CAN THE FIRST AMENDMENT SAVE NET NEUTRALITY?

Eric Sirota*

In December 2017, the FCC passed an order ending net neutrality. That order took effect on June 11, 2018. Net neutrality advocates have always presented protection of the open internet as essential to the Freedom of Speech. As such, in the absence of Obama-era net neutrality regulations, and as internet service provider (ISP) censorship becomes increasingly common, ISP efforts to block and slow access to certain content will increasingly emerge as a constitutional question under the First Amendment. The answer to this question turns on whether ISP censorship can be considered State action. Other scholars have generally taken a one-size-fits-all approach to whether telecommunication censorship constitutes State action and have ultimately concluded that it does not.

This article argues that, under existing case law, in most instances, ISP censorship should be treated as State action. Ultimately, however, this article argues that whether each act of ISP censorship constitutes State action must be evaluated on a case-by-case basis and thus synthesizes the Supreme Court's State action jurisprudence both inside and outside of the telecommunications context to propose a paradigm through which courts should analyze whether instances of censorship by telecommunications providers constitute State action. As such, this article not only addresses ISP censorship generally but also within a variety of specific contexts, analyzing if and when such censorship should be attributed to the State.

*Eric Sirota is a Clinical Teaching Fellow at the Veterans Legal Clinic at Michigan Law School. Most of his career has focused around providing legal assistance to low-income individuals in consumer protection matters. A huge thank you to Professor Tracy Douglas at the University of Illinois College of Law and Professor Stacey Tutt at University of California, Irvine School of Law for all of their help with this article and for fighting for consumers every day.

INTRODUCTION

Net neutrality ended on June 11, 2018.[1] Previously, on December 14, 2017, the FCC voted 3-2 to reclassify Internet Service Providers (ISPs) from 'communications providers' to 'information providers.'[2] While this may sound like little more than bureaucratic newspeak, the reclassification is commonly thought of as the end to net neutrality;[3] the FCC prohibits

[1] David Shepardson, *U.S. 'Net Neutrality' Rules will Expire on June 11: FCC*, REUTERS, https://reuters.com/article/amp/idUSKBN1IB1UN (last visited May 11, 2018).

[2] Brian Fung, *The FCC just Voted to Repeal its Net Neutrality Rules, in a Sweeping act of Deregulation*, WASHINGTON POST, https://www.washingtonpost.com/news/the-switch/wp/2017/12/14/the-fcc-is-expected-to-repeal-its-net-neutrality-rules-today-in-a-sweeping-act-of-deregulation/?noredirect=on&utm_term=.77e2688131da (last visited May 10, 2018).

[3] *Id.*

communications providers, but generally not information providers, from limiting their users' access to content and data.[4] In 2015, the Obama-FCC changed ISPs' classification from information providers to communications providers; this action constituted the FCC's most definitive and official policy statement in favor of enforcing net neutrality.[5] Still, even before this, the FCC took action to prevent and deter ISPs from limiting their customers' access to content by, for example, blocking or slowing down access to certain websites.[6] In response, in December 2017, the Trump administration explicitly reclassified ISPs as information providers with the explicit intent of rolling back Obama-era net neutrality protections.[7] While a bill restoring net neutrality passed the Senate, it floundered in the House and, even with the new Congressional landscape, would very likely be vetoed by the President.[8] As such, this reversal of net neutrality is likely to remain in place at least until the political landscape of our nation's capital changes significantly.

Net neutrality advocates are, of course, not giving up the fight. As stated, Congress took up the issue, though with little success.[9] A handful of states have enacted their own net neutrality protections,[10] though there is concern that such protections may be preempted by Federal law.[11] The FCC

[4] ANGELE A. GILROY, CONGRESSIONAL RESEARCH SERVICE, THE NET NEUTRALITY DEBATE: ACCESS TO BROADBAND NETWORKS, 1–2 (June 22, 2018), https://fas.org/sgp/crs/misc/R40616.pdf.

[5] *Id.* at Summary.

[6] Shepardson, *supra* note 1.

[7] Seith Feigerman, *Trump's FCC Votes to Repeal Net Neutrality*, CNN (Dec. 14, 2017), http://money.cnn.com/2017/12/14/technology/fcc-net-neutrality-vote/index.html.

[8] Jon Brodkin, *Bill to Save Net Neutrality is 46 Votes Short in House*, ARSTECHNICA (June 27, 2018), https://arstechnica.com/tech-policy/2018/06/bill-to-save-net-neutrality-is-46-votes-short-in-us-house/.

[9] *Id.*

[10] Kaleigh Rogers, *Which States Have Net Neutrality Laws?*, MOTHERBOARD (Apr. 9, 2018), https://motherboard.vice.com/en_us/article/ywx5pw/which-States-have-net-neutrality-laws.

[11] Kaleigh Rogers, *Washington Passed the First State-Level Net Neutrality Law, and Now Braces for a Brawl with the FCC*, MOTHERBOARD (Mar. 6, 2018), https://motherboard.vice.com/en_us/article/mb5djn/washington-passed-the-first-State-level-net-neutrality-law-and-now-braces-for-a-brawl-with-the-fcc.

has taken such a stance and implemented orders arguably designed to preempt local net neutrality protections.[12]

Such efforts to revitalize net neutrality are inevitably based in free speech principles. Free speech advocates such as the ACLU have taken up the cause on the basis that:

> Network neutrality is a consumer issue, but it is also one of the foremost free speech issues of our time. In this day and age, it is pretty much impossible to get through life without using the internet — which is why it's essential that our free speech rights are protected both on- and offline. After all, freedom of expression isn't worth much if the forums where people actually make use of it are not themselves free.[13]

In context, such evocations of free speech principles beg the question of whether the First Amendment might itself help promote net neutrality and prohibit ISP censorship. Indeed, now that proponents of net neutrality can no longer rely on the FCC, it is increasingly likely that such advocates will turn to the First Amendment itself as a means to push back against ISP censorship. However, the First Amendment only limits actions taken by the government, as opposed to by private actors, and Comcast, Verizon, and the like are private corporations.[14] The question of whether the First Amendment limits ISP censorship thus begs the question of whether ISPs might be considered "State actors" for First Amendment purposes. If ISPs can be considered State actors, then it is clearly unconstitutional for them to limit users' access to data and information, but that is a giant *if*.

There is no single answer to this question, as the Court's State action jurisprudence relies on a case-by-case analysis, and ISPs engage in censorship in a variety of contexts involving greatly varying degrees of State involvement.[15] ISPs have vastly different relationships with different

[12] Fred Campbell, *State Net Neutrality Regulations are an Exercise in Futility*, FORBES (Aug. 13, 2018), https://www.forbes.com/sites/fredcampbell/2018/08/13/state-net-neutrality-regulations-are-an-exercise-in-futility/#661375a24742.

[13] *What is Net Neutrality?* ACLU (Dec. 2017), https://www.aclu.org/issues/free-speech/internet-speech/what-net-neutrality.

[14] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 168–69 (1972).

[15] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 294 (2001).

government actors and choose to censor for a variety of reasons.[16] While much of this article is dedicated to establishing the paradigm courts should use in deciding whether an act of ISP censorship should be attributed to the State, this article also argues that ISP censorship should generally be treated as State action under the First Amendment. Both the paradigm this article proposes and this general conclusion greatly differ from the approach taken and conclusion reached by scholars and courts which have addressed whether ISPs should be treated as State actors.[17] Both courts and commentators have generally treated the question as an all-or-nothing proposition and have concluded that ISPs are not State actors, thus ignoring the reality that "the true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met."[18]

In analyzing if and when ISP censorship should be considered State action under the First Amendment, this article will first, in Section I, briefly summarize the historical role the government has played in shaping and managing the internet.

In Section II, this article will survey the Supreme Court's State action jurisprudence, both inside and outside of the telecommunications context as well as scholars' and lower courts' application of this jurisprudence to the matter at hand. Section IIA will summarize trends in the Court's State action jurisprudence generally and will address the lack of cohesion within this jurisprudence. This Section will also discuss the three factors and/or tests the Supreme Court employs when deciding whether to treat a private entity as the State, i.e., the degree of entanglement between the private entity and the State (entanglement test), the degree to which the State and private actors are acting as partners (symbiosis test), and whether the private entity is occupying what is traditionally an exclusive function of the State (traditional public/State function test). Section IIB will survey case law in which the Court, at least implicitly, discusses whether censorship by telecommunications providers should be treated as State action. Note that

[16] Jason Koebler, *The FCC Can't Help Cities Trapped By Predatory Internet Deals With Big Telecom*, MOTHERBOARD (June 13, 2014), https://motherboard.vice.com/en_us/article/pgak38/the-fcc-cant-help-cities-trapped-by-predatory-internet-deals-with-big-telecom.

[17] *See, e.g.*, Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436 (E.D. Pa. 1996); Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 546 (E.D. Va. 2003); *see also* Green v. AOL, 318 F.3d 465, 472 (3rd Cir. 2003); *See infra* Section II.D.

[18] Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

this article will not use 'telecommunications providers' to refer the entities the FCC classifies as "Communications Providers" but rather more colloquially to refer to internet service providers, cable companies, television broadcasters, phone companies and the like. Though the Court has not addressed the exact question at hand, it has commented upon whether cable and broadcast television providers may be considered State actors, holding that they are in some circumstances but not others.[19]

Section IIC will survey the lower court cases addressing whether ISPs (and more specifically America Online – the ISP in all three cases), acted as the State in their efforts to block or limit user access.

Section IID surveys the academic literature on the matter. While scholars have approached this matter from various angles, much of the literature on the subject focuses upon whether ISPs are State actors because, by managing the internet, they are managing a public forum analogous to streets or parks – a role traditionally exclusively occupied by the State.[20] In the very rare instances where scholars have argued that ISPs are State actors under the First Amendment, they have done so on this basis. While this article takes the stance that ISP censorship generally does constitute State action, Section IID will argue that the traditional State function test is the least useful consideration in making this assessment. As such, while the entanglement and symbiosis tests will be discussed throughout this article, this article will only apply the public function test in Section IID.

Section III discusses whether, under existing precedent, ISP censorship should be considered State action. As stated, this Section, painting with broad strokes, concludes that ISP censorship should usually be considered State action, though Section IV then discusses at great length why a one-size-fits-all approach is ill-suited for this inquiry and articulates a fact-specific paradigm courts should employ. Still, as this article cannot analyze every context in which ISPs may censor, Section III does offer valuable, if general, analysis. As such, Section IIIA discusses, in general terms, the relationship between ISPs and the government, both on a federal and

[19] *See, e.g.*, Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 119 (1973). A related question is whether various internet players act as State action under the Fourth Amendment by, for example, turning over user information to law enforcement due to government prodding. Such instances will be touched upon in Section IV.B, but this is not the discrete scenario this article is focused upon.

[20] *See, e.g.*, *infra* Section II.D.

municipal level. Section IIIB then specifically applies the Court's State action jurisprudence to the question at hand. This section attempts to synthesize early precedent, more modern precedent, and precedent specifically within the telecommunications context to ultimately conclude that ISP censorship generally should be attributed to the State.

Nonetheless, this article concedes that, ultimately, there is no single answer to whether ISP censorship (or that of another telecommunications provider) should be considered State action. As such, Section IV proposes a paradigm through which courts can evaluate this question. Courts should consider the following factors: (1) the extent to which the censoring ISP holds a monopoly on the subject locality and the federal and state role in contributing to that monopoly; (2) the specifics of the agreement between the ISP and the subject municipality; and (3) the reasons the ISP chose to censor.

The first factor – the extent of the ISP's monopoly – will be discussed under Section IV(1), which will further discuss the role government plays in establishing and entrenching such monopolies.

Section IV(2) will discuss the licensing arrangements between ISPs and government and will address under which types of arrangements ISPs are most likely to be considered State actors. Section IV(2)(a) will discuss the instance where ISPs are most explicitly acting as the State, i.e., where the municipality hires the ISP to operate a municipal broadband network. Section IV(2)(b) surveys more free-market based relationships between ISPs and local governments both to elucidate the diversity of these relationships and discuss which arrangements are more likely to result in ISP censorship being considered State action.

Section IV(3) will discuss how an ISP's motive for censorship may play into whether the censorship should be attributed to the State. More specifically, this Section discusses various law enforcement efforts to induce ISP censorship, as well as to what extent these various enforcement efforts may convert the ISP into a State actor. Section IV, to an extent, assumes *arguendo* that the conclusion of Section III is incorrect – that ISP censorship cannot generally be considered State action – though Section III implicitly integrates and sets the stage for the paradigm articulated in Section IV. Section V will conclude and give suggestions for further research.

I. A BRIEF HISTORY OF THE STATE AND THE INTERNET

The net neutrality debate did not emerge until relatively recently[21] because, even into the early 1990s, the internet was generally considered the province of the Federal Government.[22] The earliest internet (or proto-internet) network, ARPAnet, was developed by the Department of Defense, arguably as a means to maintain communications should the Cold War turn hot and lead to the demise of the U.S.'s telecommunications infrastructure.[23] In the 1980s, additional networks began to spring up, also at the Federal Government's behest, such as NSFnet, developed by the National Science Foundation to help coordinate research efforts among academics.[24] These networks were generally administered by private contractors and universities.[25] However, they were seen as government programs used exclusively to further the government's ends.[26] As such, issues of "net neutrality" were largely beside the point. Use of the internet was generally delegated only for government-sanctioned purposes.[27]

A 1982 MIT user guide, for example, states as follows:

> It is considered illegal to use the ARPANet for anything which is not in direct support of Government business . . . .

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[21] *Net Neutrality Timeline: Where We Are & How We Got Here*, NCTA (Mar. 10, 2015), https://www.ncta.com/positions/net-neutrality-timeline-where-we-are-how-we-got-here-0.

[22] *See Internet History:: NSFNET*, CYBERTELECOM, http://www.cybertelecom.org/notes/nsfnet.htm#aup (last visited May 10, 2018) (quoting Ken Werbach, Digital Tornado: The Internet and Telecommunications Policy, FCC – OPP Working Paper Series (Mar. 1997)); Susan R. Harris and Elise Gerich, *Retiring the NSFNET Backbone Service: Chronicling the End of an Era*, MERIT (Apr. 1996), https://web.archive.org/web/20130817124939/http://merit.edu/research/nsfnet_article.php (NSF internet backbone replaced with a decentralized infrastructure in 1995, leading to the end of the NSF-dominated internet era and birthing the modern internet).

[23] JOHNNY RYAN, A HISTORY OF THE INTERNET AND THE DIGITAL FUTURE 24 (Reaktion Books, Ltd. 2010). *But see* BARRY M. LEINER ET AL., BRIEF HISTORY OF THE INTERNET 3 (The Internet Society, 1997) https://www.internetsociety.org/wp-content/uploads/2017/09/ISOC-History-of-the-Internet_1997.pdf.

[24] *The Launch of NSFNET*, NATIONAL SCIENCE FOUNDATION (Sept. 17, 2008), https://web.archive.org/web/20080917161720/http://www.nsf.gov:80/about/history/nsf0050/internet/launch.htm.

[25] *Id.*; Kim Ann Zimmermann & Jesse Emspak, *Internet History Timeline: ARPANET to the World Wide Web*, LIVE SCIENCE (Jun. 27, 2017), https://www.livescience.com/20727-internet-history.html.

[26] CYBERTELECOM, *supra* note 22.

[27] CYBERTELECOM, *supra* note 22.

> [P]ersonal messages to other ARPANet subscribers (for example, to arrange a get-together or check and say a friendly hello) are generally not considered harmful. . . . Sending electronic mail over the ARPANet for commercial profit or political purposes is both anti-social and illegal. By sending such messages, you can offend many people, and it is possible to get MIT in serious trouble with the Government agencies which manage the ARPANet.[28]

This policy remained in place until the early 1990s.[29] Even into the early 1990s, the internet was still, to an extent, considered government 'property.' Indeed, the NSF greatly regulated the permissible uses of NSFnet, limiting those uses mainly to academic pursuits.[30] The NSF specifically prohibited internet use for profit and for extensive private dealings.[31] Only into the 1990s did private service providers begin to proliferate to the point that a federally-centralized internet was no longer viable, thus leading the Federal Government to largely cede direct control of the internet to a decentralized private sector.[32] This decentralization of the internet by the end of the 1990s can, in many ways, be considered the advent of the modern internet, where internet access is provided by a diffuse array of companies, as opposed to being considered the province of the government.

Of course, the internet has rapidly expanded and evolved since. Indeed in 1995, the Pew Research Center found that only

> 14% of U.S. adults [had] internet access. Most were using slow, dial-up modem connections—just 2% of internet users were comparatively streaming along with an expensive 28.8 modem.
>
> To put things into further perspective, 42% of U.S. adults had never heard of the internet and an additional 21% were

[28] CHRISTOPHER C. STACY, GETTING STARTED COMPUTING AT THE AI LAB 9 (Mass. Inst. of Tech. Sept. 7, 1982), https://dspace.mit.edu/bitstream/handle/1721.1/41180/AI_WP_235.pdf?sequence=4.

[29] CYBERTELECOM, *supra* note 22.

[30] CYBERTELECOM, *supra* note 22.

[31] CYBERTELECOM, *supra* note 22.

[32] Scientific and Advanced-Technology Act of 1992, 42 U.S.C. § 1862(g) (2012).

> vague on the concept—they knew it had something to do with computers and that was about it. Yet even then, 63% of people who used a computer at home said they would miss it "a lot" if they no longer had one.[33]

In contrast, today, nearly 90% of adults use the internet and 75% have broadband at home.[34] Notably, as of 2015, only 13% of Americans relied on their cell phones for internet access, as reliance on a cell phone for access comes with significant limitations.[35] As Americans remain primarily reliant on broadband for internet access, this article will focus on broadband-providing ISPs.[36] Interestingly, despite Americans' primary reliance on broadband, only a relatively small percentage of Americans have access to more than one broadband provider.[37]

It is of course difficult to discuss the historical relationship between private and government actors in the development of the internet without discussing the regulatory history of the internet. In many ways, the involvement of the government in the development of the internet revolves around how the FCC treats ISPs. In some sense, this depends on how the FCC formally classifies ISPs - as information service providers (like modern cable providers) or as communications service providers, i.e., common carriers (like phone companies).[38] Information services, such as cable companies, are generally not subjected to regulations enforcing the equivalent of net neutrality, while the FCC generally restricts phone

[33] Susannah Fox and Lee Rainie, *Part 1: How the Internet Has Woven Itself into American Life*, PEW RESEARCH CTR. (Feb. 27, 2014), http://www.pewinternet.org/2014/02/27/part-1-how-the-internet-has-woven-itself-into-american-life/.

[34] *Internet/Broadband Fact Sheet*, PEW RESEARCH CTR. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/internet-broadband/.

[35] Monica Anderson and John B. Horrigan, *Smartphones help those without broadband get online, but don't necessarily bridge the digital divide*, PEW RESEARCH CTR. (Oct. 3, 2016), http://www.pewresearch.org/fact-tank/2016/10/03/smartphones-help-those-without-broadband-get-online-but-dont-necessarily-bridge-the-digital-divide/.

[36] *Id.*

[37] Jeff Dunn, *America Has an Internet Problem — But a Radical Change Could Solve it*, BUSINESS INSIDER (Apr. 23, 2017), http://www.businessinsider.com/internet-isps-competition-net-neutrality-ajit-pai-fcc-2017-4.

[38] Fung, *supra* note 2.

companies and other common carriers from discriminating against the content their users may access.[39]

However, until recently the FCC's formal classification did not necessarily determine whether the FCC would try to enforce net neutrality principles against ISPs.[40] For much of the 21st Century, the FCC has classified ISPs as information providers (which are not generally subject to net neutrality) but still attempted to enforce net neutrality principles.[41]

The current debate about net neutrality can be traced back to the early 2000s.[42] In 2002, the FCC classified broadband ISPs as information service providers.[43] Somewhat paradoxically, though, shortly thereafter the FCC began to treat ISPs much like common carriers subject to net neutrality restrictions.[44] In 2004, the FCC published "The Four Internet Freedoms," a bill of rights of sorts for internet users, aspiring to guarantee:

> Freedom to access content
>
> Freedom to use applications
>
> Freedom to attach personal devices
>
> Freedom to obtain service plan information.[45]

In 2005, the FCC formalized these rules into official guidelines.[46] That same year, the FCC began to enforce and litigate these guidelines against those violating net neutrality principles.[47] Still, the FCC continued to classify ISPs as information service providers.[48] In 2005, in the *Brand X* decision, a case not explicitly concerning net neutrality, the Supreme Court

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[39] *Id.*

[40] *See supra* notes 32–35.

[41] *Id.*

[42] *Net Neutrality Timeline: Where We Are & How We Got Here*, *supra* note 21.

[43] *FCC Classifies Cable Modem Service as "Information Service,"* (Mar. 14, 2002), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-220835A1.pdf.

[44] Tim Wu, *How the FCC's Net Neutrality Plan Breaks with 50 Years of History*, WIRED (Dec. 6, 2017, 07:00 AM), https://www.wired.com/story/how-the-fccs-net-neutrality-plan-breaks-with-50-years-of-history/.

[45] *Id.*

[46] *Net Neutrality Timeline: Where We Are & How We Got Here*, *supra* note 21.

[47] Wu, *supra* note 44.

[48] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000 (2005).

upheld the FCC's right to classify ISPs as information providers.[49] Still, the FCC continued to intensify its net neutrality enforcement. In 2008, in *Comcast v. FCC*, the FCC issued a cease and desist order prohibiting Comcast from limiting user access to Bit Torrent.[50] In 2010, the DC Circuit Court of Appeals reversed the FCC decision, throwing out the cease and desist order.[51] Nevertheless, on December 21 of that same year, the FCC issued its first official regulations designed to protect net neutrality.[52] In 2014, however, the DC Circuit held in *Verizon v. FCC* that the FCC has no authority to enact net neutrality regulations upon broadband ISPs.[53] In response, the Obama-FCC famously reclassified ISPs as communication providers, thus subjecting them to net neutrality restrictions.[54] Thus, while the FCC did not officially classify ISPs as communication providers until 2015, from at least 2004 through 2014 and 2015 through December 2017, the FCC operated under a policy favoring net neutrality.

It was thus not until December 2017 that the FCC first took a definite stance against its own ability to enforce net neutrality. On December 14, 2017, the Trump-FCC reclassified ISPs as information providers, thus reversing net neutrality in perhaps the most definitive way since the net neutrality debate emerged.[55] Indeed, when, during the Aughts, the FCC classified ISPs as information providers, it did not seem to do so in order to abandon net neutrality. The Trump-FCC, however, reversed the Obama-era classification with the explicit intent of removing the Federal Government (and localities) from the business of enforcing net neutrality.[56]

[49] *Id.*

[50] Madison River Commc'ns, LLC, 20 FCC Rcd. 4295, 4297 (2005).

[51] Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010).

[52] FCC Open Internet Order (Dec. 21, 2010), https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf.

[53] 740 F.3d 623 (D.C. Cir. 2014).

[54] Gilroy, *supra* note 4.

[55] Fung, *supra* note 2.

[56] Todd Shields & Ben Brody, *FCC Votes to End Net Neutrality Rules*, BLOOMBERG (Dec. 14, 2017), https://www.bloomberg.com/news/articles/2017-12-14/net-neutrality-rules-swept-aside-by-republican-led-u-s-fcc.

II. STATE ACTION JURISPRUDENCE AND DIFFICULTIES IN ASSESSING THE STATUS OF ISPS

Throughout the 21st Century, net neutrality and ISP censorship have emerged as important free speech issues. While few courts have thus far addressed whether some degree of net neutrality is actually required by the First Amendment, this question will become more common now that net neutrality proponents cannot look to the FCC for help.

This section will, in IIA, explore the Supreme Court's State action jurisprudence, discussing first its early State action jurisprudence, then its modern jurisprudence, and then, in IIB, its First Amendment State action jurisprudence specifically as applied to telecommunications providers. These sections will also discuss the limited predictive value of this precedent, both because the Court's State action jurisprudence lacks cohesion and because the Court is prone to treat similarly situated telecommunications providers differently.

In Section IIC, this article will survey the few lower court cases addressing whether ISPs are State actors under the First Amendment and will distinguish these cases from analysis of ISPs in a more contemporary context. IID will survey the literature on the subject, critiquing both the scholarly articles that have argued that ISP censorship does not constitute State action and the single article arguing that it does. This discussion will involve an analysis of whether, by managing and regulating the internet, ISPs assume a traditionally exclusive State function. It will also argue that, ultimately, the fatal flaw in much of the existing literature is that it treats the question of whether ISP censorship is State action as an all-or-nothing proposition.

A. Overview of Supreme Court State Action Jurisprudence

To determine whether to treat a private entity as a State actor, the courts' "inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[57] Finding State action in the actions of a private entity is a highly fact-intensive inquiry that must be evaluated on a case-by-case basis. The courts may consider actions

[57] Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972)).

of a private entity to constitute State action where the State is very significantly tied up in the affairs of the private entity.[58] State regulation or State funding alone are not sufficient to convert a private entity into a State actor.[59] These factors, however, do enter into the Court's analysis, as does the overall extent to which the action is a product of State encouragement or coercion.[60] Overall, when evaluating the entanglement between the private entity and the State, the courts seek to determine whether "the State is responsible for the specific conduct of which the plaintiff complains."[61]

The Court is yet to glean a clear standard for this evaluation.[62] Instead, the Court uses multiple loosely articulated strands of analyses to evaluate whether to treat a private entity as a State actor.[63] The Court evaluates: (1) the degree of entanglement between the State and the private entity; (2) the extent to which the State and the private entity have a partnership/symbiotic relationship or are participating in a joint venture; and (3) whether the private entity is performing a traditionally exclusive State function.[64] It is unclear the extent to which these various considerations are distinct tests or simply different factors.[65] Early in its State action jurisprudence, the Court took a more rigid, rules-based approach to analyzing State action, applying these analyses as strict tests to determine State action.[66] More recently,

[58] *See, e.g.,* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400 (1995) (finding that Amtrak may be treated as a State actor under the First Amendment).

[59] *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 723 (1961).

[60] *See, e.g.,* Rendell-Baker v. Kohn, 457 U.S. 830, 840–843 (1982); *see also* Huff v. Notre Dame High School, 456 F. Supp. 1145, 1147 (D. Conn. 1978) (citing *Burton*, 365 U.S. at 722; *Jackson*, 419 U.S. 345 (1974); and *Moose Lodge*, 407 U.S. at 176–77).

[61] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

[62] *Burton*, 365 U.S. at 722.

[63] *See Brentwood Acad.*, 531 U.S. 288 (2001).

[64] *See* Rendell-Baker v. Kohn, 457 U.S. 838 n.6, 840–43 (1982) (citing *Blum*, 457 U.S. at 992 (considering State funding and whether action was taken in concert with the State as factors)); Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (traditional public function); *Burton*, 365 U.S. at 723 (symbiotic relationship); United Church of Christ v. Gateway Econ. Dev. Corp., 383 F.3d 449, 454 (6th Cir. 2004) (citing *Lebron*, 513 U.S. at 400 (entanglement and symbioses, noting that the two theories are very similar); Lansing v. Memphis, 202 F.3d 821, 828 (traditional State function)); *Huff*, 456 F. Supp. at 1147 (citing *Burton*, 365 U.S. at 722 (entanglement, conflating this theory with the symbioses analysis)). *But see* Marsh v. Alabama, 326 U.S. 501 (1946) (doubting the viability of the traditional State function theory) (citations omitted).

[65] *Compare Rendell-Baker*, 457 U.S. at 840–843 with *Huff*, 456 F. Supp. at 1147.

[66] Daniel Rudofsky, *Modern State Action Doctrine in the Age of Big Data*, 71 N.Y.U. ANN. SURV. AM. L. 741, 756 (2016).

however, the Court has merely integrated these analyses as factors in a totality of the circumstances-based analysis.[67] Regardless, in making its determination, the Court evaluates whether the "alleged infringement of federal rights [is] 'fairly attributable to the State.'"[68]

Not surprisingly then, there is very little consistency in the Court's State action decisions.[69] In this sense, the Court's State action jurisprudence can be more accurately categorized chronologically than jurisprudentially; in the mid-Twentieth Century, pre-dating the Civil Rights Era, the Court readily treated the conduct of private entities as State action ("early State action decisions").[70] However, from the mid-late Twentieth Century to present, the Court has been far more hesitant to do so, though with several very notable exceptions.[71] Moreover, the Court continues to stand by and apply, albeit somewhat narrowly, its earlier State action decisions.[72] The result has been, what one commentator described as, "a bewildering series of unpredictable results."[73] More charitably, the Court's State action

[67] *See, e.g.*, *Brentwood Acad.*, 531 U.S. at 294.

[68] *Rendell-Baker*, 457 U.S. at 839 (quoting Lugar v. Edmondson Oil, 457 US 922, 937 (1982)).

[69] *See, e.g.*, *Brentwood Acad.*, 531 U.S. at 294.

[70] *See* Am. Mfrs. Mut. Co. v. Sullivan, 526 U.S. 40, 43 (1999).

[71] *Id.*; *see also Brentwood Acad.*, *supra* note 15; *Lebron*, *supra* note 64.

[72] *See*, for example, *Lebron*, 513 U.S. at 379, where the Court positively cites *Burton*, 365 U.S. at 715. *See also Flagg Bros.*, 436 U.S. at 163–64, where the Court comments that the decision does not reflect on past precedents treating private entities as State actors.

[73] Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 129 (2004) ("A restaurant that leases space in a government building engages in State action when it commits racial discrimination, but a club that secures a government license to sell liquor may discriminate with impunity. Judicial enforcement of a racially restrictive real estate covenant is State action, but judicial enforcement of a racially discriminatory condition in a will is not. A landlord's racial discrimination in renting, authorized by the State constitution's repeal of local antidiscrimination laws, is State action, but a warehouseman's sale of bailed goods to satisfy a lien, authorized by the State's adoption of the Uniform Commercial Code, is not. A creditor that uses State courts to attach a debtor's property in an ex parte proceeding is a State actor, but a utility that uses its State-conferred monopolistic power to cut off a customer's electric service without notice or a hearing is not. A Statewide interscholastic athletic association that includes both public and private schools is a State actor, but a nationwide interscholastic athletic association that includes both public and private schools is not. Everyone agrees that public schools by State actors, and yet a nominally private school that receives nearly all its funding from the State and must adhere to extensive State regulations is not." (internal citations omitted)).

jurisprudence could be described as a thorough case-by-case analysis, though, regardless of the framing, it remains of little predictive value.

In the mid-20th Century, the Court was not shy to treat private entities as State actors.[74] The Court seemed to do so as a means to apply the Constitution to prohibit some instances of private sector racial discrimination where the State was in some way involved. In *Burton*, for example, the Court held that a diner leasing space in a government building violated the Fourteenth Amendment by refusing service to a black patron on account of his race.[75] The Court showed particular discomfort with the fact that the diner excluded the patron from government space and that the State, in turn, relied upon a discriminatory diner's rental payments for revenue.[76] Perhaps tellingly, in a later case, *Moose Lodge*, the Court refused to consider racial discrimination by a private diner to be State action though the diner carried a state-issued liquor license.[77]

In *Evans*, another early State action decision, the Court treated a private board of trustees governing a private tract of land as a State actor.[78] There, a testator bequeathed land to the state with the instruction that only white people may use the land.[79] The state, however, opened the land to everyone and the estate sued.[80] In response, the state turned the land over to a private board of trustees who proceeded to only allow white people on the land.[81] The Supreme Court treated the trustees' discrimination as State action under the logic that the state, who was originally to manage the land, could not dodge the Constitution by delegating governance to the private sector.[82] The Court also based its decision, in part, on the fact that the private

[74] *Id.* at 130; *see, e.g.*, Marsh v. Alabama, 326 U.S. 501, 507–08 (1946) (corporate town); Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952) (bus company broadcasting public radio service); Terry v. Adams, 345 U.S. 461, 465–66 (1953) (Jaybirds political party); Shelley v. Kraemer, 334 U.S. 1, 19 (1948) (State court enforcing a private restrictive covenant is State action).

[75] 365 U.S. at 720–21.

[76] *Id.* at 724–26.

[77] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972).

[78] *See* Evans v. Newton, 382 U.S. 296, 297 (1966).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

trustees were filling a traditional exclusive public function by managing a tract of open land.[83]

In another early State action decision, the Court treated a court's enforcement of a private, racially discriminatory restrictive covenant as State action, though the lawsuit in question was brought by private citizens against private citizens to enforce a contract formed entirely by private citizens.[84] Still, in a fortunate application of a novel approach, the Court found that the judicial enforcement of the restrictive covenant sufficiently implicated the State so as to render enforcement of this private contract unconstitutional.[85] As such, these early State action decisions, in some sense, functioned as a piecemeal stand-in for Civil Rights Laws. In the 1970s, after the Civil Rights Era, the Court became more conservative in its State action jurisprudence.[86]

However, the Supreme Court's early State action decisions went beyond the Court creatively applying the Constitution to stop private-sector racial discrimination.[87] In a 1946 decision, *Marsh v. Alabama*, for example, the Court held that a corporate-owned town violated the First Amendment by prohibiting the distribution of religious and political pamphlets on its sidewalks.[88] As the corporate town had assumed the role of the government, the Court reasoned, it should be held constitutionally accountable.[89]

Under its modern State action jurisprudence, however, the Court is far more hesitant to hold private entities constitutionally accountable. In *Jackson*, for example, the Court treated a highly regulated public utility company with a de facto government-granted monopoly as a private actor when a consumer challenged the company's termination policy which had been explicitly approved by the State.[90] The Court stressed that even explicit State approval of a highly regulated utility with a State-supported monopoly does not constitute State action, as:

[83] *Id*. at 297.

[84] *See Kraemer*, *supra* note 74.

[85] *Id.*

[86] *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 358–59 (1974).

[87] *See, e.g.*, *Pollak*, *supra* note 74.

[88] 326 U.S. at 509.

[89] *Id.*

[90] *Jackson*, 419 U.S. at 358–59.

> Approval by a State utility commission of such a request from a regulated utility [to employ a certain termination process for non-payment], where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'State action.' At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by State law where the initiative comes from it and not from the State, does not make its action in doing so 'State action' for purposes of the Fourteenth Amendment.[91]

Similarly, in *Blum*, the Court refused to treat as State action a nursing home utilization review committee's decision to transfer patients, despite the fact that the State approved the decision and adjusted benefits based on the decision.[92] The Court again stressed that heavy regulation does not turn a private entity to a State actor.[93] The Court further articulated that "our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[94]

Following suit, the *Sullivan* Court treated an insurance review board's decision to withhold benefits without providing notice as private action even though the State created the review board and its procedures.[95] Thus, under recent precedent, the Court is far less likely to treat ISP censorship as State action.

Tellingly, the *Sullivan* Court commented on the Court's growing reluctance to treat private entities as State actors. Discussing *Burton*, the Court stated:

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[91] *Id.*

[92] 457 U.S. 991, 1002–12 (1982).

[93] *Id.*

[94] *Id.* at 1004.

[95] Am. Mfrs. Mut. Co. v. Sullivan, 526 U.S. 40, 43 (1999).

> *Burton* was one of our early cases dealing with "State action" under the Fourteenth Amendment, and later cases have refined the vague "joint participation" test embodied in that case. *Blum* and *Jackson*, in particular, have established that "privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*."[96]

Still, the Court remains willing to hold private entities constitutionally accountable.[97] The Court, for example, held Amtrak to be a State actor even though, by statute, the Federal Government disclaimed ownership of it.[98] As stated by the Court, "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."[99] In *Morse*, the Court treated the Republican Party of Virginia's practice of charging a fee to nominate a delegate as a poll tax which could be targeted by the enabling clause of the 15th Amendment, which targets only action taken under the authority of the State.[100] While the Court stopped short of deeming the State political party or its convention a State actor, the Court held that the parties "ac[t] under authority" of Virginia when they decide who will appear on the general election ballot, as "whatever method is chosen, State law requires the Commonwealth to place the name of the nominee on the general election ballot."[101] That the state legal structure necessarily vested authority in the party's decision gives the color of State authority to those decisions.

Most recently, in *Brentwood Academy*, the Court held a private non-profit secondary school athletic association constitutionally accountable

[96] *Id.* at 57 (quoting *Blum*, 457 U.S. at 1011) (citing *Jackson*, 419 U.S. at 357–58).

[97] *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) (holding a non-profit secondary school athletic association comprised primarily of public schools constitutionally accountable), *rev'd and remanded on other grounds*.

[98] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394 (1995).

[99] *Id.* at 400.

[100] *See* Morse v. Republican Party, 517 U.S. 186 (1996).

[101] *Id.* at 197.

pursuant to a § 1983 action brought by a member school.[102] The Court held the Athletic Association to be a State actor, stating that "The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it."[103] Previously, the State had formally delegated authority to the Association, though this formal delegation had been eliminated when the action giving rise to the lawsuit took place.[104] Still, the Court found the elimination of this formal delegation to be nominal.[105] In finding State action, the Court relied largely on the fact that 84% of the Athletic Association was made up of public schools represented by public school employees, articulating that "Only the 16% minority of private school memberships prevents this entwinement of the Association and the public school system from being total and their identities totally indistinguishable."[106] Though the *Brentwood* Court rejects a rigid application of any test to determine State action, the Court nonetheless explicitly states that, in this instance, the entwinement between the private association and government sufficed to establish the Association as a State actor, while acknowledging that the Association was not a State actor under the other tests.[107] As such, while the Court takes a totality of the circumstances approach to State action, it also seems to tacitly concede that if the totality of the circumstances satisfies one of the Court's original tests, then those circumstances likely warrant a finding of State action.

Still, the *Brentwood* Court goes to considerable lengths to emphasize the Court's flexible approach to determining State action, discussing a multitude of factors without placing them neatly into the three tests.[108] The Court at least loosely synthesized, or at least summarized, its early and later State action jurisprudence as follows:

> Our cases have identified a host of facts that can bear on the fairness of such an attribution. We have, for example,

[102] 531 U.S. at 304–05.

[103] *Id*.

[104] *Id.* at 292.

[105] *Id.* at 289.

[106] *Id.*

[107] *Id.* at 289, 303–04.

[108] *Id.* at 296–97.

> held that a challenged activity may be State action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operates as a "willful participant in joint activity with the State or its agents," We have treated a nominally private entity as a State actor when it is controlled by an "agency of the State," when it has been delegated a public function by the State, when it is "entwined with governmental policies[,]" or when government is "entwined in its management or control[.]"
>
> Amidst such variety, examples may be the best teachers. . . . *Lebron* . . . held that Amtrak was the Government for constitutional purposes, regardless of its congressional designation as private . . . . *Pennsylvania v. Board of Directors of City Trusts of Philadelphia* . . . held the privately endowed Gerard College to be a [S]tate actor and enforcement of its private founder's limitation of admission to whites attributable to the State, because, consistent with the terms of the settlor's gift, the college's board of directors was a [S]tate agency established by [S]tate law. Ostensibly the converse situation occurred in Evans v. Newton . . . which held that private trustees to whom a city had transferred a park were nonetheless State actors barred from enforcing racial segregation, since the park served the public purpose of providing community recreation, and "the municipality remained entwined in [its] management [and] control . . ."[109]

B. Supreme Court State Action Decisions in the Telecommunications Context

As stated by the Court in *Brentwood*, "What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding State action; nor is any set of circumstances absolutely

[109] *Id.* (citations omitted).

sufficient, for there may be some countervailing reason against attributing activity to the government."[110] To everyone's benefit, this article will not attempt what much wiser commentators could not do and what the Supreme Court itself does not attempt – to reconcile the various strands and principles of the Court's State action jurisprudence.

As such, while the entirety of the Court's State action precedent - fact-specific as it may be - is of significant value in assessing whether and when to treat ISPs as State actors, more helpful is precedent within the telecommunications context.[111] In multiple instances, the Court has at least implicitly addressed when telecommunications providers may be treated as State actors under the First Amendment.[112]

In *Columbia Broadcasting*, a case decided before the advent of cable, the Court held a broadcaster franchisee's decision to exclude political advertisements from broadcast to not constitute State action.[113] The Court largely analogized broadcasters to private journalists, arguing that the decision to exclude some advertisements "fell within the area of journalistic discretion . . . Thus, it cannot be said that the Government is a 'partner' to the action of the broadcast licensee complained of here . . . ."[114]

In *Denver Telecomm*, the Court addressed a federal law which, in relevant part, permitted cable providers to censor obscene, albeit legal, material on both privately operated channels and public access, educational, and governmental channels.[115] Because of the permissive nature of the legislation, the Court, in addressing the constitutionality of the legislation itself, addressed whether cable provider censorship constitutes constitutional State action.[116] Balancing a variety of factors, the Court held

[110] *Id.* at 295–96.

[111] Though it should be noted that, in assessing State action, the Court does sometimes treat seemingly similar entities as distinct. For example, in *Brentwood*, the Court treated the high school athletic association as the State but in *Tarkanian* refused to treat the NCAA as such. This lack of cohesion is here compounded by the fact that the Court often treats seemingly similar telecommunications providers as distinct. *See supra* note 17; *See infra* text accompanying note 231.

[112] *See Columbia Broad. Sys.*, 412 U.S. at 119; Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 760-66 (1996).

[113] *Columbia Broad.*, 412 U.S. at 119.

[114] *Id.* at 118–19.

[115] 518 U.S. at 732.

[116] *Id.* at 735–47, 760–63.

that the portion of the statute permitting private cable operators to censor obscene material on private cable channels does not sanction unconstitutional action:

> The importance of the interests here – protecting children from exposure to patently offensive depictions of sex; the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; . . . and the flexibility inherent in an approach that *permits* private cable operators to make editorial decisions, lead us to conclude [that the law does not permit unconstitutional State action].[117]

The Court, thus, treats cable providers censoring private channels as private actors.

The *Denver Telecomm* Court, also, however, held it unconstitutional for the law to permit cable operators to censor public access channels, reasoning that the State is especially entangled with cable providers concerning these channels.[118] The Court argued that public access channels were distinct from private channels for several reasons.[119] First, while cable companies traditionally exercise editorial discretion over private cable channels, they do not historically maintain such unfettered control over the content of public access channels.[120] As such, the section of the law allowing censorship of public access channels "does not restore to cable operators editorial rights that they once had, and the countervailing First Amendment interest is nonexistent, or at least much diminished."[121] Additionally, the Court notes that public access channels have a particularly entangled relationship with local government in matters such as setting and meeting programmer indemnification requirements, "certification of compliance with local standards, time segregation, adult content advisories, [and] . . . prescreening individual programs . . . ."[122] And further states:

[117] *Id.* at 743.

[118] *Id.* at 761–62.

[119] *Id.* at 760–66.

[120] *Id.* at 761.

[121] *Id.*

[122] *Id.* at 762.

> Public access channels, on the other hand, are normally subject to complex supervisory systems of various sorts, often with both public and private elements . . . . Municipalities generally provide in their cable franchising agreements for an access channel manager, who is most commonly a nonprofit organization, but may also be the municipality, or, in some instances, the cable system owner . . . . This system of public, private, and mixed nonprofit elements, through its supervising boards and nonprofit or governmental access managers, can set programming policy and approve or disapprove particular programming services.[123]

The Court analogizes public access licenses to public easements.[124] The Court also argues that, historically, local public access channels seldom broadcast obscene content such that explicitly authorizing cable companies to engage in additional censorship would likely lead to censorship of protected speech.[125] In striking down a law allowing cable providers to censor public access channels, the Court treats cable providers' censorship of public access channels as State action, though the Court never states this explicitly.[126]

Unfortunately, even these cases are of limited precedential value. The Court is hesitant to address telecommunications providers under the First Amendment and instead applies the appropriate regulatory scheme.[127] Further, the Court is likely to treat even seemingly similarly-situated telecommunications providers differently.[128] In *Brand X*, the Court, in allowing the FCC to classify ISPs as distinct from telephone service providers, acknowledged the internet as constantly evolving and as unique from other telecommunications medium which may appear analogous.[129]

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[123] *Id.* at 761–62.

[124] *Id.* at 760–61.

[125] *Id.* at 763–67.

[126] *Id.* at 737.

[127] *See, e.g.*, *Denver Telecomms.*, 518 U.S. at 737; *Columbia Broad.*, 412 U.S. at 102 (1973); Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 527 (1959).

[128] *See, e.g.*, *Denver Telecomms.*, 518 U.S. at 741; *Farmers Educ.*, 360 U.S. at 530.

[129] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003 (2006).

The Court may treat ISPs differently than cable providers even though the two share many similarities. In fact, in countering the dissents, the majority in *Denver Telecomm* stressed that it is not appropriate to analogize cable television with other seemingly analogous communication platforms.[130]

Still, there are several important takeaways from *Denver Telecommunications* and *Columbia Broadcasting* in assessing whether the Court will treat ISPs as State actors. The first is that, in addressing whether such providers are State actors, the Court sees an important dichotomy between telecommunications companies acting as speakers and telecommunications companies acting as censors.[131] This determination is important in assessing State action. If a telecommunications company is a speaker, then what is commonly referred to as "censorship" is actually just the company exercising its First Amendment-protected editorial discretion to exclude material it finds objectionable.[132] Telecommunications companies are not State actors insofar as they are speakers; as speakers, the First Amendment does not limit them, but rather gives them protection from being forced to broadcast material against their will.[133]

On the other hand, if the telecommunications company is not itself a speaker and, by limiting the content available to consumers, is acting as a censor, that company is far more likely to be treated as a State actor depending of course on the degree to which it is intertwined with or acting on behalf of the government.[134] If the telecommunications provider must license a scarce resource, such as spectrum or radio frequencies to broadcast, the Court views government efforts to ensure that broadcasters give access to various viewpoints as enhancing free speech, not unconstitutionally limiting the broadcaster's editorial discretion.[135]

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[130] 518 U.S. at 748–52.

[131] *Id.* at 737; *Columbia Broad.*, 412 U.S. at 120–21.

[132] *See Columbia Broad.*, 412 U.S. at 120–21.

[133] *See id.*

[134] *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 761–62 (1996).

[135] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 391–92 (1969) ("As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use. . . . Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be

Second, these cases, especially in conjunction with each other, make clear that a telecommunications provider can be a private actor in some acts of censorship and a State actor in others.[136] Indeed, a given cable provider generally will not be considered a State actor regarding its decision to censor cable channels, but is more likely treated as a State actor when censoring public access channels.[137] Cable companies are not either State actors or private actors. Rather, some acts of censorship maybe attributable to the State and others not.

C. Lower Court Decisions on Whether ISPs are State Actors

To the limited extent they have confronted the issue, lower courts have been unreceptive to First Amendment claims brought against ISPs and have been unwilling to treat ISPs as State actors.[138] In *Noah v. AOL*, a federal district court rejected plaintiff's claim that AOL violated his First Amendment rights by suspending his account because he posted pro-Islamic statements in an AOL chat room.[139] The court quickly dismissed plaintiff's First Amendment claims and instead adjudicated the matter under the congressionally-established regulatory scheme.[140] The *Noah* court simply reasoned that "the First Amendment . . . does not protect against action taken by private entities . . . . Plaintiff does not argue that AOL is a State actor, nor is there any evident basis for such an argument."[141]

The Federal Eastern District of Pennsylvania reached a similar conclusion in *Cyber Promotions Inc. v. AOL*, a case cited in *Noah*, though

given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'").

[136] *See Denver Telecomms*., 518 U.S. at 761–62.

[137] *Id.*

[138] *See, e.g.*, Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 444–45 (E.D. Pa. 1996); Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, at 546 (E.D. Va. May 15, 2003); *see also* Green v. AOL, 318 F.3d 465, at 472 (3d Cir. 2003).

[139] 261 F. Supp. 2d at 546.

[140] *Id.* at 537, 546.

[141] *Id.* (citing *Cyber Promotions*, 948 F. Supp. at 444–45 and *Green*, 318 F.3d at 472).

Cyber Promotions includes much more in-depth analysis regarding whether to treat AOL as a State actor.[142] There, the court analyzed whether AOL was a State actor violating Cyber Promotions' First Amendment rights by blocking Cyber Promotions' spam emails to AOL email users.[143]

The court went through each of the three tests for determining State action, operating under the assumption that, if any of these tests favored AOL being a State actor, than AOL would be treated as such.[144] First, in assessing whether AOL exercises powers traditionally exercised exclusively by the State, the court rejected Cyber Promotions' argument on the basis of precedent that "no single entity, including the State, administers the Internet."[145] More specifically, the court reasoned that "By providing its members access to the Internet through its e-mail system . . . AOL is not exercising *any* of the municipal powers or public services traditionally exercised by the State . . . ."[146]

The court next addressed the second and third tests, referred to above as the entanglement and the symbiosis tests, framing these tests as follows: "[W]e evaluate whether AOL is a State actor under the remaining two tests, i.e., whether AOL is acting with the help of or in concert with State officials and whether the State has put itself in a position of interdependence with AOL such that it must be considered a participant in AOL's conduct. These tests actually overlap one another."[147] The court quickly rejected that AOL acted in concert with State officials as Cyber Promotions failed to argue as much.[148] Rather, Cyber Promotions argued that AOL's actions should be attributed to the State because the court is aiding AOL to prevent Cyber Promotions' spam pursuant to an AOL-initiated lawsuit.[149] The court, however, rejected the notion that a private actor becomes a State actor simply by utilizing the courts to enforce its rights.[150]

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[142] *Cyber Promotions*, 948 F. Supp. at 442.

[143] *Id.* at 441.

[144] *Id.*

[145] *Id.* (citing Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 832 (E.D. Pa. 1996)).

[146] *Id.* at 442.

[147] *Id.* at 444.

[148] *Id.* at 444 (distinguishing cases in which the Supreme Court found collusion between government actors and private actors).

[149] *Id.* at 444–45.

[150] *Id.* at 445.

In *Green v. AOL*, the Third Circuit, like the *Noah* court, summarily dismissed the plaintiff's claim that AOL should be treated as a State actor.[151] There, Green, an AOL user, argued that AOL violated his First Amendment rights by requiring him to adhere to Community Guidelines in using the internet.[152] Green argued that AOL was a State actor because it was open to non-AOL subscribers and because it provided access to government websites.[153] The Third Circuit rejected this argument, stating that "private property does not lose its private character merely because the public is generally invited to use it for designated purposes" and describing AOL as "a private . . . fee-based Internet service provider that runs a proprietary content-based online service."[154]

Again, while these cases are illuminating, they are also of limited precedential value. That each of these cases involve AOL as the subject ISP lessens their relevance to the question at hand. AOL, at least at the time of the just-discussed litigation, provided only dial-up, as opposed to broadband, internet service.[155] As will be discussed, dial-up providers are far less entangled with the State than broadband providers, and this article focuses upon broadband internet as it is the way most Americans get internet access.[156] Unlike broadband providers, dial-up providers provide internet through normal phone lines and thus do not need to license broadband from the Federal Government or gain monopolistic or duopolistic access to municipal infrastructure.[157] As importantly, these cases revolve around AOL restricting use or accessibility of AOL-provided email and AOL websites. AOL is, thus, simply restricting the use of its own unique product provided to paying consumers.

[151] 318 F.3d 465, at 469–72 (3d Cir. 2003).

[152] *Id.* at 472.

[153] *Id.*

[154] *Id.* (citing Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972)).

[155] Saul Hansen, *As Broadband Gains, the Internet's Snails, like AOL, Fallback*, N.Y. TIMES (Feb. 3, 2003), https://www.nytimes.com/2003/02/03/business/as-broadband-gains-the-internet-s-snails-like-aol-fall-back.html; *see also Free AOL Plan – FAQs*, AOL, https://help.aol.com/articles/free-aol-plan-faqs#2 (last checked May 13, 2018).

[156] Cathryn Le, *How Have Internet Service Providers Beat Spammers*, 5 RICH. J.L. & TECH. 9, 21 (Winter 1998).

[157] *See* 47 C.F.R. § 24.

D. Literature On Whether ISPs Are State Actors

Like the courts, scholars addressing whether ISP censorship constitutes State action generally agree that it does not.[158] One of the more recent articles on the topic examines whether various internet participants – Google, Facebook, Dropbox, Comcast, and the like – could be considered State actors.[159] This commentator concludes that none of them are likely to be treated as State actors.[160] He admits, however, that Comcast is more likely to be treated as a State actor than the other entities considered but ultimately concludes that Comcast is not a State actor as the trial courts who have addressed the question have uniformly refused to treat ISPs as such.[161]

[158] *See, e.g.*, Le, *supra* note 156; *see also* Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121 (2014) (arguing that, for policy reasons, Facebook and other social media providers should be considered State actors because social media sites are analogous to traditional public for a such as highways and sidewalks but not addressing whether ISPs are State actors); Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 152 (1998); David J. Goldstone, *Public Forum Doctrine in the Age of the Inforrmation Superhighway–Where Are the Public Forums on the Information Superhighway*, 46 HASTINGS L.J. 335, 353 (1995). *But see* Daniel Rudofsky, *Modern State Action Doctrine in the Age of Big Data*, 71 N.Y.U. ANN. SURV. AM. L. 741, 757–59 (2016) (gives the most credence to the possibility that ISPs could be considered State actors, though ultimately seems to conclude that a court would never reach this holding). The Rudofsky article largely starts the conversation expanded upon by this article. Rudofsky provides a useful survey of modern State action doctrine and how that doctrine has been applied to internet service providers, though this article focuses almost entirely on the exclusive government function State action test. Rudofsky's article is largely dedicated to surveying various big data providers, such as Comcast, Google, and Facebook, to develop appropriate due process standards for these entities to provide user data to the government. Rudofsky concludes that none of the data providers would be classified as State actors and argues that, instead, they should be held accountable to due process standards outside of the Constitution. This article does not necessarily disagree with Rudofsky's conclusion but rather expands upon his brief discussion of whether ISPs might be considered State actors, both by analyzing the relationship between the State and ISPs, not generally, but in a variety of specific contexts and under various strains, trends, and contexts of State action jurisprudence, each of which arguably dictate a different conclusion. Further, this article focuses almost entirely on First Amendment questions related to instances where ISPs directly block speech, a distinct question from that asked by Rudofsky, who focuses on internet user privacy concerns and whether it may violate the Fourth Amendment (or other standards of due process that do or should apply to non-State actors) for big data providers to provide information to government entities.

[159] Rudofsky, *supra* note 158, at 766.

[160] Rudofsky, *supra* note 158, at 766, 769, 774, 777, 782, 787, 788, 790, 794, 796.

[161] Rudofsky, *supra* note 158, at 782.

Another article, albeit one published during a pre-broadband age, argues that ISPs are not State actors under the entanglement and traditional State function tests.[162] Still, much of this commentator's analysis is at least seemingly relevant to assessing whether modern broadband providers should be treated as State actors. As the commentator argues:

> The government only has a minor and indirect connection to Internet service providers such as AOL and CompuServe. Although the government has allowed its computers and computer networks to be linked with the Internet, "the government apparently does not plan to operate the networks." In fact, government literature emphasizes that "[t]he private sector will lead the deployment of the [National Information Infrastructure] and 'the private sector role in NII development will predominate.'"[163]

Notwithstanding the fact that broadband providers are more entangled with the State than dial-up providers, this argument, while certainly of some merit, is flawed in several ways. First, it seems to assume that a seemingly private entity is not a State actor because the government says that entity is not a State actor. Such analysis belies the very purpose of the State action doctrine, as made clear by the Court in *Brentwood Academy* and *Lebron*, respectively treating the non-profit athletic association and Amtrak as the State.[164] The *Lebron* Court, for example, gave little credence to the fact that Amtrak's charter explicitly labeled it a private corporation.[165] As stated by the Court in *Brentwood Academy*, "our cases are unequivocal in showing that the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to

[162] Le, *supra* note 156, at 17–21. Ms. Lee argues that ISPs are not entangled with the State as the Federal Government relies on the private sector for internet infrastructure. This, however, was in an age of DSL internet such that ISPs did not need to license broadband from the Federal Government or engage in complex franchise agreements with localities.

[163] Le, *supra* note 156, at 21.

[164] *See* Le, *supra* note 156, at 19.

[165] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 391 (1995).

acknowledge the entity's inseparability from recognized government officials or agencies."[166]

The just-discussed article, and several others, also discuss whether ISPs may be considered State actors under the exclusive public function test.[167] Commentators addressing this question analyze whether the World Wide Web is analogous to a public forum traditionally policed by the State, such as a sidewalk or park.[168] The courts may treat a private entity as a State actor insofar as the private entity is performing a traditional exclusive State function.[169] Private entities do not satisfy the traditional State function test simply by holding property open to the public or by performing functions the State also performs.[170] Rather, under the traditional State function test, the Court asks "whether the 'private entity exercises powers which are traditionally exclusively reserved to the State.'"[171] The Court thus considers private entities to be State actors insofar as they, for example, control sidewalks made open to the public, as public sidewalks are traditionally exclusively controlled by the State.[172] Similarly, the courts consider privately owned public parks[173] and corporate towns[174] to function as State actors. Private schools, however, are generally not State actors.[175] Even though the government traditionally provides citizens with education, private schools have traditionally shared this function with the State.[176]

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[166] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001) (citing *id.*).

[167] *See, e.g.*, Le, *supra* note 156, at 19; Goldstone, *supra* note 158, at 352.

[168] Goldstone, *supra* note 158, at 352. The Goldstone article concedes that traditional public forums do not provide a necessarily useful analogy for discussing in what contexts the internet may be considered a public forum. However, as discussed just below, this article is not concerned with assessing what type of forum the internet is, as there can be little doubt that the internet is not historically "exclusively" managed by the State and, as such, the traditional public function test is not terribly elucidating in assessing whether ISPs are State actors.

[169] United Church of Christ v. Gateway Econ. Dev. Corp., 383 F.3d 449, 454 (6th Cir. 2004) (citing Hudgens v. NLRB, 424 U.S. 507, 96 (1976)).

[170] *Id.*

[171] *United Church of Christ*, 383 F.3d at 454 (quoting Lansing v. Memphis, 202 F.3d 821, 828 (6th Cir. 2000)).

[172] *Id.* at 455 (citing Lee v. Katz, 276 F.3d 550, 555 (9th Cir. 2002)).

[173] Evans v. Newton, 382 U.S. 296, 302 (1966).

[174] *See* Marsh v. Ala., 326 U.S. 501, 506–07 (1946).

[175] *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[176] *Id.*

Some articles reject the notion that ISPs serve a traditionally exclusive public function.[177] As stated somewhat prophetically by one commentator:

> Even if the government began using the network to perform traditional State functions, such as providing methods for their constituents to cast votes, the courts would not likely scrutinize an online service provider as a State actor because it merely furnishes the means which allows the government to perform a State function.[178]

This analysis does, however, beg the corollary question of whether there is sufficient entanglement or a sufficient partnership between the State and the ISP to establish the ISP as a State actor, at least insofar as the ISP provides these services for the State's benefit.

Those scholars concluding that ISP censorship violates or may violate the First Amendment have done so on the basis that the internet is analogous to a sidewalk or street such that ISPs assume a traditional public function by regulating the internet.[179] A library's worth of articles could be written on whether the internet is analogous to a public right-of-way.

That said, of the three tests the courts consider in determining whether a private entity engaged in State action—the entanglement of the private entity and the State, the degree of the joint partnership between them (symbiosis), and whether the private entity has taken over a traditional public function—the public function test is the least relevant to the inquiry here. Concededly, the internet is, in many ways, a modern free speech forum, as more protests certainly take place online than in parks.[180] In this sense, regulation of the internet is arguably analogous to the regulation of parks or sidewalks.[181]

Still, that the internet is arguably analogous to a park or sidewalk as a free speech forum does not establish the management or policing of the internet as a traditional public function. It seems quite a stretch to describe

[177] Goldstone, *supra* note 158, at 352.

[178] Le, *supra* note 156, at 20.

[179] Zatz, *supra* note 158; *cf.* Allen Hammonds, *Private Networks, Public Speech: Constitutional Speech Dimensions of Access to Private Networks*, 55 U. PITT. L. REV. 1085 (1994) (explaining that the convergence and privatization of telecommunication networks may pose a new threat to First Amendment free speech rights).

[180] *See* Zatz, *supra* note 158.

[181] *See* Zatz, *supra* note 158.

the management of the internet as an *exclusive* traditional State function as, since the internet rose to true prominence, private entities have played a direct, central role in its general management and distribution.[182] By analogy, while providing education is certainly a traditional State function, the Court does not treat private schools as State actors,[183] as providing education is not an *exclusive* traditional State function.[184] Similarly, while the government does traditionally manage highway and sidewalk traffic, it does not traditionally manage internet traffic. On the other hand, the government does traditionally control the allocation of bandwidth, perhaps like it controls the licensing of other public commons, but that is a distinct conversation not addressed here.[185]

This article takes a different view than the vast majority of existing literature—that, based upon the entangled relationship between ISPs and the State, ISP censorship should generally be considered State action. Still, perhaps more importantly, this article stresses that a one-size-fits-all approach to assessing whether a telecommunications company is a State actor ignores both the diverse spectrum of provider-State relationships and the motivations behind various manifestations of ISP censorship. The literature on the subject thus generally argues that ISPs either are or are not State actors; Comcast is not a State actor because other courts have ruled that AOL is not a State actor.[186] But to ask whether an ISP categorically is or is not a State actor is to ask the wrong question. While this article will argue that ISP censorship often constitutes State action, such an argument concededly paints with overly broad strokes. As such, this article proposes a paradigm to evaluate whether an ISP, or really any telecommunications provider, is acting as the State. This article will argue that the specific relationships between ISPs and government, along with the specific context of the censorship, will determine, on a case-by-case basis, whether an instance of ISP censorship may be attributed to the State.

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[182] *See infra* Section I.

[183] *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

[184] *Id.*

[185] *See Radio Spectrum Allocation*, FED. COMM. COMM'N, https://www.fcc.gov/engineering-technology/policy-and-rules-division/general/radio-spectrum-allocation (last visited May 14, 2018).

[186] Rudofsky, *supra* note 158, at 782.

III. ARE ISPS STATE ACTORS?

While this article stresses answering this question on a case-by-case basis, there are of course too many individual contexts in which ISP censorship may occur to analyze all of them. Section III thus attempts to address, in general terms, whether ISP censorship should be treated as State action, accounting for what can imprecisely be described as the 'typical relationship' between ISPs and the State. Section III.A will discuss this relationship—both at the municipal and Federal level. Section III.B will then apply the Court's State action jurisprudence to this typical relationship, with a particular focus the Court's State action cases concerning telecommunications providers. This Section concludes that, because ISPs operate with bandwidth licensed from the Federal Government and often operate pursuant to municipally sanctioned de facto monopolies established through municipal licensing practices, ISP censorship should generally be treated as a State action. As stated, however, this Section paints with broad strokes. Section IV, then, will discuss factors that should be applied to assess, on a case-by-case basis, whether ISP censorship constitutes State action.

A. Entanglement Between ISPs and the State

ISPs are primarily entangled with the State in two ways. First, ISPs must license public wireless spectrum from the Federal Government.[187] While perhaps it is technically owned by the public, this spectrum is, at least for all practical purposes, owned by the Federal Government. There is only a finite amount of broadband. Broadband is generally licensed through auctions administered by the FCC.[188] The resulting licensing agreements between the FCC and the ISP provide for additional entanglements. In order to obtain and maintain their licenses, wireless ISPs must "obtain FCC-certified equipment," register on the ULS, a consolidated database, and,

[187] *Who Must File Form 477?*, FED. COMM. COMM'N, https://transition.fcc.gov/form477/WhoMustFileForm477.pdf (last visited Sept. 14, 2018); *Wireless Operations in the 3650–3700 MHz Band*, FED. COMM. COMM'N, https://www.federalregister.gov/documents/2005/05/11/05-9096/wireless-operations-in-the-3650-3700-mhz-band (last visited Sept. 14, 2018).

[188] *Auctions*, FED. COMM. COMM'N, http://wireless.fcc.gov/auctions/default.htm?job=auctions_home (last visited Sept. 13, 2018).

subject to FCC mandates, coordinate services with nearby ISPs.[189] The FCC may also set aside some amounts of spectrum for smaller companies and for specific purposes.[190] However, with some exceptions, the FCC does not allocate spectrum based upon its assessment of who would best employ it, but rather provides spectrum to the highest bidder.[191] Thus, in order to provide customers with wireless access, ISPs must license wireless space from the government and subject themselves to government regulation.

Second, to gain access to a local market, an ISP must obtain approval from and enter into an arrangement with local government; this agreement often comes in the form of a franchise or licensing agreement, and, at a minimum, requires the ISP to obtain building and use permits from the municipality.[192] Each ISP-municipal agreement is different and some

[189] *See ULS Frequently Asked Questions*, FED. COMM. COMM'N, https://www.fcc.gov/wireless/support/universal-licensing-system-uls-resources/uls-frequently-asked-questions#block-menu-block-4 (last visited Oct. 4, 2018).

[190] Erik Telford, *Beware the Spectrum 'Extravaganza'*, U.S. NEWS & WORLD REP., https://www.usnews.com/opinion/economic-intelligence/articles/2016-02-24/beware-the-fccs-wireless-spectrum-extravaganza (last visited Feb. 24, 2016).

[191] Paul Klemperer, *Auctions vs Beauty Contests*, http://www.paulklemperer.org/PressArticles/auctionsvbeauty.pdf (last visited Sept. 14, 2018).

[192] Hannah Trostle & Christopher Mitchell, *Profiles of Monopoly: Big Cable & Telecom*, INST. FOR LOC. SELF-RELIANCE (Jul. 31, 2018), https://ilsr.org/monopoly-networks/ (large study demonstrating widescale lack of broadband ISP competition); Dunn, *supra* note 37; Klint Finley, *Want Real Choice in Broadband? Make These 3 Things Happen*, WIRED (Apr. 17, 2017), https://www.wired.com/2017/04/want-real-choice-broadband-make-three-things-happen/. *See* Cmty. Telecable of Seattle, Inc. v. Seattle, 149 P.3d 380, 381 (Wash. Ct. App. 2006); Linda A. Rushnak, *Cable Television Franchise Agreements: Is Local, State or Federal Regulation Preferable?*, 33 RUTGERS COMPUTER & TECH. L.J. 41, 41–46, 87–96 (2006). *See generally* Conference, *Transcript of 2006 Telecommunications Federalism Conference: Intro and Opening Remarks*, 2007 B.C. INTELL. PROP. & TECH. F. 165 (2007). Notably, the Rushnak article focuses largely on the regulation of cable television providers. *Id.* The article makes clear, however, that it is difficult to separate cable television franchises from cable internet franchises, as the same cable companies often provide both cable TV and internet to a given municipality, often in package deals to consumers; often the agreements with a municipality include requirements for the ISP to provide free internet to municipal buildings. Perhaps most importantly, cable internet and cable television are dependent on the same wires and municipal infrastructure. The FCC seeks to prevent municipalities from regulating the provision of cable internet, while allowing them to regulate the provision of cable television. *See* Mixed Use Clarification Rule, at *infra* Section A. But because the services are so intertwined, there is reason to be skeptical that the FCC will succeed in disentangling localities from cable internet services while continuing to allow them to regulate cable television services. This regulatory distinction becomes further blurred as internet

impose more requirements upon ISPs than others. Under these agreements, ISPs may be required to, for example, provide adequate service, and municipalities must provide ISPs with access to the necessary infrastructure.[193] ISPs may also be required to provide adequate customer service, pay franchise fees and, often, provide municipal buildings with free cable internet access.[194]

Even if the terms of the agreement itself do not much entangle the ISP and the municipality, by entering into an agreement with a municipality, the

services become less and less distinguishable from television services. For example, consumers are increasingly reliant on internet streaming services, like Netflix, to watch television; the FCC has not resolved whether to treat such streaming services as internet or television services. *In re* Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distrib. Serv., FCC 14-210 (Dec. 19, 2014) (proposed rule to treat some streaming services like cable television services). Concededly, there are instances where it is more plausible for localities to regulate cable television without regulating cable internet. For example, municipalities may be able to mandate the cable companies provide cable television to municipal buildings while not mandating that they provide cable internet and internet-dependent services. However, where the same companies provide cable television and internet using the same infrastructure and the municipal government still heavily regulates these companies' provision of at least some services, it is hard to disentangle these companies from local government in the provision of other services.

[193] *See, e.g.*, Tricia L. Nadolny, *Philadelphia, Comcast Hammer Out Details of 15-Year Franchise Agreement*, GOV'T TECH. (Aug. 11, 2015), http://www.govtech.com/dc/articles/Philadelphia-Comcast-Hammer-Out-Details-of-15-Year-Franchise-Agreement.html; https://lincoln.ne.gov/city/mayor/communications/lincoln-broadband-franchise.pdf. The FCC is currently seeking commentary on proposed regulations which would reinforce prohibitions against local franchise authorities regulating cable companies' provision of internet services (LFA's could still regulate the provision of video services). Such a regulation may serve to somewhat disentangle ISPs and local government. However, in at least some regards, the LFA's continuing ability to regulate cable provider's provision of cable keeps them entangled with cable providers' provision of internet services as cable broadband is provided using the same infrastructure as cable television. Further, as many ISPs already have entrenched relationships with local governments pursuant to franchise agreements, such ISPs are unlikely to fight the terms of these existing contracts. *See* Mike Maciag, *FCC Sets Rules for 5G Infrastructure, Limiting State and Local Control*, GOVERNING (Sept. 26, 2018), http://www.governing.com/topics/transportation-infrastructure/gov-fcc-5g-telecom-smartphone-states-cities.html. Perhaps most importantly, the FCC's stance against LFA's regulating ISPs has existed since at least 2007. While the FCC is seeking to reinforce it, if the past is any indicator, localities will continue to impose regulations and requirements upon ISPs, who would rather comply with such requirements than to pursue litigation, thus maintaining ISPs' entanglement with local government. Rushnak, *supra* note 192, at 41–46, 87–96.

[194] Rushnak, *supra* note 192, at 87–96.

ISP generally obtains at least a de facto local monopoly.[195] This monopoly is established in large part because municipal infrastructure makes it logistically difficult for more than one ISP to provide the same type of internet service.[196]

Further, municipal governments create barriers to entry for ISPs that extend beyond the inherent limits created by the infrastructure itself.[197] Berin Szoka, in an article featured in *Wired*, argues that ISP monopolies are the fault, not of ISPs themselves nor of municipal infrastructure, but rather, of municipal graft-seeking practices.[198] As noted by Szoka, "Companies can make life harder for their competitors, but *strangling* the competition takes government . . . . The hard part . . . is the pre-deployment barrier, which local governments and public utilities make unnecessarily expensive and difficult."[199] Some municipal or state governments, however, employ policies which ensure less barriers to entry, thus exemplifying the problem with applying a one-size-fits-all answer to the question of whether ISPs may be considered State actors.[200]

ISP-municipal government agreements, and the negotiations surrounding them, often result in de facto State-sanctioned monopolies or oligopolies.[201] While these agreements generally do not explicitly foreclose

[195] Rushnak, *supra* note 192, at 90, 100.

[196] Finley, *supra* note 192; *see also* Berin Szoka, Jon Henke, & Matthew Starr, *Don't Blame Big Cable. It's Local Governments that Choke Broadband Competition*, WIRED (Jul. 16, 2013), https://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/ (noting that ISPs need access beyond mere physical infrastructure from local governments). The statement that it may be difficult for more than one company to provide "the same type of internet services" refers to the fact that while municipalities often have the infrastructure to support, for example, one DSL provider (via telephone lines) and one cable provider (via cable wires), it is difficult for two cable providers to occupy the same area.

[197] Szoka, Henke, & Starr, *supra* note 196.

[198] Szoka, Henke, & Starr, *supra* note 196.

[199] Szoka, Henke, & Starr, *supra* note 196.

[200] Szoka, Henke, & Starr, *supra* note 196.

[201] Finley, *supra* note 192; Trostle & Mitchell, *supra* note 192; Szoka, Henke, & Starr, *supra* note 196, at 279–80 (local government to blame for broadband monopolies); *see also* Conference, *supra* note 192; *see also* William H. Lehr et al., Scenarios for the Network Neutrality Arms Race 7, 34th Conference on Commc'n, Info. and Internet Policy (TPRC) (2006), http://web.si.umich.edu/tprc/papers/2006/561/TPRC2006_Lehr%20Sirbu%20Peha%20Gillett%20Net%20Neutrality%20Arms%20Race.pdf; Dunn, *supra* note 37; *see* Jon Brodkin, *US broadband: Still no ISP choice for many, especially at higher speeds*, ARSTECHNICA (Aug. 10, 2016),

upon the possibility of local competition, they do usually provide de facto monopolies to ISPs regarding the type of internet service that ISP provides.[202] According to FCC research, accurate as of 2015, only 24% of people have access to more than one high speed broadband provider.[203] Even if franchise agreements do not result in monopolies, they are generally duopolistic at best.[204] Internet users across the country frequently have access to only one provider and very rarely have access to more than two.[205] Because of the monopolistic nature of government-ISP agreements, if a broadband provider chooses to censor certain online content, local residents will have no way to utilize broadband to access such content.[206]

The FCC has made efforts throughout the 21st Century to curb local government's role in establishing and entrenching ISP monopolies.[207] Most recently, in September 2018, the FCC issued two orders – one which clarifies that localities cannot regulate cable providers' internet services ("Mixed Use Rule Clarification") and the other which limits the ability of municipal government to negotiate agreements with and impose aesthetic requirements upon some ISPs in ways the FCC believes will hinder deployment of 5G network technology ("5G Deployment Rule").[208]

In its recent Mixed Use Rule Clarification, the FCC reaffirmed its position that, when a cable company provides a municipality with both

https://arstechnica.com/information-technology/2016/08/us-broadband-still-no-isp-choice-for-many-especially-at-higher-speeds/ (noting that ISP competition has decreased since 2013).

[202] Lehr, *supra* note 201; Davina Sashkin, *Failure of Imagination: Why Inaction on Net Neutrality Regulation Will Result in a de Facto Legal Regime Promoting Discrimination and Consumer Harm*, 15 COMMLAW CONSPECTUS 261, 279–80 (2006).

[203] Dunn, *supra* note 37. Trostle & Mitchell, *supra* note 192. Various studies differ in their results regarding consumer internet access, possibly because of the imprecision of FCC measurement tools, but there is a strong consensus that many users have access to zero, one, or two broadband providers.

[204] Brodkin, *supra* note 201.

[205] Lehr, *supra* note 201; Sashkin, *supra* note 202.

[206] *See* Christopher Mitchell, *Repealing Net Neutrality Puts 177 Million Americans at Risk*, MUNINETWORKS (Dec. 11, 2017), https://muninetworks.org/content/177-million-americans-harmed-net-neutrality (compiling data to find that that many Americans have only a choice between ISPs with a history of violating net neutrality).

[207] *See, e.g.*, FCC-CIRC1809-05, at 4, ¶¶7–13 (Mixed Use Clarification); FCC-CIRC1809-02, ¶¶15–22 (5G Deployment Rule).

[208] Mixed Use Clarification, FCC Fact Sheet, *supra* note 207; 5G Deployment Rule, FCC Fact Sheet, *supra* note 207.

cable television and cable internet services, Federal law allows the local government to regulate the company's provision of cable television services but not non-television services, i.e., internet services.[209]

Through the 5G Deployment Rule, the FCC takes aim at local government practices it believes will hinder the deployment of and upgrade to 5G infrastructure.[210] In general terms, the Rule clarifies that a locality illegally 'effectively prohibits' the deployment of infrastructure if it "materially inhibit[s]" an ISP from providing local services, even if it does not effectively prohibit local residents from having access to any internet services; it also specifies that local governments may not discriminate in favor of incumbent providers.[211] More specifically, the Rule states that municipalities can only charge ISPs amounts for access to infrastructure that are commensurate with the city's actual costs and that the city cannot enforce unreasonable aesthetic requirements for 5G technology deployment.[212] Finally, the 5G Deployment Rule sets new shot clocks on the time a local government may take to respond to a ISPs application to deploy 5G technology.[213]

Of course, whether these rules will significantly disentangle municipalities from ISPs and weaken local ISP monopolies remains to be seen.[214] As such, this article bases its analysis largely on the historical, albeit varied, relationship between government and service providers. Still, it bears mention that the September 2018 rules are only the newest effort in the FCC's years' long, though by its own account largely unsuccessful effort to remove local government as an impediment to the deployment and expansion of internet technology.[215] There is already speculation that major

[209] Mixed Use Clarification, FCC Fact Sheet, *supra* note 207.

[210] 5G Deployment Rule, FCC Fact Sheet, *supra* note 207.

[211] 5G Deployment Rule, FCC Fact Sheet, *supra* note 207.

[212] 5G Deployment Rule, FCC Fact Sheet, *supra* note 207.

[213] 5G Deployment Rule, FCC Fact Sheet, *supra* note 207.

[214] Importantly, the ultimate conclusion of this article, per Section IV at *infra*, is that courts should not employ a one-size-fits-all approach to determining whether ISP censorship constitutes state action, focusing largely on the fact that, on a state and local level, different governments regulate and are entangled with ISPs in different ways.

[215] The Mixed Use Rule Clarification, for example, is a response to part of a 2017 6th Circuit opinion deeming arbitrary and capricious a 2008 rule paralleling the Mixed Use Clarification Rule and providing the FCC the opportunity to enact the rule on a more sound legal basis. *In the Matter of* Implementation of Section 621(a)(1) of the Cable Comm. Pol. Act, as Am. By the Cable Tel. Consumer Protection & Competition Act of 1992, FCC-CIRCI1809-05 (on remand from

providers in major metropolitan areas will honor their existing contracts even though they may violate these new rules.[216] ISPs may be hesitant to sue municipalities with whom they already have long standing, profitable relationships. Further, insofar as ISP monopolies result largely from the fact that localities have a finite amount of infrastructure for ISPs to utilize it may be too late, at this point, to meaningfully promote true competition in some of these areas.[217] Such difficulties in fostering local competition are exacerbated by the fact that many consumers are already stuck in long-term contracts with incumbents. Thus, often times, local governments have already granted de facto natural monopolies to ISPs who have not or will not uphold principles of net neutrality.[218]

Montgomery Cty., MD v. FCC, 863 F.3d 485 (6th Cir. 2017)). Through the Mixed Use Rule Clarification, the FCC attempts to enact the Rule on a basis the courts will deem sufficient. Thus, unless, since 2008 ISPs and localities were banking upon the 2008 rule being struck down, the efficacy of the 2008 rule is a strong indicator of the likely efficacy of its September 2018 corollary. Similarly, the FCC's justification for the 5G Deployment Rule frames the Rule largely as a reiteration of previous similar rules and a tightening of negotiation shot clocks which many localities were already failing to adhere too. *In the Matter of* Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, FCC-CIRC1809-02, at 4–11 (adopted Sept. 26, 2018). The Rule also notes that, in essential ways, it reiterates FCC and circuit court interpretations of the Communications Act dating back to the late 1990's. One must thus be cautious in being overly optimistic that this new rule will fundamentally restructure the relationship between ISPs and local governments. *Id.* at 5.

[216]Magarian, *supra* note 73.

[217]*See* Finley, *supra* note 192 ("But the reality is that terrestrial wired broadband is a natural monopoly. So when regulators 'get out of the way,' they hand the market to incumbents." (citations omitted)); Rushnak, *supra* note 192.

[218]In fairness, underlying the 5G Deployment Rule is the premise that, because 5G providers are not dependent on cable wires and because they employ small scale technology, as opposed to cell towers, 5G providers will be able to break into monopolized markets and do so in a less monopolistic way. *See* 5G Deployment Rule, FCC Fact Sheet, *supra* note 207. This also, of course, remains to be seen as 5G deployment is still in its very early stages. Many commentators are optimistic about this prospect. *See, e.g.*, Franklin-Hodge, Jascha, *Will Cities Allow 5G to Kill Broadband Monopolies?*, STATESCOOP (Nov. 3, 2017), https://statescoop.com/will-5g-allow-cities-to-kill-broadband-monopolies/. Others, however, observe that, while 5G does not require the building of new cell towers, it does require the use of large amounts of fiber-optic cables. Brian Lavallée, *5G Wireless Needs Fiber, and Lots of It*, CIENA (May 31, 2016), https://www.ciena.com/insights/articles/5G-wireless-needs-fiber-and-lots-of-it_prx.html (citing *Trends in Telecommunication Reform 2016: New Edition of ITU's Flagship ICT Regulatory Report*, ITU (Apr. 5, 2016), http://www.itu.int/net/pressoffice/press_releases/2016/12.aspx#.W-z2ePk3k2w) (noting that "capital expenditures on fibre infrastructure are expected to surpass $144.2 billion between 2014–2019"); Kara Mullaley, *5G Networks' Impact on Fiber-Optic*

B. Based on Current Supreme Court Precedent, Should ISP Censorship be Considered State Action?

The Court has valued flexibility over cohesion in its State action jurisprudence.[219] This limits its predictive value. For example, while the Court has over time become less likely to treat private actors as the State, the Court still positively cites its more liberal earlier case law on the matter.[220] Further, how the Court approaches a given telecommunications provider can be anyone's guess.[221] Of course, in strictly realist terms, how the Court comes down on any issue depends more on the makeup of the Court than the relevant precedent, and while ultimately, the question of whether ISP censorship constitutes State action can only be assessed on a case-by-case basis, this Section argues that, based on existing case law, the Court should treat most instances of ISP censorship as acts of the State. Looking at the Court's State action jurisprudence as a whole is, of course, highly relevant to this inquiry, but the Court's State action jurisprudence in the telecommunications context offers particularly valuable insight.

There are several factors which militate in favor of ISP censorship being generally treated as State action. For one, ISPs engage in censorship using bandwidth they have licensed from the Federal Government. As stated by

Cabling Requirements, CABLING INSTALLATION & MAINTENANCE (Aug. 1, 2018), https://www.cablinginstall.com/articles/print/volume-26/issue-8/features/design/5g-networks-impact-on-fiber-optic-cabling-requirements.html. As such, those who localities grant or have already granted access to local infrastructure may still effectively block out competition. Further, as discussed, while the new rules may lead to the reform of local ISP approval processes and pricing structures in a way that encourages local competition, if the past is any indicator, one should not be overly optimistic about the likelihood of meaningful municipal reform. *See* Mixed Use Rule Clarification, FCC Fact Sheet, *supra* note 207; 5G Deployment Rule, FCC Fact Sheet, *supra* note 207; *see also* Karl Bode, *Companies Urge FCC to End Apartment Broadband Monopolies*, DSLREPORTS (Aug. 22, 2017), https://www.dslreports.com/shownews/Companies-Urge-FCC-to-End-Apartment-Broadband-Monopolies-140186 (noting that ISPs and housing complexes have effectively skirted FCC efforts to end apartment broadband monopolies).

[219] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296–97 (2001).

[220] *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 57 (1999) (distinguishing *Burton* on the grounds that *Burton* does not imply that highly regulated private entities should be treated as the State, but, in doing so, seems to give continued credence to the fact that a private entity's renting space from the government and committing what would be unconstitutional action if committed by the State within that space is a major factor in treating a private entity as the State); *see, e.g.*, *Brentwood Acad.*, 531 U.S. at 296–97 (citing *Evans*).

[221] *See supra* notes 127–130.

the Court in *Burton*, "when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee . . . ."[222] While *Burton* is not reflective of the Court's current State action trajectory and the Court has cast some doubt on its vitality, the Court seems to consider *Burton* to still stand for the narrow principle that a private company's renting of space from the State is a factor that at least weighs in favor of treating the private entity as the State.[223] Further, the Court in *Brentwood Academy* cited *Burton* towards the fact that the State's profiting from its relationship with the private entity bolsters the notion that the two are acting as partners.[224]

That the censoring ISP has an at least de facto State-sanctioned monopoly also weighs heavily in favor of attributing such censorship to the State. It is, indeed, hard to disentangle the State's role from that of the ISP in giving users little means to access blocked content. While the ISP directly engages in the censoring, users would not have such limited access to the censored content if the municipal and federal practices did not strongly entrench certain providers. The Court zealously protects the First Amendment rights of speakers, as opposed to service providers, when such instances of scarcity result in speech limitations.[225]

Moreover, the Mixed Use Rule Clarification increases the direct role the State plays in the ISP censorship. While FCC mandates against local government regulation of ISPs may somewhat disentangle ISPs from local government, an effect of the Rule, and arguably its aim,[226] will be to

[222] Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961).

[223] *See, e.g.*, *Brentwood Acad.*, 531 U.S. at 311 (Thomas, J., dissenting) (citing *Burton* towards the point that the states gaining money from its relationship with the private entity weighs in favor of finding state action); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 409 (1995) (toward the point that, in the Court's modern State action jurisprudence, "We have . . . noted that *Burton* limited its 'actual holding to lessees of public property'" (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 358 (1974))).

[224] *Brentwood Acad.*, 531 U.S. at 311 (Thomas, J., dissenting).

[225] *See, e.g.*, Red Lion Broad. Co. v. F.C.C, 395 U.S. 367, 390 (1969); Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994) ("Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest purpose, for it promotes values central to the First Amendment.").

[226] *See* David Shepardson, *Trump Administration Rejects States' Argument on Net Neutrality*, REUTERS (Oct. 1, 2018), https://www.reuters.com/article/us-usa-internet-california/trump-

prevent local governments from imposing their own net neutrality regulations.[227] Where the FCC directly enables ISP censorship by preempting local rules against it, the State more directly contributes to the censorship itself.

Indeed, the Court has held that when the government directly enables the private sector to take some action, such action may be attributed to the State. For example, in treating the discriminatory acts of private trustees in *Evans* as State action after the trustees were deeded the land by the State, the Court stated that "a State is not justified . . . in 'permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties.'"[228] Similarly, broadband providers should not be able to use their State-sanctioned monopolistic or oligopolistic franchise to censor protected speech. Under *Evans*, a private entity may not engage in discrimination on land purchased from the State.[229] Likewise, courts should be hesitant to allow the State and ISPs to enter into agreements which result in ISPs suppressing speech.[230] That the ISP has a State-granted monopoly and, often, performs functions for the municipality makes the ISP that much more partnered with the State.

Still, under its more recent holdings, the Court is less likely to treat ISPs as State actors, even where the private actor is a State sanctioned monopoly whose actions may depend upon State approval.[231] The Court refused to evaluate a utility company's termination procedures under constitutional due process though the company held a State-sanctioned monopoly and the

administration-rejects-states-argument-on-net-neutrality-idUSKCN1MB3L9 (FCC takes stance that state net neutrality laws are preempted by FCC net neutrality repeal).

[227] *See* Mixed Use Clarification Rule, FCC Fact Sheet, *supra* note 207, at ¶25 ("Thus, we propose to prohibit LFAs [Local Franchising Authorities] from using their video franchising authority to regulate most non-cable services offered over cable systems . . . .").

[228] Evans v. Newton, 382 U.S. 296, 299 (1966).

[229] *Id.* at 302.

[230] It is important to acknowledge, however, that *Evans* is less persuasive than *Burton* in proving ISPs to be State actors. The *Evans* Court in part based its holding on the fact that the trustees perform a traditional public function by managing a public park. *Id.* See *infra* Section IV for a full discussion of this matter.

[231] *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (warehouse selling property of evicted tenants pursuant to State law); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (regarding political protests in common areas of shopping mall); Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (athletic association comprised of both private and public colleges); Magarian, *supra* note 73, at 130.

State approved its termination process.[232] That said, constitutional principles are not eroded because a private power company shuts off someone's power. There is a constitutional entitlement to speech, which the Court has acknowledged many times is eroded when a service provider limits the ability of speakers to speak and users to access that speech.[233] The State's complicity in an ISP limiting user speech implicates free speech principles. No such constitutional principles are evoked by the State being complicit in a power company withdrawing power.

The most relevant precedent, however, is that in which the Supreme Court addresses State action within the telecommunications context specifically. It is likely that when evaluating free speech claims brought against ISPs, courts will primarily rely upon cases that directly concern telecommunications providers, specifically cable television providers.[234] Cable television providers, similar to ISPs, license air waves from the government and depend on agreements with municipalities.[235] When determining whether telecommunications providers are State actors engaging in unconstitutional censorship, the Court must balance the First Amendment rights of telecommunications providers to engage in editorial discretion with the degree of government involvement in the censorship and the degree to which the censorship would decrease "the availability of avenues of expression to programmers who otherwise would not have them."[236]

To determine how it will apply *Denver Telecommunications* to the issue at hand, the Court must answer the following: is ISP censorship more analogous to the cable provider censorship of private channels, which the Court treats as a private exercise of editorial discretion, or to cable provider

[232] Jackson v. Metro. Edison Co., 419 U.S. 345, 358–59 (1974).

[233] *See, e.g.*, Red Lion Broad. Co. v. F.C.C., 395 U.S. 367 (1969).

[234] In *Columbia Broadcasting*, for example, the dissent, which would consider cable provider censorship to be State action, relies more heavily than the majority opinion on cases, such as *Burton*, that do not arise in the telecommunications context. At the time of that opinion, less case law existed regarding free speech in the telecommunications context. Still, it is not entirely clear whether courts, when ruling on whether ISPs are State actors, will defer to authority that does not involve telecommunications providers.

[235] *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 739 (1996).

[236] *Denver Telecomms*., 518 U.S. at 743–44; *see also* Amit Schejter & Moran Yemini, *Justice, and Only Justice, You Shall Pursue: Network Neutrality, the First Amendment and John Rawls's Theory of Justice*, 14 MICH. TELECOMM. TECH. L. REV. 137, 161–62 (2007).

censorship of public access channels, which the Court treats as State action in violation of the First Amendment?[237]

ISP censorship falls somewhere in between the censorship of public access channels and of private cable channels. On the one hand, ISPs have very weak free speech rights. ISPs traditionally function as conduits, not speakers, and, as such, exercise minimal control over the content displayed on the internet.[238] Cable providers, on the other hand, have stronger free speech rights. Cable operators "exercise 'a significant amount of editorial discretion regarding what their programming will include" and, thus, partake "of some of the aspects of speech . . . as do the traditional enterprises of newspaper and book publishers . . . ."[239] Importantly, in *U.S. Telecom Association*, the D.C. Circuit upheld the Obama–FCC's net neutrality order when an ISP challenged it under the First Amendment on the basis that it limited their editorial discretion.[240] Citing *Denver Telecommunications*, the D.C. Circuit Court of Appeals argued that that, unlike cable television providers, ISPs are traditionally mere speech conduits, and thus possess few of the First Amendment rights held by speakers themselves.[241] In *Comcast v. Broward*, on the other hand, the United States District Court for the Southern District of Florida held a local open access law to violate the free speech right of ISPs to exercise editorial discretion.[242] There is reason to believe, however, that the Court would be more likely to follow *U.S. Telecom Association* than *Boward*. While the Supreme Court is yet to rule on the free speech rights of ISPs, the Court

[237] *Denver Telecomms*, 518 U.S. at 737, 744, 761–62.

[238] Broadband Industry Practices and In the Matter of the Petition of Public Knowledge: Proceeding Before the FCC, WT. Docket Nos. 07-52, 08-7, at 7 (comments of Nicole A. Ozer, Technology and Civil Liberties Policy Director of the ACLU of Northern California), http://www.aclu.org/images/asset_upload_file188_34924.pdf; Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1141–42 (1996).

[239] Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494–95 (1986).

[240] U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740-42 (D.C. Cir. 2016); *but see* Comcast Cablevision v. Broward Cty., 124 F. Supp. 2d 685 (S.D. Fl. 2000); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1141 n.118 (2005) ("[P]rivate Internet actors like NSI have asserted that their content-based decisions are in furtherance of their First Amendment rights as speakers and publishers.").

[241] *U.S. Telecom*, 825 F.3d at 674, 740–42.

[242] *Comcast Cablevision*, 124 F. Supp.2d at 685; Nunziato, *supra* note 240, at 1141 n.118.

prioritizes the free speech of consumers over that of providers.[243] Moreover, federal law promoting ISP censorship specifically disavows ISPs as the speakers or publishers of online content.[244] Hence, ISPs have uniquely weak free speech interests.

On the other side of the balance, the State is generally less involved with ISPs than the State is with cable television companies in the management of public access channels. Public access programming decisions are, in part, made by the State.[245] As such, censorship of public access television is often, at least in part, directly attributable to the State.[246] Conversely, because the State does not have a large role in determining what content will be available on the internet, ISP censorship of the internet is less directly attributable to the State.[247] The Court may apply the reasoning the *Denver Telecommunications* Court employed in upholding the Federal Government's explicit allowance of private cable censorship: despite the entanglement between the State and the telecommunications provider, because the State does not itself foster the private censorship, the Court treats the censorship as private action.[248]

Still, this balance tips somewhat in favor of generally treating ISP censorship as State action. As reiterated throughout this article, an essential pragmatic concern of the Court in deciding whether to attribute a seemingly private act of censorship to the State is the extent to which the act of censorship erodes free speech values.[249] If the act of "censorship" is better characterized as an act of editorial discretion, then the "censorship" does

[243] *See* Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 390 (1969); Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 663 (1994) (upholding FCC regulations on cable television providers designed to promote competition; "Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest purpose, for it promotes values central to the First Amendment.").

[244] 47 U.S.C. § 230(c)(1) (2012) ("No provider or user o an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

[245] Denver Area Telecomms Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

[246] *Id.* at 761–62.

[247] Jonathan D. Hart, INTERNET LAW: A FIELD GUIDE 1 (BNA Books, 5th ed. 2007).

[248] *Denver Telecomms*, 518 U.S. at 743–46; *but see id*. at 737 ("Although the court said that it found no 'state action,' it could not have meant that phrase literally, for . . . petitioners attack . . . an Act of Congress." (citations omitted)).

[249] *See, e.g., id.*

not diminish free speech, and it would, in fact, diminish free speech for the State to prohibit such an exercise of discretion.[250]

This provides an essential distinction between cable television providers and broadband internet providers for the purpose of this article. Cable television providers often function as speakers. ISPs do not. On a very basic level, cable television providers favor affiliate programming and decide that certain channels should be more widely distributed for less money (e.g., basic cable comes with certain channels but viewers must pay more for other channels). ISPs, on the other hand, are not traditionally in the business of making these types of decisions and rather provide users access to the entire internet, regardless of how the FCC classifies them.[251] As such, if a municipal or federal entity strangles local competition, and the beneficiary ISP makes it difficult or impossible for users to access certain content, that governmental entity is ensuring that local users have limited access to certain information; this lack of access is not a product of editorial discretion, but rather simply of the local ISP flexing its monopolistic muscle at the expense of the First Amendment.[252]

Still, while the Court's State action jurisprudence both within and outside of the telecommunications context tips slightly in favor of considering ISPs State actors, the main takeaway from this jurisprudence is that each instance of ISP censorship must be evaluated on its own facts. The question then is what factors should be evaluated in assessing whether a given act of ISP censorship should be considered State action.

IV. FACTORS IN ASSESSING WHETHER ISP CENSORSHIP SHOULD BE TREATED AS STATE ACTION

While this article takes the stance that ISPs should generally be considered State actors due to their entanglement with the State and the symbiotic relationship between ISPs and the State on both a local and federal level, the question of whether an instance of ISP censorship constitutes State action requires a case-by-case analysis.[253] ISPs, for example, are not entangled with local government in a single uniform way; rather, the nature of this entanglement depends on the specific relationship

[250] *Id.* at 737–38.

[251] *See supra* Section I.

[252] *See* Mitchell, *supra* note 206.

[253] *See Denver Telecomms*, 518 U.S. at 740–46.

between that ISP and that municipality.[254] Similarly, not all acts of ISP censorship involve the State to equal degrees. ISP censorship may be mandated by the State, encouraged by the State, or not influenced by the State at all. As such, this article attempts to provide factors that will specifically be useful in assessing whether an act of ISP censorship should be considered State action for First Amendment purposes. Throughout this analysis, this section will discuss examples of ISP censorship that are more or less likely to be considered State action.

The factors that will be discussed here largely parallel the factors used to assess State action generally, but are here applied specifically to the ISP/telecommunications context, namely: (1) to what extent does the censoring ISP have a local de facto or de jure State-sanctioned monopoly? (2) How imposing is the local agreement and/or the federal bandwidth license upon the ISP? Relatedly, is the ISP a normal market participant or did the State hire the ISP to provide some public function? and finally (3) To what extent is the specific act of censorship encouraged or induced by the State?

These factors will be discussed in turn, but it is important to remember that the more factors that are present in a given instance, the more likely an instance of ISP censorship will be treated as State action. So, for example, the mere fact that an ISP licenses public bandwidth from the Federal Government may not establish an act of ISP censorship as State action, nor may the fact that the ISP engages in the censorship under protection from a federal immunity-granting statute.[255] The combination of these factors, however—that the ISP censors content on federally licensed bandwidth pursuant to federally granted immunity—makes it more likely that the ISP should be treated as the State. It should also be noted that, while this article focuses on ISPs, these factors may also be useful in assessing whether

[254] *Compare, e.g.*, Master License Agreement for Use of City-Controlled Space on Utility Poles, Streetlight Poles and in Conduits Between the City Of Palo Alto and Astound Broadband, LLC DBA Wave (Apr. 18, 2017), https://www.cityofpaloalto.org/civicax/filebank/documents/57248, *with* Multnomah, Or. Franchise Agreement, https://multco.us/file/10438/download, *also with* Cable License Agreement Between the City of Tempe and Qwest Broadband Services, Inc., d/b/a Centurylink, http://documents.tempe.gov/sirepub/cache/1207/d0tzsu52yxdtsyrr24exwrhc/15366887100220181 03933565.PDF; *see also* Koebler, *supra* note 16.

[255] *Cf.* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392 (1995) (listing government granted immunity as one factor weighing in favor of treating seemingly private action as State action).

censorship by another telecommunications medium, such as a cable company or radiocommunication provider, should be treated as State action.[256]

A. To What Extent Does the ISP Have a State-sanctioned Monopoly and How Far Reaching is the Censorship?

If a State entity grants an ISP a monopoly and the ISP censors content, then it may be difficult for users to have any means to access such content.[257] Thus, the stronger the ISP's local monopoly, the more likely their censorship should be considered State action.[258] This is true, however, only to the extent that the State has sanctioned the monopoly. If, for example, the local infrastructure and negotiating landscape are such that multiple ISPs can readily compete and one gains a monopoly by pricing the others out, that ISP's censorship would not be State action because its monopoly cannot be attributed to the State.

The State may contribute to local ISP monopolies or duopolies in a number of ways. The State plays an especially direct role in establishing the monopoly, not only though the nature of the infrastructure and licensing

[256] Radiocommunication servicers refers to entities that provide radio frequencies, not to individual radio stations.

[257] Dunn, *supra* note 37; Brodkin, *supra* note 201.

[258] *See* Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972). In *Lloyd Corp.*, the Court held that a shopping mall was not a State actor and thus did not violate the First Amendment by prohibiting the distribution of handbills on mall property, but, in making this decision, the Court stressed that the speakers had access to public property nearby and thus could engage in near-equivalent hand-billing, the mall's prohibition notwithstanding. *Id.* On the other hand, in *Marsh v. Alabama*, which the *Lloyd* Court distinguishes but does not overturn, the Court held that a private town violated the First Amendment by excluding a Jehovah's Witness from pamphleteering. Concededly, factoring in the extent of the ISPs monopoly to determine whether the ISP is acting as the State does evoke the traditional public function test, as it evokes that notion that, *per Lloyd Corp.*, ISP censorship is State action because it excludes users from accessing a public forum. The use of a scarce resource allocated by the State, however, can be a factor in determining State action even without evoking the Court's free speech forum analysis. *See Denver Telecomms.*, 518 U.S. at 749–51; Jackson v. Metro. Edison Co., 419 U.S. 345, 350–51 (1995) (outside of the context of a public forum discussion, stating "It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics"); *cf.* Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952).

agreement, but also its bargaining practices.[259] How implementation of the FCC's September 2018 Orders play out in a given area will affect this bargaining process; using the response to past regulations as a guide, it is clear that there will be a great deal of variance in how these Orders are implemented locally.

Even if this standard de facto monopoly does not establish ISP censorship as State action, some arrangements establish especially strong ISP monopolies. For example, after realizing it could not afford to build its own public fiber network, Provo, Utah, sold its fiber network to Google Fiber for one dollar.[260] Google Fiber then created and operated the broadband network.[261] If Google Fiber were to engage in censorship, doing so would, for these purposes, be analogous to the *Evans* trustees engaging in racial discrimination. ISPs are far more likely to be considered State actors in such instances.

Further, in some states the State plays a more overt role in limiting consumer access. Indeed, 20 states have passed laws impeding the ability of municipalities to establish their own networks.[262] For example, a North Carolina law mandates that municipalities shut down their muni networks if a private provider enters the market.[263] Like many impediments to a free and open internet, this law has been challenged (unsuccessfully) under FCC regulation but not under the First Amendment.[264] Michigan prohibits municipalities from providing broadband unless it "has received less than 3 qualified bids from private providers," and, even then, the municipality may only offer terms comparable with those offered by private providers.[265] In areas where, for example, users have only access to one broadband provider

[259] Szoka, Henke, & Starr, *supra* note 196.

[260] Szoka, Henke, & Starr, *supra* note 196.

[261] Hunter Whitifield, *Google Fiber in Provo, What you Need to Know*, WHISTLE OUT, https://www.whistleout.com/Internet/Guides/Google-Fiber-in-Provo-What-You-Need-to-Know (last visited Oct. 1, 2018).

[262] BroadbandNow Team, *Municipal Broadband Is Roadblocked or Outlawed in 20 States*, BROADBANDNOW (Apr. 3, 2018), https://broadbandnow.com/report/municipal-broadband-roadblocks/.

[263] N.C. GEN. STAT. CHAPTER 160A, ART. 16A (2017).

[264] *In re* City of Wilson, NC, Petition for Preemption of North Carolina General Statute 160A-340 et seq. and The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Ann. Section 7-52-601, 30 FCC Rcd. 2408 (2015).

[265] MICH. COMP. LAWS SERVS. § 484.2252(1) (West 2016).

and that provider blocks user access to online data, it is difficult to parse through who is responsible for this limited access—the ISP through ostensibly private censorship or the State by explicitly prohibiting municipal competition—thus illustrating a particularly high level of entanglement between the private and public sectors.

Moreover, FCC bandwidth licensing practices may entrench certain ISPs' access to markets, thus providing an additional level of State responsibility for the consumers' lack of open-internet access.[266] The FCC, for example, may grant a single ISP the license to provide broadband services to a given school district.[267] Recently, the FCC changed its allocation practices such that a historically more accessible band will now likely be monopolized by larger, more entrenched ISPs, the exact type of entities primarily targeted by Obama-era net neutrality protections.[268] Thus, on the one end of the spectrum are instances where the Federal Government licenses broadband spectrum to the censoring ISP in such a way that contributes to the exclusion of competitors from a market. On the other end of this spectrum are instances where the censoring ISP is using unlicensed broadband spectrum, i.e., spectrum existing at a certain frequency that the FCC does not require it to be licensed.[269]

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[266] *See e.g.*, *Educational Broadband Service License – KZH31 – Long Beach Unified School District*, FED. COMM. COMM'N, http://wireless2.fcc.gov/UlsApp/UlsSearch/license.jsp?licKey=2590121 (last visited May 15, 2018); *3650-3700 MHz Radio Service*, FED. COMM. COMM'N, https://www.fcc.gov/wireless/bureau-divisions/broadband-division/3650-3700-mhz-radio-service (noting that qualifying incumbent providers granted grandfathered access to band for 5 years); Public Notice: Wireless Telecommunications Bureau Seeks Comment on an Appropriate Method For Determining the Protected Contours for Grandfathered 3650-3700 MHZ Band Licenses, 30 FCC Rcd. 14049 (2015) (purpose of grandfathering to protect incumbent providers from signal interference).

[267] *Educational Broadband Service License – KZH31 – Long Beach Unified School District*, FED. COMM. COMM'N, http://wireless2.fcc.gov/UlsApp/UlsSearch/license.jsp?licKey=2590121 (last visited May 15, 2018).

[268] Michael Calabrese & Amir Nasr, *The Good, the Bad, and the 5G*, NEW AM. FOUND. (Oct. 3, 2018), https://www.newamerica.org/oti/blog/good-bad-and-5g/; *In the Matter of* Promoting Investment in the 3550-3700 MHz Band, FCC 18-149 (Oct. 24, 2018) (final rule and order of rule discussed in Calabrese & Nasr article); *see, e.g.*, FCC 15-24, at ¶ 198 (noting an instance in which larger ISPs have unique incentive to violate net neutrality).

[269] *See* Amir Nasr, *Harnessing the Potential of 'Unlicensed Spectrum' to Power Connectivity*, NEW AM. FOUND. (Jun. 1, 2017), https://www.newamerica.org/weekly/edition-168/harnessing-potential-unlicensed-spectrum-power-connectivity/; Matt Barranca, *Unlicensed Wireless*

The more far reaching the act of ISP censorship in such instances, the more likely it will be treated as State action.[270] As stated by the Supreme Court in a case regarding radio broadcasters:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas, rather than the countenance monopolization of that market, whether it be by the government itself or a private licensee.[271]

The extent to which the government, be it state, local, federal, or a combination of the three, enables or sanctions an ISP monopoly should thus factor heavily in a court's decision of whether to attribute ISP censorship to the State. The more the ISP has a local monopoly, the degree to which the municipality contributed to that monopoly—by way of municipal infrastructure and franchising practices or otherwise—and the involvement of the Federal Government in licensing the spectrum thus are all important factors in assessing whether ISP censorship is attributable to the State.

B. The Nature of the Agreement Between the ISP and the Licensing State Entity

The terms of the specific agreement between the ISP and the State is essential in assessing whether the ISP's act of censorship can be attributed to the State. One key question is whether the ISP accesses infrastructure from local government as a market participant or whether the local government has enlisted the ISP to provide a service to the local residents. Whether the ISP is a municipal hire or simply a market participant is itself a fact specific inquiry which often lacks a single clear answer. Indeed, while in some instances a State entity has not officially 'hired' an ISP to, for

Broadband Profiles: Community, Municipal & Commercial Success Stories, NEW AM. FOUND. (Apr.2004),
http://wireless.fcc.gov/outreach/2004broadbandforum/comments/NewAmericaUnlicensed.pdf.

[270] *See* Red Lion Broad. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the purpose of the First Amendment to preserve and uninhibited marketplace of ideas, rather than the countenance monopolization of that market, whether it be by the government itself or a private licensee." (citations omitted)).

[271] *Id.*

example, operate a municipal broadband program, the franchise agreement between the two may obligate the ISP to perform extensive services for the municipality which further entangle the two entities and strengthen the nexus between them.

On the far end of the government-hire spectrum are ISPs hired to operate municipal wireless networks. On the other end of the spectrum are instances in which State entities do little more than permit ISPs to utilize municipal infrastructure.

1. Municipal WIFI Networks

The Court is likely to consider the action of a private entity to constitute State action when the private entity and the government have a highly symbiotic relationship.[272] The Court examines whether the State and the private entity act as partners or "joint venturers."[273] Moreover, when a private entity acts through the State's machinery, pursuant to a State plan, and the State condones the action, the otherwise private action becomes "within the reach of the law . . . . [The private and State actions] are bound together as the parts of a single plan. The plan may make the parts unlawful."[274] While the Court does not consider private institutions that help the State to meet its obligations, such as private schools receiving public funding,[275] to be State actors, the Court may treat as State actors private entities created by the State, like Amtrak,[276] or persons the State directly employs as agents.[277]

Under *Lebron*, the Court treats private corporate entities controlled by the government as State actors.[278] Plaintiff Lebron challenged Amtrak on First Amendment grounds for refusing to display his billboard in an Amtrak station.[279] The Court treated Amtrak as a State actor subject to

[272] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 409 (1995); Jackson v. Metro. Edison Co., 419 U.S. 345, 358 (1995).

[273] *Jackson*, 419 U.S. at 358.

[274] Terry v. Adams, 345 U.S. 461, 476 (1953) (quoting Swift & Co. v. U.S., 196 U.S. 375, 396 (1905)).

[275] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[276] *Lebron*, 513 U.S. at 400.

[277] *See, e.g.*, U.S. v. Ziegler, 474 F.3d 1184 (9th Cir. 2007); *see also, e.g.*, Cassidy v. Chertoff, 471 F.3d 67 (2nd Cir. 2006).

[278] *Lebron*, 513 U.S. at 394.

[279] *Id.* at 377.

constitutional constraints.[280] Although Amtrak's charter disclaims Amtrak as a government agent, Amtrak is indeed an "agency or instrumentality of the United States for the purpose of . . . the Constitution" because it "was created by a special statute explicitly for the furtherance of federal governmental goals."[281] Moreover, the Federal Government appoints many of Amtrak's directors.[282] The Court stressed that "it surely cannot be that the government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."[283] Because the government created Amtrak to achieve governmental goals, the Court considers Amtrak to have a symbiotic relationship with the government which establishes Amtrak as a State actor.

Admittedly municipal governments do not create ISPs. In order to establish municipal networks, or muni programs, however, municipalities employ and otherwise control ISPs. Indeed, "to fund such networks, a city commonly commits to an outside telecommunications company to provide service but retains control of the network in exchange for building and maintenance."[284] City governments do not appoint ISPs' boards of directors, as city governments only control the ISPs at the municipal level.[285] Still, at this micro-level, city governments and ISPs are codependents. The government relies on ISPs to advance the government purpose of providing affordable wireless to the city residents, just as the Federal Government relies on Amtrak to provide cheap railroad transportation.[286] ISPs similarly rely on muni programs to gain access to the local market. Most importantly, the essential factor in *Lebron* is present in muni programs: the government ultimately controls the ISPs at the municipal level and the municipality and ISP are engaged in a joint venture.[287]

There is, indeed, a stronger symbiosis between a local government and an ISP running a muni network than between the local government and the

[280] *Id.* at 394.

[281] *Id.* at 394, 397.

[282] *Id.* at 397.

[283] *Id.*

[284] *Id.*

[285] Tracy Wilson, *How Municipal WiFi Works*, HOWSTUFFWORKS, http://computer.howstuffworks.com/munbricipal-wifi1.htm, http://computer.howstuffworks.com/municipal-wifi2.htm.

[286] Wilson, *supra* note 285.

[287] *Lebron*, 513 U.S. at 396–97.

diner in *Burton*. In *Burton*, the diner rented space from the State and the two were particularly entangled, but the government did not explicitly hire the diner to provide food in a government building.[288] Local governments do hire ISPs to operate muni networks.[289] As such, local governments have a particularly entangled and symbiotic relationship with ISPs hired to operate municipal networks. Such ISPs should thus be unequivocally considered State actors under the entanglement and symbiosis tests.

Importantly, however, ISPs reach a very small percentage of their markets through muni networks, as only 108 municipalities across the country use municipal WiFi.[290] Further, to the extent municipal networks begin to emerge with greater frequency, it will likely be as a response to the repeal of net neutrality.[291] Such networks are thus more likely to adopt open-internet practices. Still just as cable companies are far more likely to be considered State actors in their censorship of public access programing, ISPs are likely to be considered State actors insofar as they are operating a municipal broadband network.[292]

2. Nature of relationship with government

The degree to which the agreement with municipal government entangles the ISP with the municipal government varies by licensing agreement and by municipality. Some agreements regulate little more than the ISPs ability to perform construction work to establish the non-exclusive use of the municipality's infrastructure.[293] Where agreements provide ISPs with little more than a license to use city infrastructure in a non-monopolistic way, it is far less likely that ISPs are acting as the State.

Other agreements, however, regulate the speed and quality of the service provided and explicitly entangle the ISP and municipality regarding the transmission of public video programming.[294] In such instances, ISP

[288] Burton v. Wilmington Parking Auth., 365 U.S. 715, 723 (1961).

[289] *Id.*

[290] BroadbandNow Team, *supra* note 262; Wilson, *supra* note 285.

[291] *See The Public Internet Option*, ACLU (Apr. 2, 2018), https://www.aclu.org/report/public-internet-option.

[292] Denver Area Educ. Telecomms Consortium, Inc. v. FCC, 518 U.S. 727, 749 (1996).

[293] *See, e.g.*, Palo Alto Franchise Agreement, *supra* note 254.

[294] *See, e.g.*, Franchise License Agreement, April 2013, between Provo City Corporation, a municipal corporation located in Provo, Utah, and Google Fiber, Utah, LLC ("The City must

censorship is more likely to be attributed to the State. For example, ISP censorship which effects the transmission of public video programming is more analogous to cable company censorship of public access channels which the *Denver Telecommunications* Court, at least implicitly, considered State action.[295]

Similarly, instances like that in Provo, Utah, where the municipal government sold its broadband infrastructure to Google Fiber for a nominal price evoke the reasoning of *Evans* and *Lebron*.[296] There, the city of Provo constructed a $39 million fiber broadband infrastructure but did not have the resources to operate it.[297] So it sold the entire infrastructure to Google Fiber for $1.[298] City officials were explicit that they gave Google the nod, not just to provide cheap or free internet to residents, but also to provide internet to public and municipal services.[299] Courts are skeptical of instances where the State outsources responsibility to a private actor who then violates the rights of individuals.[300] In *Evans*, the Court held a private board of trustees for a tract of land to be constitutionally accountable for racial discrimination where the State deeded the land to the trustees to avoid having to manage the trust itself.[301] In *Lebron*, the Court stressed that Amtrak's censoring of a billboard would be attributed to the State even though Amtrak took the form of a private corporation.[302] Where a

ensure that all transmissions, content or programming to be transmitted over a channel or facility by Google Fiber are provided or submitted to Google Fiber in a manner of form that is capable of being accepted and transmitted by Google Fiber, without requirement for additional alteration or change in content, over the particular network of Google Fiber, which is compatible with the technology or protocol used by Google Fiber to deliver video services."). Some federal spectrum licenses also impose more onerous requirements upon ISPs than others. *See* Calabrese & Nasr, *supra* note 268.

[295] *Denver Telecomms*, 518 U.S. at 749.

[296] Szoka, Henke, & Starr, *supra* note 196.

[297] Cheryl Conner, *Where Provo, Utah Intends To Take Google Fiber: 'What If?'*, FORBES (Jul. 10, 2013).

[298] Szoka, Henke, & Starr, *supra* note 196.

[299] Szoka, Henke, & Starr, *supra* note 196; Conner, *supra* note 297 (quoting the Deputy Mayor of Provo in saying, "Our libraries, museums, education facilities and medical resources, all connected. Our high schools and universities could specialize in some topics and theirs in others, with students taking courses from both").

[300] Evans v. Newton, 382 U.S. 296, 287 (1966).

[301] *Id.*

[302] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 409 (1995).

municipality all but gives its infrastructure to a private entity so that the private entity can provide a service which the municipality could not provide, the actions of the private entity should be attributed to the State.

This scenario, of course, exists on the far end of the State action spectrum alongside municipal networks. However, municipalities (as well as the Federal Government, though to a lesser extent) enter into agreements with ISPs to provide services to municipalities to varying degrees.[303]

In some instances, the franchise agreement may actually mandate ISP censorship.[304] For example, the Multnomah, Oregon Franchise Agreement states that ISPs must block obscene material and "upon request by a subscriber, Grantee shall without charge, fully scramble or otherwise block audio and video programming so that one not subscribing to that programming does not receive it."[305] The municipal government would thus be heavily entangled with any ISP decision to block or scramble content. Where the municipal government actually engages in content-setting, ISP censorship is particularly likely to be treated as State action.

C. What Motivated the ISP to Censor?

This question largely evokes the symbiosis test—did the ISP engage in censorship because a State entity enlisted it to do so? Such a question generally arises in instances where ISP censorship is in some way induced by federal or state law enforcement. Such enforcement mechanisms are generally aimed at censoring illegal content—specifically child pornography—but may also incentivize ISPs to censor legal content to varying degrees. The State action implications on ISPs of these attempts to target child pornography have already been discussed by scholars at length and thus this discussion of them will be brief, though scholars have generally discussed whether federal laws mandating the reporting of child pornography convert ISPs into agents of the State in violation of the Fourth Amendment as opposed to the First Amendment.[306] Notably, though, while mandatory reporting may most intuitively pose Fourth Amendment questions, mandating that ISPs report speech also implicates the First

[303] *See* Provo Franchise, *supra* note 294.

[304] *See, e.g.*, Multnomah Franchise Agreement, *supra* note 254.

[305] Multnomah Franchise Agreement, *supra* note 254.

[306] *See* Mitchell Waldman, *Expectation of Privacy in Internet Communication*, 92 A.L.R.5th 15 (Oct. 3, 2013).

Amendment right of the speakers to speak anonymously.[307] Also notable is that, while limiting child pornography does not generally violate the First Amendment, restriction of legal speech in even a somewhat narrow effort to target child pornography likely does.[308]

Law enforcement efforts at both the state and federal level target ISPs as a mechanism of fighting child pornography. Federal law does not require ISPs to actively monitor and ban content, though such proposals have certainly been made.[309] Rather, federal law both provides ISPs with sweeping immunity[310] in their efforts to block obscene content and also requires, under threat of federal prosecution, that ISPs report child pornography when they become aware of it.[311] State law, of course, is far more varied, but some states have taken more overt efforts to specifically induce ISPs to block child pornography.[312] In some instances, these state efforts have come not through legislation but, for example, through threats of prosecution under current legislation and through other less formal efforts.[313]

Government efforts to induce ISP censorship take many forms. At the end of the day, the more coercive and the more targeted the State-inducement, the more likely ISP censorship is to be treated as State action. For example, that the government broadly grants immunity to ISPs in their efforts to censor obscene content is certainly a factor weighing in favor of the ISP being treated as the State,[314] though an ISP is will not likely be treated as a State actor simply because it is acting under the protection of a

[307] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (state statute prohibiting anonymous leafleting violates First Amendment).

[308] Ashcroft v. Free Speech Coal., 535 U.S. 234, 251 (2002) (holding the Child Pornography Protection Act unconstitutional insofar as it banned virtual child pornography or the use of actors in pornography that appeared to be minors but, in fact, were not).

[309] 18 U.S.C. § 2258A (2012); *see, e.g.*, H.R. 837, SAFETY Act of 2007.

[310] *See. e.g.*, 47 U.S.C. § 230(c) (2012) (protection for "Good Samaritan" blocking and screening of offensive material, gives ISPs immunity for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected").

[311] 18 U.S.C. § 2258A (2012).

[312] Danny Hakim, *Net Providers to Block Sites with Child Sex*, THE NEW YORK TIMES (Jun. 10, 2008), https://www.nytimes.com/2008/06/10/nyregion/10internet.html.

[313] Hakim, *supra* note 312.

[314] *Cf.* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392 (1995).

broad-sweeping immunity statute.[315] If the ISP censors or reports content to comply with a law requiring such censorship or reporting, the ISP is more likely to be treated as a State actor.[316]

In *Center for Democracy & Technology v. Pappert*, the Eastern District Court of Pennsylvania addressed whether a law mandating that ISPs block child pornography through the use of one of several pre-approved technologies violated the First Amendment.[317] The court struck down the law as empirical data showed that the law's requirements, in conjunction with the ISPs use of the approved technologies, lead to massive over-blocking of protected speech.[318] The state argued that the over-blocking was carried out by ISPs, not State actors.[319] The court does not specifically address whether ISPs are State actors, but rather focuses on the fact that the law itself burdens speech by making mandates upon ISPs, and those mandates, as carried out by ISPs, suppress protected speech.[320] The court does, however, rely greatly upon the fact that ISPs have more access to the less precise blocking technology.[321] Thus, the practices of ISPs do implicate the constitutionality of the law, but the Pennsylvania court focuses on the law itself and not on the specific acts of ISPs.

Somewhat counterintuitively then, less formal State inducements of ISP censorship may establish a more intimate nexus between the State and the ISP and thus are more likely to convert ISP censorship into State censorship.[322] For example, in 2008, New York Attorney General Andrew

[315] *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982) ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment" (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164–65 (1978); Jackson v. Metro Edison Co., 419 U.S. 345, 357 (1974)).

[316] Cassidy v. Chertoff, 471 F.3d 67, 74 (2nd Cir. 2006) (company treated as State actor conducted individual searches of those entering vessel pursuant to Federal policy); *but see* United States v. Am. Library Ass'n, 539 U.S. 194, 214 (2003) (libraries, treated as private actors, do not engage in illegal censorship by employing Federally mandated blocking software).

[317] 337 F. Supp. 2d 606 (E.D. Pa. 2004).

[318] *Id.* at 647.

[319] *Id.* at 650–51.

[320] *Id.* at 651.

[321] *Id.*

[322] *See* United States v. Ziegler, 474 F.3d 1184, 1186–87 (9th Cir. 2006) (two co-workers of defendant, at request of police, entered defendant's office in his absence and copied his hard

Cuomo induced major ISPs to begin taking the initiative to block child pornography by threatening them with litigation if they did not.[323] While such State intervention is less formal than statutes mandating that ISPs report or block child pornography, these less formal efforts are more specifically targeted and are thus, in fact, more likely to result in ISP censorship being treated like State action.[324] Indeed, a closer nexus between the State and an ISP is formed when the State reaches out to a specific ISP and induces them to engage in specific act of censorship than when a legislative body simply passes laws from afar and the ISPs act in compliance.[325]

There are any number of ways that the State may induce ISPs to censor content, either formally or informally, and the specific inducement of the censorship is essential to assessing whether it should be treated as State action. For example, in 2008, a private company (actually a domain name distributor, though analogous to ISPs for this discussion) limited a travel agent, Steve Marshall's access to the internet because his website appeared on a federal blacklist for advertising trips to Cuba (albeit for non-Americans).[326] The company claimed it found out that the site was on the blacklist through a blog.[327] Mr. Marshall, however, claimed that the Federal Government actually called the company to persuade them to block the website.[328] If the company's account proved true, the company likely did not engage in State action, as they merely took information about a

drive); Katz v. United States, 389 U.S. 347 (1967) (attributing acts of informant to the State where direct State collusion is present).

[323] Hakim, *supra* note 312; *see also* Alexandra Mitter, *Deputizing Internet Service Providers: How the Government Avoids Fourth Amendment Protections*, N.Y.U. (Dec. 6, 2011), http://www.law.nyu.edu/sites/default/files/upload_documents/NYU-Annual-Survey-67-2-Mitter.pdf.

[324] *Cf.* U.S. v. De La Fuente, Crim. No. L-86-272, 1986 WL 12504 (S.D. Tex. Sept. 3, 1986) (mem. op.).

[325] *See Katz*, 389 U.S. at 347 (attributing acts of informant to the State where direct State collusion is present); *Ziegler*, 474 F.3d at 1186–87 (two co-workers of defendant, at request of police, entered defendant's office in his absence and copied his hard drive); *cf.* Cassidy v. Chertoff, 471 F.3d 67, 74 (2nd Cir. 2006) (company treated as State actor conducted individual searches of those entering vessel).

[326] Adam Liptak, *A Wave of the Watch List, and Speech Disappears*, THE NEW YORK TIMES (March 4, 2008), https://www.nytimes.com/2008/03/04/us/04bar.html.

[327] Liptak, *supra* note 326.

[328] Liptak, *supra* note 326.

government classification and acted on it of their own accord. However, if the latter scenario is true and the government exerted pressure on the company to block Mr. Marshall's site, there is a much clearer case for State action.

CONCLUSION

The FCC's repeal of net neutrality regulations begs the question as to whether other sources, such as the First Amendment, provide similar protections. Indeed, net neutrality has always been discussed as a free speech issue, but, as a legal matter, has generally been discussed in the context of the FCC regulatory framework as opposed to as a constitutional question. Now that the FCC has taken perhaps its most definitive stance to date against net neutrality, ISP censorship emerges more explicitly as a First Amendment issue. For ISP censorship to violate the First Amendment, however, ISPs must first be treated as State actors.

Whether ISPs should be treated as State actors, of course, warrants the classic lawyerly response: *it depends*. To the extent one may paint with broad strokes, however, ISP censorship should often be treated as State action under existing law. ISPs not only license bandwidth from the Federal Government, but also enter into often monopolistic agreements with municipalities which are often greatly entrenched by municipal politics and graft seeking. As such, when an ISP blocks content, users will, in many scenarios, have no way to utilize broadband technology to access that content as, due to municipal practices or the like, they do not have an alternative broadband provider available.

Ultimately though, whether a given act of ISP censorship should be treated as State action depends on the specific circumstances surrounding that act of censorship. There is little coherence to the Supreme Court's State action jurisprudence, largely because the Court evaluates questions of State action on a case-by-case basis. Further the nature of the agreement the ISP operates under varies greatly by municipality and ISPs are spurned to censorship for a variety of reasons. As such, when evaluating whether ISP censorship should be treated as State action, the courts should weigh: how monopolistic the ISP's stronghold on the municipality is, the degree to which the ISP and municipality have partnered in the provision of broadband to the area, and the extent to which the ISP was motivated to censor by either formal or informal State inducements. Further, research should take a more empirical look at these questions, analyzing, for example, the breath of franchise agreements between municipalities and

ISPs and engaging in qualitative analysis about the bargaining process leading up to these agreements and surrounding ISP censorship generally.