COMMON SENSE AND KEY QUESTIONS

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In the net neutrality proceeding at the FCC and in *Verizon v. FCC*,[1] Internet access service providers contended that the First Amendment applied to any regulation of their provision of Internet access service. As Susan Crawford notes in *First Amendment Common Sense*,[2] this argument, if accepted, would have enormous ramifications: any regulation of the services offered by Internet access providers would be subject to heightened scrutiny (and strict scrutiny if it was content based). I focused on this issue in a previous article, and came to the same basic conclusion that Crawford does.[3] Using broadly accepted legal sources, which for the First Amendment means primarily Supreme Court jurisprudence,[4] the Internet access providers' argument is quite weak. The Court has treated the scope of the First Amendment expansively, but there is no real basis for contending that mere transmission of bits is "speech."

Although I largely agree with her bottom line, a list of our agreements would be boring. Instead, I want to focus on two considerations Crawford introduces in her analysis that I think are largely irrelevant: Internet access providers' economic interests and their potential status as common carriers. In focusing on these two considerations, I believe Crawford distracts from the question whether Internet access providers are engaging in substantive communication. This is the key question under the Supreme Court's jurisprudence.

As to the first consideration, in section II(B) of her article Crawford attributes significance to the fact that the Internet access providers' interests are "primarily economic."[5] I think this is irrelevant under the Supreme Court's jurisprudence and normatively. Many newspapers are owned by publicly traded companies answerable to shareholders,

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[1] 740 F.3d 623 (D.C. Cir. 2014).

[2] Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343 (2014)

[3] Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673 (2011).

[4] *See* Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV 1445, 1452–55 (2013) (noting that Supreme Court jurisprudence is the central broadly accepted legal source with respect to the Free Speech Clause).

[5] Crawford, *supra* note 2, at 2375.

but First Amendment jurisprudence appropriately treats that as immaterial.[6]

I think the relevant question under the prevailing jurisprudence turns on what Internet access providers are doing or want to do. Specifically, as Crawford notes, under the Supreme Court's jurisprudence First Amendment coverage seems to require a speaker who seeks to transmit some substantive message or messages to a listener who can recognize that message.[7] And that's all.[8] The Court has never found a substantive communication that was sendable, receivable, and actually sent to be outside First Amendment coverage unless it fell into one of the Court's articulated exceptions. And the Supreme Court has interpreted those exceptions narrowly. The Court's jurisprudence in recent years has made that particularly clear. In *United States v. Stevens*,[9] *Brown v. Entertainment Merchants Association*,[10] and *United States v. Alvarez*,[11] the Supreme Court addressed arguments in favor of broadening, or broadly construing, exceptions to First Amendment coverage. In each case the Court rejected such arguments, construing the exceptions quite narrowly and thus construing the First Amendment's coverage very broadly.[12]

Importantly, the requirement of a message that is sendable and receivable and that one actually chooses to send means that *if* Internet access providers (or FedEx, or any other transmitter of speech) are willing to engage in substantive editing, then I think First Amendment scrutiny will apply to regulation of those activities. If an Internet access provider is willing to say, "We give you an edited Internet — the

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[6] *See* Benjamin, *supra* note 4, at 1473 (noting that "for a newspaper or magazine owner who is a faithful agent, with shareholders who want the highest possible return on their investment, presumably all the owner's actions would be undertaken in order to maximize shareholder value"). For all I know, Jeff Bezos decided to find the best money-making opportunity available, and ended up flipping a coin as between buying a fracking operation and the Washington Post.

[7] *See* Crawford, *supra* note 2, at 2382 ("Communication of a particular message requires a speaker who transmits some substantive message or messages to a listener who can recognize that message."); *accord* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.'") (alteration in original) (citation omitted) (quoting City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986)); Benjamin, *supra* note 3, at 1696–1701 (discussing minima for application of First Amendment under the Supreme Court's jurisprudence and laying out the criteria described in the text).

[8] *See* Benjamin, *supra* note 4, at 1461–71 (arguing that under the Supreme Court's jurisprudence, the criteria in text are not only necessary but also sufficient).

[9] 130 S. Ct. 1577 (2010).

[10] 131 S. Ct. 2729 (2011).

[11] 132 S. Ct. 2537 (2012) (plurality opinion).

[12] *See* Benjamin, *supra* note 4, at 1456–58 (discussing the breadth of these cases).

Internet we think you want," I think they are engaged in speech under the prevailing jurisprudence.

But under the Supreme Court's jurisprudence it has to be editing that sends a *substantive* message. As I discussed in an earlier article, document delivery is an illustrative analogy. FedEx offers different delivery speeds for documents, with higher prices for faster speeds. Documents are covered by the First Amendment, but it is difficult to see how a statutory ban on this differential pricing would raise First Amendment issues. Transporting documents does not entail a communication, and thus the First Amendment would not seem to encompass FedEx's deliveries. It would be different if a company devoted its transportation of documents to messages with which it agreed. If, for example, a document transport company decided to deliver only documents to and from Democratic-affiliated groups, delivery would likely entail a communication. Every delivery would communicate to the recipient that a group that shared its political orientation was sending it a document. But for a transport company like FedEx that does not so limit itself, there is no similar message. FedEx's delivery of a document communicates no information about the content of that document.[13]

The interesting question is what else constitutes a substantive message. Does blocking spam and malware constitute communication, and therefore speech for First Amendment purposes? It depends. A transmitter protecting its own network is engaged in nonsubstantive editing. But protecting users from receiving material that upsets them is substantive editing. It may be that the transmitter's filter is content neutral, but if its reason for blocking the content is substantive, then it is engaged in substantive editing. And if the transmitter communicates such substantive blocking to its users, that would seem to satisfy the requirements for communication and thus for the freedom of speech. This means that, to determine whether the First Amendment applies to an Internet access provider's decision to block spam and malware, a court must determine why the provider engaged in such blocking. Does the provider block to keep its network running efficiently, or also because it believes that its customers do not want the blocked content? If it blocks for substantive reasons (such as to protect its customers from content they do not want), does it communicate that to customers? Does it advertise itself as a company that "blocks material that you would not like" (or words to that effect)?[14]

In her conclusion Crawford says she is concerned that if Internet access providers start to charge some edge providers, "They will be, in

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[13] *See* Benjamin, *supra* note 3, at 1685–86.

[14] *See id.* at 1705–11.

fact, exercising editorial discretion. They will have succeeded in recharacterizing their own activities for First Amendment purposes, all on their own."[15] As I indicated above, I don't agree that charging more for some users is editorial discretion. If so, then every company that charges different prices is engaged in speech by doing so, a result I do not find credible. But I also don't agree that there is any particular significance to whether or not they start engaging in true substantive editing. Either way, they can say they *want* to engage in substantive editing, and that's enough for First Amendment purposes.

Turning to the other consideration that I think is irrelevant, in section II(A) Crawford argues that Internet access providers are in actuality common carriers.[16] And she suggests that the idea is that Internet access providers will "escape[] all forms of oversight by virtue of mere administrative classification."[17] As the discussion above suggests, I think this focus on administrative or statutory categories is misplaced, both under the prevailing jurisprudence and normatively. In determining what is "speech" under the First Amendment, the Supreme Court has not relied on categories like "common carriage," but instead has looked to see exactly what the alleged speakers do. Congress could tomorrow pass legislation compelling Upworthy and Reddit to give equal priority to all messages. The applicability of the First Amendment to Upworthy and Reddit would in no way depend on whether Congress also characterized them as "common carriers" in that legislation. And this is as it should be. If an entity is engaged in pure transmission of bits, I don't think it is engaged in speech, regardless of whether we call it a "common carrier" or a "banana."

This also highlights a fundamental agreement between Crawford and me — how radical the Internet access providers' argument is.[18] If transmitting bits constitutes "speech," then the telephone companies in the twentieth century were speakers for First Amendment purposes, and their lawyers were fools not to have challenged common carriage as an infringement on its speech rights. In reality, the Supreme Court has always required substantive communication or self-expression as a requirement for the application of the First Amendment.[19]

The discussion so far has focused on the Supreme Court's jurisprudence. Now let me take a step away from that jurisprudence. We certainly could eliminate any possibility of Internet access providers being speakers for First Amendment purposes if we were willing to bite the

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[15] Crawford, *supra* note 2, at 2391.

[16] *Id.* at 2372.

[17] *Id.* at 2375.

[18] *See id.* at 2382 ("There is nothing inherently expressive about transmitting others' data packets . . . over the Internet.").

[19] *See* Benjamin, *supra* note 4, at 1460–61.

bullet and settle on an underlying theory of the First Amendment, and that theory did not extend to substantive editing by Internet providers. But any such theory would entail a significant reshaping of First Amendment coverage. We could decide that corporations can't be speakers. But newspapers and magazines are owned by corporations, so excluding them would be a radical change. As I noted above, excluding speech for economic reasons would knock out for-profit owners of newspapers and magazines. What about limiting the scope of the First Amendment to government actions with a censorial motive? Then we would have to investigate, and be confident we could discern, actual government motivation. And we would protect the blunderbuss legislature that has no censorial motive and doesn't care about speech.

If we really want to prevent Internet access providers from being speakers, we are going to have to radically reshape the Supreme Court's First Amendment jurisprudence and understandings. Maybe that is what we need. But I do not think fears about Internet access providers' claims support an overhaul of the Court's jurisprudence, in light of what the jurisprudence actually is.

Is there anything short of revamping we should do? I think so. Insofar as we are concerned about the expansiveness of First Amendment coverage, we may want to limit it in two areas of genuine uncertainty: editorial decisions that are neither obvious nor communicated to the reader, and laws that single out speakers but do not regulate their speech. (The D.C. Circuit has treated regulation of the rates cable operators charge their customers as raising First Amendment issues.[20])

Even with those limitations, however, an enormous and growing amount of activity will be subject to heightened scrutiny absent a fundamental reorientation of First Amendment jurisprudence.

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[20] *See* Benjamin, *supra* note 4, at 1481–91.