential buyers for what we think is junk in our garages. Somewhere, in the next state or the next continent, there are people who may very well want to buy that "junk" and pay us more than we ever dreamed for it. The open Internet has opened markets beyond the traditional geographic limitations.¹¹⁶

The FCC came full circle in the 2010 Open Internet Order (“the 2010 Order”).¹¹⁷ Where the Reno court had placed commerce last in its analysis of what the Internet marketplace supported (“[f]rom the publishers’ point of view, [the open Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers”),¹¹⁸ the 2010 Order places it first (“Today the Commission takes an important step to preserve the Internet as an open platform for innovation, investment, job creation, economic growth, competition, and free expression.”)¹¹⁹ Where the *Reno* user was considered a full fledged publisher, the 2010 FCC’s user is a mere consumer. Where the Reno court considered the Internet to be a marketplace of ideas, the 2010 FCC characterizes it mostly as a marketplace for commerce: “Each round of innovation increases the value of the Internet for broadband providers, *edge providers*, online businesses, and *consumers*. Continued operation of this virtuous circle, however, depends upon low barriers to innovation and entry by *edge providers*, which drive *end-user* demand. Restricting *edge*

116. Michael Powell, Chairman, Fed. Comm’n, Remarks at the Silicon Flatirons Symposium on “The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age”: Preserving Internet Freedom: Guiding Principles for the Industry (Feb. 8, 2004).

117. Preserving the Open Internet, 25 FCC Rcd. 1834 (3) (2010), <https://docs.fcc.gov/public/attachments/FCC-10-201A1.pdf> (“the 2010 Order”).

118. *Reno v. Am. C.L. Union*, 521 U.S. 844, 853 (1997) (emphasis added).

119. *2010 Order*, *supra* note 117, at 113.

providers' ability to reach end users, and limiting end users' ability to choose which edge providers to patronize, would reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure."¹²⁰ In FCC vernacular, "End user" refers to any individual or entity that uses a broadband Internet access service; we sometimes use "subscriber" or "consumer" to refer to those end users that subscribe to a particular broadband Internet access service. . . . We use "edge provider" to refer to content, application, service, and device providers, because they generally operate at the edge rather than the core of the network."¹²¹ The FCC recognizes that "These activities are not mutually exclusive. For example, individuals who generate and share content such as personal blogs or Facebook pages are both end users and edge providers."¹²² Yet, even in the face of the fact that *all* end-users are content creators ("edge-providers"), the FCC persists in opposing the two, because, it argues, "this basic taxonomy provides a useful model for evaluating the risk and magnitude of harms from loss of openness."¹²³ It may be so, but only to the extent that "harms" are measured in dollar amounts potentially lost by commercial entities whose product distribution is being hindered by ISP's two-sided pricing schemes. For the FCC to oppose (consumerist) end-users to (commercial) edge providers contributes to reinforcing the narrative of the Internet being mostly important to commerce, and to eluding the significance of the Internet as an integral tool of culture and democratic progress. This framing by the FCC is not surprising, as the development of the information-industrial complex has led to a "symbiosis between the states and the corporations," where "the metrics for policy success became aligned to those of the markets."¹²⁴ In other words, as Monica Horten put it, "[t]here is therefore a sharp political divide between the user-empowerment narrative and the market-led perspective of policymaking."¹²⁵ But this dominant framing creates a major issue, because, as Janet Abbate noted, "[h]istories that focus on the dominant players, those with the resources to create expensive new technologies, run the risk of privileging their visions in a contemporary Internet system that has, and should take into account, a much broader scope and constituency. Definitions that locate the defining features of the Internet in situated social practices can help challenge the claim of hardware- and software-builders to speak for the Internet. In the arena of

120. *Id.* at 7 (emphasis added).

121. *Id.* at 3 n.2.

122. *Id.* at 11.

123. *Id.*

124. MONICA HORTEN, *THE CLOSING OF THE NET* 16-18 (2016); *see generally* SHAWN M. POWERS & MICHAEL JABLONSKI, *THE REAL CYBER WAR: THE POLITICAL ECONOMY OF INTERNET FREEDOM* (2015) (discussing the information-industrial complex and its development).

125. HORTEN, *supra* note 124, at 19.

public policy, histories that frame the Internet as the evolution of the public sphere can support arguments for protecting freedom of speech or subsidized public access in a way that histories framing the Internet as an entertainment service or a vehicle for private expression would not.”¹²⁶ Conversely, the FCC’s vernacular, which was used again in the 2015 and 2017 Orders, further eludes thinking about the impact of two-sided pricing models on these content-creating, non-commercial, end-users.

Such opposition between end users and edge providers is easy to grasp for most, because it makes the Internet fit into old-world media categories, within a familiar framework where people are either producers or consumers. But this radio-TV-world analysis is far outdated. In reality, “end-users” are themselves all publishers. Whether we publish a personal website, a blog, shout an announcement to a listserv, or send an email, we are no less content providers than Netflix, CNN.com, or MLB.com. There is a difference in degree, but not in nature, as far as the definition of a publisher is concerned. This false dichotomy is reinforced by narratives put forth by many influential pro-net neutrality activists themselves. Just like Chairman Powell had stressed that we needed “Power to the People” because “there are people who may very well want to buy that ‘junk’ and pay us more than we ever dreamed for it,” if only we get access to the “Internet’s open architecture” and to E-Bay, so did Chad Dickerson, CEO of Etsy, in a well-publicized testimony before the US House of Representatives in 2015. After reminding the lawmakers that “Etsy is an online marketplace where you can buy handmade and vintage goods from artists, designers, and collectors around the world 88% are women. Most are sole proprietors who work from home, and they depend on Etsy income to pay their bills and support their families,” and that “Our members understand what’s at stake,” he went on to tell the teary-eye story of Tina, an Etsy seller from Spring Valley, Illinois, [who] captured the sentiments of many micro-businesses when she wrote, “We rely on all my sales to make ends meet. Any change in those and it’s the difference between balanced meals for my children and cereal for dinner.”¹²⁷ Aside of this public relations exercise in benevolence by the CEO of a publicly-traded company, generally, most of mainstream media’s reporting on net neutrality violations covered commercial, for-profit enterprises, from

126. Janet Abbate, *What and where is the Internet? (Re)defining Internet histories*, INTERNET HISTORIES, Mar. 2017, at 13.

127. Chad Dickerson, CEO, Etsy Inc., Address before the U.S. House of Representative Committee on Energy and Commerce, Subcommittee of Communications and Technology: Testimony on Protecting the Internet and Consumers through Congressional Action (Jan. 21, 2015), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-CT-Dickerson-Internet-Consumers-Congressional-Action-2015-1-21.pdf>.

Skype¹²⁸ to Netflix¹²⁹ to Google Voice,¹³⁰ whose content or apps were blocked by wireline or wireless ISPs.¹³¹

Such coverage does not mean that small and/or not-for-profit speakers have not suffered in an era devoid of enforceable net neutrality rules, but, rather, that these content creators do not make the news, and neither do political speakers who are shut out of the marketplace of ideas, without due process, by oligopolistic ISPs. Even John Oliver, whose contribution to putting the importance of net neutrality in the public eye and shifting FCC Chairman Wheeler's position on the topic is well documented and should not be understated,¹³² fell into the trap of reducing the Internet to a consumerist platform. To illustrate the harm caused by the implementation of two-sided pricing models by ISPs, he jokingly suggested that his "startup video streaming service, *Nutflix*, a one-stop resource for videos of men getting hit in the nuts," wouldn't be able to compete with wealthy companies like Netflix who are able to pay the ISPs' tolls. While hilarious, this constant representation of the Internet as a place focused on commerce and mindless entertainment marginalizes speakers who are not part of the capitalist mainstream, these very content creators who have historically made the Internet interesting before it became mostly about online shopping, reruns of *The Office*, and cute cat videos.¹³³ Obfuscating the role of average Internet

128. Steven Cherry, *The VoIP Backlash: Internet-based telephony saves consumers money by bypassing traditional carriers—but new software lets the carriers block those pennies-per-minute calls*, IEEE SPECTRUM (Oct. 1, 2005), <https://spectrum.ieee.org/the-voip-backlash>; Philip Elmer-DeWitt, *Group asks FCC to probe iPhone Skype restrictions*, FORTUNE (Apr. 3, 2009), <https://fortune.com/2009/04/03/group-asks-fcc-to-probe-iphone-skype-restrictions/>.

129. LastWeekTonight, *Net Neutrality: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (June 1, 2014), <https://youtu.be/fpbOEOrrHyU>; Juliana Reyes, *This graph shows how Netflix speeds changed after Comcast deal*, TECHNICALLY (May 9, 2014), <https://technical.ly/philly/2014/05/09/graph-shows-netflix-speeds-changed-comcast-deal-comcast-roundup/>.

130. Nilay Patel, *AT&T, Apple and Google respond to the FCC over Google Voice and the iPhone App Store*, ENGADGET (Aug. 21, 2009), <https://www.engadget.com/2009/08/21/atandt-tells-the-fcc-it-had-no-role-in-removing-google-voice-fro/>.

131. See also Joint Comments of Internet Engineers, Pioneers, and Technologists on the Technical Flaws in the FCC's Notice of Proposed Rule-making and the Need for the Light-Touch, Bright-Line Rules from the Open Internet Order at 33-35, 39-40, 42, 82 Fed. Reg. 105 (proposed May 18, 2017) (to be codified at 47 CFR pt. 8, 20), WC Docket No. 17-108 (2017), <https://www.eff.org/document/internet-engineers-commentsfcc-nn>.

132. Brook Boliek, Alex Byers, & Bill Duryea, *The FCC chair's Internet pivot*, POLITICO (Feb. 2, 2015), <https://www.politico.com/story/2015/02/tom-wheeler-net-neutrality-114785>.

133. See *Net Neutrality: What You Need to Know Now*, FREE PRESS, <https://www.freepress.net/issues/free-open-Internet/net-neutrality/net-neutrality-what-you-need-know-now> (last visited Oct. 4, 2021) ("The consequences will be particularly devastating for marginalized communities media outlets have misrepresented or failed to serve. People of color, the LGBTQ community, indigenous peoples and religious minorities in the United States rely on the open Internet to organize, access economic and educational opportunities, and fight back against systemic discrimination. Without Net Neutrality, how will activists be able to fight oppression? What will happen to social movements like the Movement for Black Lives? How will the next disruptive technology, business or company emerge if Internet service providers let only incumbents succeed? The open Internet allows people of color to tell their own stories and organize for racial justice. When activists are able to turn out

users in creating content that has value besides sheer entertainment makes it more difficult to think about the impact of two-sided pricing models on politics, community involvement, the arts, and on democracy in general. And that impact is more than speculation by radical activists or theoretical ramblings by law, economics, history, or computer science academics. There is plenty of evidence that political speech, on both ends of the spectrum, from anti-Iraq-war groups to pro-choice and white-nationalist activists, have been shut out of the publishing game by American ISPs.¹³⁴

thousands of people in the streets at a moment's notice, it's because ISPs aren't allowed to block their messages or websites The mainstream media have long misrepresented, ignored and harmed people of color. And thanks to systemic racism, economic inequality and runaway media consolidation, people of color own just a handful of broadcast stations. This dynamic will only get worse: In 2017, Chairman Pai demolished the media-ownership rules to pave the way for even more consolidation. The lack of diverse ownership is why news outlets have gotten away with criminalizing and dehumanizing communities of color. The open Internet allows people of color and other marginalized communities to bypass traditional media gatekeepers. Without Net Neutrality, ISPs can block speech and prevent dissident voices from speaking freely online. Without Net Neutrality, people of color are losing a vital platform. And without Net Neutrality, millions of small businesses that people of color own won't be able to compete against larger corporations online, which will deepen economic disparities.”)

134. John M. Peha, *The Benefits and Risks of Mandating Network Neutrality, and the Quest for a Balanced Policy* 13, 34TH TELECOMMUNICATIONS POLICY RESEARCH CONFERENCE (TPRC), Sept. 2006, available at http://users.ece.cmu.edu/~peha/balanced_net_neutrality_policy.pdf (“In 2003, Cumulus Broadcasting and Cox Radio banned the radio play of music from the Dixie Chicks after one member criticized President George W. Bush and the war in Iraq, in spite of the fact that the multi-Grammy-winning artists had the most popular country song in the US at the time, and none of their antiwar sentiments were reflected in their songs. Radio stations have the right to play only what they wish. After all, there are many radio stations, so if listeners are unhappy with the offerings of one station, they can try another. However, users of broadband Internet do not have so many options. Members of the Telecommunications Union in Canada were reminded of this during a labor dispute in 2005, when the ISP Telus blocked access to a web site that was trying to disseminate the union’s views”); see generally Kevin Graham, *Protest Draws Attention to Memo*, TAMPA BAY TIMES, June 3, 2005; Brad Friedman, *COMCAST KILLS EMAIL FROM ‘AFTERDOWNINGSTREET’ COALITION!*, THE BRADBLOG (July 15, 2015), <http://www.bradblog.com/?p=1603> (cited in DAWN NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE 5-6 (2009) (discussing how in 2005, Comcast blocked incoming emails sent from AfterDowningStreet, an anti-Iraq-war group, to its subscribers, a fact Comcast acknowledged, although it blamed a third-party vendor for that action); *Id.* at 7 (citing Winter Patriot, *Censoring Again: Comcast Blocks Emails Linking to Cindy Sheehan Website!*, THE BRADBLOG (Aug. 17, 2005), <http://www.bradblog.com/?p=1721> (A month later, “another antiwar organization experienced difficulty communicating via email with Comcast subscribers. The organization MeetwithCindy, headed by Cindy Sheehan, an antiwar advocate whose son was killed in the war in Iraq, had its email communications censored by Comcast, Cox, and other email providers . . . Once again, as with the AfterDowningStreet incident, neither the sender nor the intended recipients of the communications were informed that the emails were being censored, as such blocking was implemented in a manner that was both transparent either to the sender or the intended recipients.”); Nate Anderson, *Pearl Jam censored by AT&T, calls for a neutral ‘Net*, ARS TECHNICA (Aug. 9, 2007), <https://arstechnica.com/tech-policy/2007/08/pearl-jam-censored-by-att-calls-for-a-neutral-net/> (cited in DAWN NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE 7-8 (2009)) (AT&T has censored a webcast of a Pearl Jam cover of Pink Floyd’s Another Brick in the Wall, where the band changed the lyrics “Teacher, leave those kids alone,” to, “George Bush, find yourself another home,” something AT&T has acknowledged, although calling it “a mistake by a webcast vendor.” As this instance of net neutrality violation by a large ISP unfolded, Pearl Jam declared: “This, of course, troubles us as artists but also as citizens concerned with the issue of censorship and the increasingly consolidated control of the media . . . What happened to us this weekend was a wake-up call, and it’s

“Nerdcare” music star Monzy, who represents a style of music that celebrates geek culture,¹³⁵ might as well have been speaking in the name of large US ISPs addressing their “end-users” acting as content providers when he wrote, in his 2006 hit *Kill Dash Nine*:

*I'll chown your home and take your access away
Comin' straight outta Stanfurd, ain't nobody tougher
Control-X, Control-C, I'll discard your fuckin' buffer
You're outside your scope, son, close them curly brackets
Cause I drop punk-ass bitches like a modem drops packets¹³⁶*

Indeed, “punk-ass bitches” content creators that do not have the favor of local ISPs get dropped from other users’ sight when the ISP-controlled network gateways and routers drop their content’s packets to enforce two-sided pricing models. But they do not have John Oliver on hand to defend them, because they are not entertainment-worthy. As Oliver himself put it sarcastically, “if you want to do something evil, put in inside something boring.”¹³⁷ And the fate of democracy, to most, being much more boring than cute cat videos, Twitter memes, or Instagram selfies, small political, educational, or artistic speakers have not generally been placed under the limelight. The consumerist narrative has so far triumphed over the user-empowerment narrative in Washington, D.C. policy circles. The result has been to obfuscate the essential role of the little guy in contributing to the marketplace of ideas. But in July 2021, both President Biden’s Executive Order, and former President Trump’s lawsuit against Facebook, Twitter, and YouTube, have put the importance of political speech back into the public eye, and there is therefore momentum for net neutrality legislation. In the remainder of this article, I explore what traditional political theory in the realm of freedom of speech, and the body of case law it has grounded, can tell us for thinking about net neutrality policy from a normative standpoint, and fight the depletion of ideas in the marketplace caused by two-sided

about something much bigger than the censorship of a rock band.” They were, indeed, right, and, in fact, it also is about something much bigger than the censorship of the left end of the political spectrum.); Robert Dieckmann, *The Collapse of American Culture*, THE CONSERVATIVE VOICE, May 20, 2007; Jim Kouri, *INTERNET PROVIDERS CENSORING CONSERVATIVE NEWS E-MAIL*, NEWSWITHVIEWS (Apr. 26, 2007), <http://www.newswithviews.com/NWVexclusive/exclusive114.htm> (cited in DAWN NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE 7 (2009)) (Conservative speakers have not been spared by large ISPs either. SBC Global and Earthlink have blocked incoming emails from NewsWithViews and other conservative newsletters, and Verizon has prevented willing subscribers to NARAL Pro-Choice America’s SMS’ dispatch from receiving such messages).

135. See, e.g., Allura Dannon, *What Is It? Nerdcore*, XLR8R (Oct. 28, 2007), <https://www.xlr8r.com/features/what-is-it-nerdcore>.

136. Monzy, *Kill Dash Nine Lyrics*, GENIUS (2006), <https://genius.com/Monzy-kill-dash-nine-lyrics>.

137. LastWeekTonight, *Net Neutrality: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (June 1, 2014), <https://youtu.be/fpbOEoRrHyU>.

pricing models. Drawing particularly from influential political science scholar Alexander Meiklejohn, and the landmark case *Pruneyard Shopping Center v. Robins*,¹³⁸ I argue that both controlling political philosophy and Supreme Court precedent give legitimacy to an Anti-Discrimination Act for Cyberspace which would pass constitutional muster.

VI. FIGHTING THE MARKETPLACE OF IDEAS' DEPLETION BY EXPANDING FREEDOM OF SPEECH THROUGH LEGISLATION

I have demonstrated in Parts I through IV that the implementation of two-sided pricing models by last-mile ISPs would drastically affect the way that the public Internet has historically functioned, because such an implementation requires turning last mile ISPs, by default, into walled gardens – the gates of which will only open upon payment by, or other discriminatory arrangement with, select content providers. I have also shown that despite their claims that such schemes will boost infrastructure investments for the benefit of users, and that nobody's speech will be suppressed thanks to "dirt roads," ISPs' incentive actually is to degrade service for the majority of users, in order to extract payments by a few large content providers that have the ability to do so. The likely result of such an implementation, then, is for small speakers to be shut out of the publishing game, and for the once-open Internet to drift back towards walled gardens models of the 1980s where content accessible to the users was drastically limited, and where freedom of expression was curtailed without due process. The result is a depletion of the marketplace of ideas. What, then, can be done to protect freedom of expression over the open Internet, and the overall wealth of networks?¹³⁹ I suggest that we turn to traditional American political philosophy and to the existing body of case law to find the answer. One of the most important theories that supports free speech jurisprudence in the United States is that of the "marketplace of ideas."¹⁴⁰ This theory, which can be traced back to John Milton and John Stuart Mill, generally suggests that good ideas will emerge and prevail over bad ideas, but only if

138. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

139. See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 29-127 (2006) (discussion of the networked information economy).

140. Burt Neuborne, *An Overview of the Bill of Rights*, in *FUNDAMENTALS OF AM. LAW* 91-92 (Alan B. Morrison ed., 1998) ("[f]ree speech protection in the United States is ... complicated by the lack of a consensus theory of why we care about protecting speech. Two theories currently vie for acceptance. One, associated with Alexander Meiklejohn, argues that government interference with the free flow of information prevents the public from making informed democratic choices... A second theory, associated with Tom Emerson, argues that free speech is protected, not merely because it is vital to the proper functioning of democratic institutions, but because self-expression is an essential component of human dignity... Modern approaches to free speech are often untidy amalgams of the two theories that fail to acknowledge the tension between an 'instrumental' and a 'dignitary' vision of free speech."). In this article, I chose not to oppose the two theories but to rather focus on what we can learn from Meiklejohn, with no demerit for Emerson.

all ideas can freely confront each other in a marketplace – follows that government curtailment of speech deemed nefarious by a token ruler – no matter how good the ruler’s intentions - is bad policy, because “wrong” speech does not get to be exposed and is more likely to proliferate in the underground than if it were exposed under the light of rational debate.¹⁴¹ Free speech theorist Alexander Meiklejohn provided a modern articulation of this theory within the framework of the U.S. Constitution. In his 1955 *Testimony before Congress on The Meaning of the First Amendment*, he stated that the First Amendment to the Constitution is directed against the “mutilation of the thinking process of the community,” that “in our popular discussion, unwise ideas must have a hearing as well as wise ones, dangerous ideas as well as safe, un-American as well as American,” and that “[s]uppression is always foolish. Freedom is always wise. That is the faith, the experimental faith, by which we Americans have undertaken to live.”¹⁴² The impact of Meiklejohn’s thought is evident in the Supreme Court’s case law on political speech since the middle of the 20th century. For example, in *Terminiello v. Chicago*,¹⁴³ the Supreme Court overturned on First Amendment grounds the conviction for breach of the peace of a bigot who had made inflammatory comments which resulted in a riot. In the majority opinion, Justice Douglas stated that “a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest There is no room under our Constitution for a more restrictive view. For the alternative would lead

141. On the marketplace of ideas in free speech jurisprudence in the United States, *see generally* LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986); DONALD A. DOWNS, *NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT* (1985); STEVEN J. HEYMAN, *HATE SPEECH AND THE CONSTITUTION* (1996); Julien Mailland, *Freedom of Speech, the Internet, and the Costs of Control: The French Example*, 33 N.Y.U. J. INT’L L. & POL. 1179 (2001); Julien Mailland, *The Blues Brothers and the American Constitutional Protection of Hate Speech: Teaching the Meaning of the First Amendment to Foreign Audiences*, 21 MICH. ST. INT’L L. REV. 443 (2013); ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (1979); *contra* RICHARD DELGADO, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (1997); Stanley Fish, *There’s No Such Thing as Free Speech and It’s a Good Thing Too* (Feb. 1992), *reprinted in* STEVEN J. HEYMAN, *HATE SPEECH AND THE CONSTITUTION* 180 (1996).

142. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), *reprinted in* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 109-12 (1960).

143. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

to standardization of ideas either by legislatures, courts, or dominant political or community groups.”¹⁴⁴ The Supreme Court of the United States further implicitly confirmed the importance of Meiklejohn’s political thought on its case law when it refused to grant certiorari in the so-called *Skokie* case.¹⁴⁵ In June, 1977, the National Socialist Party of America applied for a parade permit from the Village of Skokie, Illinois. Of the population of Skokie, a Chicago suburb, the majority was Jewish, and a substantial number were actual holocaust survivors. The nazis planned to assemble in front of the Village Hall, to “wear uniforms with swastikas,” and to “carry placards proclaiming free speech for white persons.”¹⁴⁶ The Village denied the permit. The nazis sued the Village, and the United States District Court for the Northern District of Illinois declared the Village’s attempt to prevent the parade unconstitutional under the First Amendment and provided injunctive relief.¹⁴⁷ The United States Court of Appeals for the Seventh Circuit affirmed.¹⁴⁸ The US Supreme Court denied certiorari because, as a constitutional matter, it was what has been dubbed “an easy case.”¹⁴⁹ This denial to further hear the case was in itself extremely significant, because nazi speech is so ignominious, and the consequences of its implementation so horrific, that most sensible people deem it to be “wrong.”¹⁵⁰ Yet, in denying certiorari and confirming the lower courts’ injunctions to let the nazis parade, the U.S. Supreme Court made it clear that the freedom of speech was a value so integral to the US democratic way of life as to withstand virtually any form of legal balancing.¹⁵¹ In doing so, it implicitly confirmed that Meiklejohn’s interpretation of the First Amendment is indeed a controlling force under positive law. Aryeh Neier, the holocaust survivor who represented the nazis in court and fought for their First Amendment right to parade, provided a pre-Internet, yet modern, formulation of the marketplace of ideas theories as applied to the utmost heinous speech:

144. *Id.*

145. *Smith v. Collin*, 439 U.S. 916 (1978).

146. *Id.* at 917.

147. *Collin v. Smith*, 447 F. Supp. 676 (1978).

148. *Collin v. Smith*, 578 F.2d 1197 (1978).

149. See Lee Bollinger & Aryeh Neier, *The Skokie Legacy: Reflections on an ‘Easy Case’ and Free Speech Theory*, 80 MICH. L. REV. 617 (1982); Martin H. Redish, *New Film Explores Skokie’s Battle with Neo-Nazis*, WTTW (Jan. 24, 2013), <https://news.wttw.com/2013/01/24/new-film-explores-skokie-s-battle-neo-nazis>.

150. Carl Cohen, *Skokie—The Extreme Test*, THE NATION, Apr. 15, 1978, at 422, 428. (“[t]he principle that ‘Congress shall make no law’ . . . is perennially tested by American Nazis . . . By presenting the extreme case, these Nazis provide an instructive test of a very good principle.”); see also Julien Mailland, *The Blues Brothers and the American Constitutional Protection of Hate Speech: Teaching the Meaning of the First Amendment to Foreign Audiences*, 21 MICH. ST. INT’L L. REV. 443, 450 n.49 (2013).

151. Julien Mailland, *Freedom of Speech, the Internet, and the Costs of Control: The French Example*, 33 N.Y.U. J. INT’L L. & POL. 1179, 1183 (2001).

I supported free speech for Nazis when they wanted to march in Skokie in order to defeat Nazis. Defending my enemy is the only way to protect a free society against the enemies of freedom I could not bring myself to advocate freedom of speech in Skokie if I did not believe that the chances are best for preventing a repetition of the Holocaust in a society where every incursion on freedom is resisted.¹⁵²

As the *Skokie* case illustrates, Meiklejohn's work in decrypting the meaning of the First Amendment has provided an ideological basis for fundamental cases expanding the right to free speech for Americans to an extent unmatched in any other country. A core point to be made here is that the First Amendment is itself a regulation. *It is a regulation that frees*, because it prevents those in control of the physical facility where speech is to be conducted from discriminating against speech they do not favor by simply cutting access of disfavored speakers to said physical facility. This is precisely what the 2015 Open Internet Order did when it banned blocking, throttling, and paid prioritization. In that sense, such net neutrality regulation is, simply, *an anti-discrimination act for cyberspace*, one that brings the spirit of the First Amendment into the digital age.

Yet, in today's politically-polarized America, the very idea of net neutrality regulation has been spun to mean something different. "Pro-freedom" politicians such as Senator Ted Cruz have claimed that "'Net Neutrality' is Obamacare for the Internet; the Internet should not operate at the speed of government."¹⁵³ When Chairman Ajit Pai's FCC issued the Notice of Proposed Rulemaking that set the recall of net neutrality regulations in the 2017 Order in motion ("the 2017 NPRM"),¹⁵⁴ it framed the 2015 Order as a government takeover over the Internet. The decision to (properly) reclassify ISPs as common carriers under Title II of the 1996, the NPRM declared, "represented a massive and unprecedented shift in favor of government control of the Internet."¹⁵⁵ The very title of the NPRM, "In The Matter of Restoring Internet Freedom," is a rhetorical artifice used to suggest that the 2015 Open Internet Order had diminished freedom on the Internet, and to portray proponents of net neutrality as opponents of a free Internet. The 2017 NPRM, I have argued elsewhere, is in fact "little more than a political document pursuing a political agenda rather than a well-reasoned legal analysis objectively applying the facts as required by the

152. ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 1-3 (1979).

153. Senator Ted Cruz (@SenTedCruz), TWITTER (Nov. 10, 2014, 10:43 AM), <https://twitter.com/sentedcruz/status/531834493922189313>.

154. Restoring Internet Freedom, 82 Fed. Reg. 25568 (proposed on May 23, 2017) (to be codified at 47 C.F.R. pt. 8, 20) [*hereinafter* the 2017 NPRM].

155. 2017 NPRM, *supra* note 154, at 25570.

Administrative Procedures Act.”¹⁵⁶ In fact, the NPRM embraced “the same rhetorical tools as the broadband Internet service providers and their industry trade associations, which is to confuse the public and suggest that they are the real supporters of an ‘open Internet.’”¹⁵⁷ But that rhetoric is flawed. Regulation can free. This seemingly radical-and-internally-inconsistent suggestion is actually neither radical nor internally inconsistent. In 2010, *The Economist*, a newspaper that can hardly be accused of publishing socialist pamphlets or being a breeding ground for the radical left, took a stance in favor of Internet regulation. It specifically pushed for requiring “telecom operators to open their high-speed networks to rivals on a wholesale basis as is the case almost everywhere in the industrialized world” (but something the Obama FCC itself had not dared even considering, as it did forbear from a majority of provisions of Title II of the 1996 Act in the 2015 Open Internet Order).¹⁵⁸ The conservative British outlet wrote: “This newspaper has always championed free trade, open markets, and vigorous competition in the physical world. The same principles should be applied on the Internet as well.”¹⁵⁹ The *Economist* editorialists understand well, contrary to what they call “those on the right [who] see net neutrality as a socialist plot to regulate the Internet,”¹⁶⁰ that regulation, when well designed, can indeed restore free trade and open markets when these have been compromised (in that case, by “the lack of competition in broadband access.”)¹⁶¹ Indeed, what holds true in the marketplace of goods and services

156. Reply Comments of Barbara A. Cherry, Julien Mailland, & Matt Pierce at 1, *In the Matter of Restoring Internet Freedom*, 82 Fed. Reg. 105 (proposed May 18, 2017) (to be codified at 47 CFR pt. 8 and 20) (Aug. 29, 2017), WC Docket No. 17-108 (2017), <https://ecfsapi.fcc.gov/file/1209736308391/Cherry%20Mailland%20Pierce%20Reply%20Comments%20WC%20Docket%2017-108.pdf>.

157. *Id.*; see, e.g., Comments of AT&T Services Inc. at 1, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108 (“AT&T supports an open Internet, as do essentially all broadband ISPs”); Comments of the NCTA – The Internet & Television Association at 54 n.215, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108 (citing NCTA, *Reaffirming Our Commitment to an Open Internet*, PLATFORM (May 17, 2017), <https://www.ncta.com/platform/public-policy/reaffirming-our-commitment-to-an-open-internet/>); Comments of USTELECOM Association at ii, WC Docket No. 17-108 (“Our broadband provider members have long been committed to delivering to their customers an open Internet that meets consumer expectations”); Comments of Verizon at 5, WC Docket No. 17-108 (“As we have explained before, Verizon is committed to an open Internet. We have invested billions of dollars in businesses that rely on the open Internet, which our customers view as essential and which is therefore a critical ingredient to our success”); Comments of Comcast Corporation at 52-53, WC Docket No. 17-108 (citing May 2017 Joint ISP Commitment) (“As noted above, Comcast has consistently supported open Internet protections and will continue to do so regardless of what legal framework is in place. The consensus principles of openness on which the Internet was built are a core component of Comcast’s commitment to its customers. Indeed, Comcast has prominently and unequivocally reaffirmed—in advertisements, blog posts, and elsewhere—that we’ve always been committed to an open Internet that gives you the freedom to be in charge of your own online experience. And that will not change”).

158. See Cherry, Mailland & Pierce, *supra* note 156, at 12-15.

159. *The web’s new walls*, THE ECONOMIST, Sept. 4, 2010, at 11.

160. *Id.*

161. *Id.*

also holds true in the marketplace of ideas. And the digital open networks of networks had become just the place to realize the vision of the likes of John Milton. Consider this classic, 1945 statement by Justice Jackson:

[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.¹⁶²

Layer over it a statement made 70 years later by Apple co-founder Steve Wozniak:

The Internet when it first came, it was a breath of fresh air, it was so free, nobody owned the Internet space. . . . it was worldwide, it was people to people, it was like we little people of the world all of a sudden had this incredible resource and we didn't have to go through other people selling it to us...

I think that a lot of online social interactions will be curbed I fear that the gatekeepers, those who can turn on and off switches, allow certain things, disallow other things, allow who gets to send me data rather than anyone having equal say so of reaching me, yeah, I fear that very strongly especially net neutrality, issues like that. . . . Internet freedom is being interfered with in major ways, and it shouldn't. . . . I'm an optimist, and I believe we can move more and more towards net neutrality. The trouble is, a lot of it has to be enforced by the government, and conservative types and libertarian types say "government shouldn't have any say and control over that, that takes away our freedom." Wrong! It takes away the freedom of the companies that are taking away the freedom from us. Every freedom we have in the United States, every one of them, was given to us by Congressional regulation, it's called the Bill of Rights. That is what gives us our freedom, and yet it was from the government, it was government regulation. No, there are times when government regulation says "you will not impede with the Internet neutrality of the users."¹⁶³

Wozniak's statement is simply an Internet-age reformulation of Justice Jackson's 1945 statement, and of Meiklejohn's interpretation of the First Amendment. For Meiklejohn went much farther than suggesting that "unwise ideas must have a hearing."¹⁶⁴ While arguing against governmental *suppression* of speech, he concomitantly provided an argument in favor of *positive* government action that would *expand the freedom of speech through*

162. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

163. RT, *Wozniak: Web crackdown coming, freedom failing*, YOUTUBE (Aug. 14, 2012), <https://www.youtube.com/watch?v=LJnghGBBP2Q>.

164. Alexander Meiklejohn, *Testimony on the Meaning of the First Amendment, Address before the U.S. Senate Subcommittee on Constitutional Rights*, Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights, Hearings, 84th Congress, 1st Session, 1955, *reprinted in* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 109 (1960).

regulation. Commenting on the meaning of the sentence “Congress shall make no law ... abridging the freedom of speech,” Meiklejohn noted:

[B]y those words, Congress is not debarred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it. The freedom of the mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information, by giving men health and vigor and security, by bringing them together in activities of communication and mutual understanding. And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends. On the contrary, *in that positive field the Congress of the United States has a heavy and basic responsibility to promote the freedom of speech.*¹⁶⁵

A net neutrality regulation that prevents blocking, throttling, and paid prioritization does not abridge the freedom of speech of Internet users; it instead reinforces it, in a world where the marketplace of ideas has physically shifted from the public square to a privately-owned apparatus of copper or fiberoptic cable. Such regulation is simply a non-discrimination act for cyberspace, which protects against the “mutilation of the thinking process of the community,” which Meiklejohn warned Congress against in 1955.¹⁶⁶ His words have never been more modern and relevant.

But would such a regulation by Congress survive judicial scrutiny when it would clearly – at least to a feeble extent – interfere with ISPs’ property rights, and potentially be construed as forced speech in violation of the First Amendment?¹⁶⁷ There indeed is legal precedent supporting the constitutionality of such expansion of freedom of speech through regulation, even in the face of private-property rights recognized over the facility through which the speech is expressed. I have already argued elsewhere that the FCC, if it were to impose net neutrality regulations on ISPs under the Telecommunications Act of 1996, either under Section 706 in conjunction with Title I, or under Title II, would likely pass constitutional muster if

165. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), reprinted in ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 19-20 (2d ed., 1960) (emphasis added).

166. MEIKLEJOHN, *supra* note 165.

167. ISPs have already argued that net neutrality rules adopted in the FCC 2010 Open Internet Order were unconstitutional under the First Amendment, but the D.C. Circuit Court of Appeals did not rule on this constitutional challenge. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). See a discussion of the Verizon case’s First Amendment aspects in Barbara Cherry & Julien Mailland, *Toward Sustainable Network-Openness Obligations on Broadband in the U.S.: Surviving Providers’ First Amendment Challenges*, TELECOMMUNICATION POLICY RESEARCH CONFERENCE (TPRC), Geo. Mason U. School of Law, Arlington, VA (Sept. 13, 2014); Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343 (2014).

challenged on First Amendment grounds.¹⁶⁸ Said opinion has been cited by the FCC in the 2105 Open Internet Order in support of enforcing net neutrality.¹⁶⁹ The purpose of the present article, however, is not to discuss fine points of administrative and constitutional law as they apply to the FCC under the 1996 Act, but, rather, to ground a new net neutrality law in a First Amendment political theory recognized as controlling by positive law. If Congress itself was to cut the Gordian Knot by passing new legislation from a blank slate, could Meiklejohn's insights and judicial precedent regarding political speech ground an Anti-Discrimination Act for Cyberspace? To think about this question, I turn to a leading Supreme Court case infused with Meiklejohn's First Amendment insights, *Pruneyard Shopping Center v. Robins*.¹⁷⁰

In *Pruneyard*, a group of California high school students had set up a table in the central courtyard of a privately-owned shopping center named Pruneyard. They peacefully distributed pamphlets and solicited signatures for a petition against a United Nations resolution against "Zionism." A security guard soon asked them to leave. They complied, and subsequently filed a lawsuit which sought to enjoin the shopping center from denying them access to its facility for the purpose of circulating their petition.¹⁷¹ After facing a couple of setbacks in the lower courts, the teenagers prevailed before the California Supreme Court. The state high court ruled that they were allowed to conduct their speech activities on Pruneyard's private property, because the California Constitution contains a positively phrased provision that actively protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."¹⁷² In deciding that the California Constitution gave the teenagers a "right to solicit signatures on [the private mall's] property in exercising their state rights of

168. Barbara Cherry & Julien Mailland, *supra* note 167; see also Reply Comments of Professor Barbara A. Cherry & Assistant Professor Julien Mailland, Before the Federal Communications Commission Washington, D.C. 20554, Protecting and Promoting the Open Internet, GN Docket No. 14-28, Framework for Broadband Internet Service, GN Docket No. 10-27, Preserving the Open Internet, GN Docket No. 09-191, Broadband Industry Practices, WC Docket no. 07-52 (Sept. 2014), <https://ecfsapi.fcc.gov/file/7522644794.pdf>.

169. "Other commenters respond that broadband providers are not engaged in speech when providing broadband Internet access services, so they are not entitled to First Amendment protections in their operation of these services... Consistent with our determination in the 2010 Open Internet Order, we find that when broadband providers offer broadband Internet access services, they act as conduits for the speech of others, not as speakers themselves." 2015 FCC Open Internet Order at 268, 30 FCC Red 5601 (2015), <https://docs.fcc.gov/public/attachments/FCC-15-24A1.pdf> (citing Reply Comments of Professor Barbara A. Cherry & Assistant Professor Julien Mailland, Before the Federal Communications Commission Washington, D.C. 20554, Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Service, GN Docket No. 10-27; Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices, WC Docket no. 07-52 (Sept. 2013)).

170. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

171. *Id.* at 77.

172. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979).

free expression and petition,” the state’s high court rejected the mall’s “claim that recognition of such a right violated [their] ‘right to exclude others,’ which is a fundamental component of their federally protected property rights.”¹⁷³ The US Supreme Court deferred to the state’s high court’s construction of the state constitution as protecting “speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.”¹⁷⁴ It then addressed the two federal constitutional questions presented: “whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner’s property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments.”¹⁷⁵ In a sweeping 9-0 decision, it concluded that neither the Fifth nor the First Amendment rights of the privately owned facility had been violated by the state law. This decision is particularly relevant to the debate on net neutrality, because a privately-owned mall which serves, de facto, as a public forum in the analog world, bears striking similarities with a privately-owned set of pipes and switches which also serve, de facto, as a public forum in the digital age.

On the Fifth Amendment question, the *Pruneyard* Court found that “a State, in the exercise of its police power, may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.”¹⁷⁶ The Supreme Court found the California Constitution federally permissible in this regard. In doing so, it noted that “[t]he requirement that [the shopping center] permit [the outside speakers] to exercise state-protected rights of free expression and petition on shopping center property does not amount to an unconstitutional infringement of appellants’ property rights under the Taking Clause of the Fifth Amendment, appellants having failed to demonstrate that the ‘right to exclude others’ is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a ‘taking.’”¹⁷⁷ A detailed description of ISPs’ 5th Amendment rights is far outside the scope of this paper,¹⁷⁸ but it is generally worth noting that the very business model of ISPs, just like the mall, is to provide service indiscriminately to the public, and to provide access for the customers to the whole Internet. Any “right to exclude others” would therefore be antithetical to the ISPs’ business model, just like it was

173. 447 U.S. at 79-80.

174. *Id.* at 78, citing 592 P.2d 347.

175. *Id.* at 76-77.

176. *Id.* at 75.

177. *Id.*

178. On this topic, see generally Cherry & Mailland, *supra* note 167.

in Pruneyard. In this sense, then, the situation of the Pruneyard mall and ISPs vis a vis speech activities conducted over their facility and which they deem undesirable are very similar. The Pruneyard's Fifth Amendment rationale would therefore likely support an Anti-Discrimination Act for Cyberspace passing constitutional muster.

In holding that the California law passed First Amendment muster and that positive law did not “ex proprio vigore limit a State’s authority to exercise its police power or its sovereign right to adopt in its own constitution individual liberties *more expansive* than those conferred by the Federal Constitution,”¹⁷⁹ the US Supreme Court applied a three-prong test: “[t]he shopping center, by choice of its owner, is not limited to the personal use of appellants, and the views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Furthermore, no specific message is dictated by the State to be displayed on appellants’ property, and appellants are free to publicly dissociate themselves from the views of the speakers or handbillers.”¹⁸⁰ Just like with the Fifth Amendment issue, with regard to the First Amendment, the similarities between the shopping center and ISPs are striking. When it comes to the first prong, that the physical facility not be limited to the personal use of its owners, just like in Pruneyard, the Internet access facilities maintained by the ISPs are not limited to the personal use of the ISPs. Quite the contrary, in fact, since the very business model of the ISPs is to carry the speech of others, to let others use the ISPs’ privately owned facilities to distribute their information. As Verizon’s lawyers themselves noted in a court filing, “the Internet service provider performs a pure transmission or “conduit” function This function is analogous to the role played by common carriers in transmitting information selected and controlled by others. Traditionally, this passive role of conduit for the expression of others has not created any duties or liabilities under the copyright laws.”¹⁸¹ In other words, according to Verizon itself, an ISP cannot be liable for copyright violation for the infringing speech of others that is conducted over its facility, because it is obvious that the ISP is not the speaker. Consequently, referring to the Supreme Court’s second prong, the views expressed by online speakers “thus will not likely be identified with those of the owner” of the Internet access facility. Therefore, Pruneyard’s

179. 447 U.S. at 75 (emphasis added).

180. *Id.*

181. Brief for Appellant at 23, Recording Indus. Ass’n of Am. v. Verizon Internet Serv., 351 F.3d. 1229 (D.C. Cir. 2003) (Nos. 03-7015 & 03-7053).

second test would likely be met in the case of a net neutrality law prohibiting blocking, throttling, and paid prioritization by the ISPs.¹⁸²

Finally, regarding *Pruneyard*'s third prong, that no specific message be dictated by the State to be displayed on the facility owner's property, and that the facility owner be free to publicly dissociate themselves from the views of the speakers, a net neutrality law prohibiting blocking, throttling, and paid prioritization by the ISPs would simply be an anti-discrimination act for cyberspace and would in no way dictate the ISPs to distribute any message over their facilities. ISPs would not be required for example, to display a "live free or die" banner on the computer screen of their customers when a web browser is opened, something that would likely be unconstitutional under *Wooley v. Maynard*.¹⁸³ And, ISPs would remain free, as they already do today, "to publicly disassociate themselves from the views of the speakers" using their facility. Compare Verizon's own disclaimer, in this regard: "Verizon assumes no responsibility for any Content and Verizon does not endorse any advice or opinion contained therein,"¹⁸⁴ with those placated outside supermarkets and malls in California as a direct result of *Pruneyard*:

182. See a similar analysis in Nicholas Bramble, *Ill Telecommunications: How Internet Infrastructure Providers Lose First Amendment Protection*, 17 MICH. TELECOMM. & TECH. L. REV. 67, 89-93 (2010).

183. *Wooley v. Maynard*, 430 U.S. 705 (1977).

184. See *Verizon Online Terms of Service* 16-2, (July 24, 2016), https://www.verizon.com/about/sites/default/files/Internet_ToS_07242016.pdf.



Figure 5: A disclaimer placated outside of a California Wal-Mart reads: “Wal-Mart apologizes for any inconvenience caused by solicitors outside our store. We do not advocate their view or methods of expression. Their presence on our property is currently permitted by California Court Decisions.”¹⁸⁵

In both cases, the facility owner actively ensures that the speech expressed by third-parties over the facility “will not likely be identified with [the speech] of the [facility’s] owner.” The third prong of the *Pruneyard* First Amendment test would therefore also easily be met, if Congress passed an Anti-Discrimination Act for Cyberspace: “no specific message is dictated by the State” when a law is designed to guarantee *neutrality* of treatment of all speakers by the facility owner and is therefore, by definition, content neutral.¹⁸⁶

In ruling in *Pruneyard*, the Supreme Court embraced Alexander Meiklejohn’s interpretation of the First Amendment, which stressed that “[l]egislation which abridges that freedom [of speech] is forbidden, but not legislation to enlarge and enrich it.”

185. Photograph of disclaimer outside a Wal-Mart store in Mountain View, California (Feb. 12, 2006).

186. See *Bramble*, *supra* note 182.

VII. CONCLUSION

Privately-owned Internet access facilities have become, de facto, the new public square. That public square, in the early days of the open Internet, was subject to a one-sided pricing model, which ensured access to all speakers to it, on a neutral basis. The implementation of two-sided pricing models by ISPs, by its very economic and technical logic, instead creates walled gardens. These walled gardens lead to a depletion of ideas in the marketplace. This trend is exacerbated by a shift, in the policy realm, from a user-empowerment narrative that focused, as the *Reno* court did, on the user as publisher, to one that reduces the empowering nature of the Internet to “consumer empowerment.” It is time to reintroduce “the little guys on their electronic soapboxes” in the policy narrative. In this realm, Alexander Meiklejohn’s thought, and cases such as *Pruneyard*, have never been so relevant. Not just for Netflix and Etsy, but for the myriad of small speakers using the electronic soap box to perform in the public sphere and maintain the vibrant marketplace of ideas which is at the core of First Amendment jurisprudence and of American political philosophy ideals generally. This has not escaped FCC Commissioner Jessica Rosenworcel: we have “a duty to protect what has made the Internet the most dynamic platform for free speech ever invented. It is our printing press. It is our town square. It is our individual soapbox.”¹⁸⁷ It is urgent for Congress to step up and guarantee, through new legislation, that political speakers will be free to setup their soap box on the ISP-maintained digital public square: an *Anti-Discrimination Act for Cyberspace*. Controlling political philosophy rhetoric in the field of free speech and Supreme Court precedent certainly give legitimacy to this path.

187. Statement of Commissioner Jessica Rosenworcel, Protecting and Promoting the Open Internet, GN Docket No. 14-28, <https://docs.fcc.gov/public/attachments/FCC-15-24A4.pdf>.
