

A. *Turner Broadcasting and Must-Carry Provisions*

The Supreme Court's decisions in *Turner Broadcasting* provide the jurisprudential framework for analyzing efforts to compel cable operators to open their systems.<sup>167</sup> In those decisions, the Supreme Court examined whether and to what extent Congress could require cable operators to carry the signals of local commercial and public broadcast stations as part of the Cable Television Consumer Protection Act of 1992.<sup>168</sup> After three years of hearings, Congress enacted the so-called "must-carry" provision because it found that cable television threatened the continued vitality and existence of broadcast television, the nation's principal source of free information.<sup>169</sup> In analyzing *Turner I*, the Justices recognized that cable operators and programmers engage in and transmit speech, and are thus entitled to First Amendment protection: "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.'"<sup>170</sup> In turn, the must-carry provisions regulate speech by reducing "the number of channels over which cable operators exercise unfettered control" and by making it more difficult for other programmers to compete for the limited remaining channels.<sup>171</sup> The Justices, however, disagreed over whether the must-carry provisions were content neutral or content based and, therefore, the level of scrutiny to be applied.<sup>172</sup> The majority concluded that the must-carry provisions were content neutral because they were "designed to guarantee the survival of a medium that has become a vital part of the Nation's communication system, and to ensure that every individual with a television set can obtain access to free television programming," and did not favor or disfavor speech based upon the content of that speech.<sup>173</sup> In contrast, the dissent argued that

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167. *Turner II*, 520 U.S. 180, 185-225 (1997); *Turner I*, 512 U.S. at 626-68; see also Sunstein, *supra* note 21, at 1765 ("The *Turner* case is by far the most important judicial discussion of new media technologies, and it has a range of implications for the future.").

168. Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended at 47 U.S.C. §§ 534-535 (1994 & Supp. III 1997)); *Turner II*, 520 U.S. at 185; *Turner I*, 512 U.S. at 626.

169. See *Turner I*, 512 U.S. at 632-34.

170. *Id.* at 636 (alteration in original) (quoting *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)); see also *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979) (holding that the FCC may not regulate cable systems as common carriers).

171. *Turner I*, 512 U.S. at 637.

172. See *id.* at 642-49 (content neutral); *id.* at 676-81 (O'Connor, J., dissenting in part) (content based).

173. *Id.* at 647.

the Act's explicit recognition of the importance of local broadcast and Congress's belief that local content was valuable indicated that the must-carry provision was justified.<sup>174</sup> According to Justice O'Connor, "[t]he interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say."<sup>175</sup> Fortunately, for the purposes of this discussion, we need not resolve the Justices' disagreement,<sup>176</sup> because even assuming that efforts to force cable operators to open their systems to competing ISPs are content neutral, as will be demonstrated shortly, those efforts cannot survive even intermediate scrutiny.

In addition to concluding that must-carry provisions are content neutral, the Supreme Court concluded that strict scrutiny was not warranted by its decisions governing compelled speech.<sup>177</sup> In so doing, the Court distinguished its decision in *Miami Herald Publishing Co. v. Tornillo*, in which it held that states could not require newspapers to publish political candidates' letters responding to the newspaper's coverage.<sup>178</sup> First, unlike the right of reply statute at issue in *Tornillo*, the Court concluded that the must-carry provisions were not triggered by the content of a cable operator's service.<sup>179</sup> Second, the Court believed that the must-carry requirement would not "force cable operators to alter their own messages to respond to the broadcast programming they are required to carry," and, given cable's history as a conduit for broadcast television, viewers would not be likely to assume that the broadcast stations "convey ideas or messages endorsed by the cable operator."<sup>180</sup>

More importantly, the Court noted that significant technological differences distinguished newspaper and cable. While both enjoy local monopolies, "[a] daily newspaper . . . does not possess the power

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174. *Id.* at 676-77 (O'Connor, J., dissenting in part).

175. *Id.* at 678 (O'Connor, J., dissenting in part); see also *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (holding that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others").

176. For discussions on the disagreement in *Turner*, see Sunstein, *supra* note 21, at 1777-81; Adam Pliska, *Turner Broadcasting v. FCC*, 13 BERKELEY TECH. L.J. 447, 461-62 (1998); Matthew D. Segal, Note, *The First Amendment and Cable Television: Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994), 18 HARV. J.L. & PUB. POL'Y 916, 916-28 (1995); see also Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1084 (1999) (arguing that access policies represent a form of content based redistribution).

177. See *Turner I*, 512 U.S. at 653-57.

178. 418 U.S. 241 (1974).

179. *Turner I*, 512 U.S. at 655.

180. *Id.*

to obstruct readers' access to other competing publications."<sup>181</sup> In contrast, cable operators can "silence the voice of competing speakers with a mere flick of the switch."<sup>182</sup> According to the Court:

When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude.<sup>183</sup>

While the First Amendment limits the government's ability to "impede the freedom of speech," it does not prevent "the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."<sup>184</sup> In light of this bottleneck control, the Court believed that it was appropriate for Congress to treat cable operators differently than other members of the press.<sup>185</sup>

Under intermediate scrutiny, the must-carry provisions would survive if: (1) they further an important or substantial governmental interest, (2) the governmental interest furthered by imposing the provision is not related to the suppression of free expression, and (3) the means chosen do not substantially burden more speech than is necessary to further the government's legitimate interest.<sup>186</sup> In support of must-carry, the government identified three "interrelated" interests: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."<sup>187</sup> While the Supreme Court in *Turner I* agreed that these interests were sufficiently substantial in the abstract, it remanded for further factual findings as to the actual threat to broadcast television and harm to cable operators.<sup>188</sup> According to the Court, to justify the must-carry provisions, Congress "must demonstrate that the recited harms are real, not merely conjectural," and that "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-

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181. *Id.* at 656.

182. *Id.*

183. *Id.*

184. *Id.* at 657.

185. *See id.* at 661; Sunstein, *supra* note 21, at 1771.

186. *Turner I*, 512 U.S. at 662.

187. *Id.*

188. *Id.* at 664, 667-68.

carry.”<sup>189</sup> Similarly, the Court found genuine issues of material fact with respect to whether the must-carry provisions were sufficiently narrow or whether there were other less restrictive means of protecting broadcast television.<sup>190</sup> Only after “another eighteen months of factual development on remand ‘yielding a record of tens of thousands of pages’ of evidence,” did the Court uphold the must-carry provisions.<sup>191</sup> According to the Court, ultimately, there was substantial evidence to support Congress’s conclusion that broadcast television was threatened and that there were no other adequate alternatives to protect the viability of free local broadcasting.<sup>192</sup>

### B. Turner Broadcasting and Open Internet Access

Assuming that cable ISPs enjoy the same First Amendment rights as operators of cable television, the conclusion that open Internet access violates the First Amendment cannot be avoided. Initially, the Supreme Court’s decision in *Tornillo* should be applicable with respect to efforts to regulate the Internet because, unlike operators of cable television, cable ISPs do not enjoy gatekeeper control over the Internet. In other words, they do not control the critical pathways of the Internet. Consequently, efforts to require cable ISPs to open their networks would have to satisfy strict judicial scrutiny.<sup>193</sup> Moreover, assuming that intermediate scrutiny applies, there is no substantial evidence that such a policy furthers a genuine, important governmental interest—such as preserving competitive access to the Internet—and there are other equally effective means of accomplishing that governmental interest.<sup>194</sup>

#### 1. First Amendment Analysis and the Medium of Expression

As the Supreme Court has recognized, “[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”<sup>195</sup>

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189. *Id.* at 664-65.

190. *Id.* at 668.

191. *Turner II*, 520 U.S. 180, 187 (1997) (quoting *Turner Broad. v. FCC*, 910 F. Supp. 734, 755 (D.D.C. 1995)).

192. *Id.* at 208-13, 218-23.

193. *See Turner I*, 512 U.S. at 641-42.

194. *See infra* Part IV.B.2.

195. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). *But see* Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1721 (1995) (“No matter how often one repeats the statement, it cannot be true that ‘[d]ifferent communications media are

Thus, the Court has recognized that some mediums may be subject to regulations that would be impermissible if imposed on other speakers.<sup>196</sup> For example, the Supreme Court has long recognized that frequency scarcity is a sufficient reason to impose additional obligations on speakers wishing to broadcast their messages through the electromagnetic spectrum.<sup>197</sup> Likewise, as discussed above, with respect to cable television, the Court has concluded that a cable operator's ownership of the essential communication pathway is a significant factor in the First Amendment inquiry.<sup>198</sup> While this rule is relatively straightforward with respect to traditional media, how should it be applied to the Internet? In *Reno v. ACLU*, the Supreme Court concluded that there was "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the Internet.<sup>199</sup> *ACLU*, however, was addressing content regulation on the Internet as a whole, and the Court was not presented with any technological limitation issues based upon the Internet's architecture.<sup>200</sup> In contrast, open access presents us with the question of what the relevant medium should be: cable, broadband communications, or the Internet in general? In other words, the issue of open access requires us to determine whether we should view the Internet as a whole or examine its components. As the following discussion demonstrates, while the constituent parts may be relevant, ultimately, we are concerned with the Internet as a whole.

The *Turner* Court's discussion of why cable television should be treated differently from the print media explains the proper approach to this question. As discussed above, in *Turner I* the Supreme Court rejected the cable operators' claim that must-carry provisions amounted to prohibited compelled speech under *Tornillo*.<sup>201</sup> According to the Court, unlike the traditional print media, cable operators' physical control over the essential pathway for speech could "silence the voice of competing speakers with a mere flick of the switch."<sup>202</sup> In contrast, "when a newspaper asserts exclusive control

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treated differently for First Amendment purposes." (alteration in original) (quoting *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986))).

196. See, e.g., *Turner I*, 512 U.S. 622 (1994) (cable); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (telephone); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (radio); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (radio or television broadcast).

197. See *Red Lion*, 395 U.S. at 399-400.

198. See *Turner I*, 512 U.S. at 656.

199. 521 U.S. 844, 870 (1997).

200. See *id.* at 851.

201. See *supra* notes 167-192 and accompanying text.

202. *Turner I*, 512 U.S. at 656.

over its own news copy, it does not thereby prevent other newspapers from being distributed to willing recipients in the same locale.<sup>203</sup> This critical distinction highlights the Court's central concern with respect to new technologies—the ability of private owners to prevent competing speakers, television programmers, or newspapers from reaching the public. In this respect, cable television arguably silences competing broadcasters in two interrelated ways: (1) cable television operators may simply refuse to carry individual broadcasters on their systems, which would effectively block that broadcaster from reaching the cable companies' subscribers;<sup>204</sup> and (2) cable television could ostensibly destroy free broadcasting as a whole by competing for advertising revenues.<sup>205</sup> In contrast, newspapers have no such control over access to the newspaper market.<sup>206</sup> In light of this concern, cable ISPs are more similar to newspapers than they are to cable television.

Cable ISPs do not have bottleneck or gatekeeper control over the Internet.<sup>207</sup> While it has been suggested that cable ISPs may silence competing ISPs just as effectively as cable television could silence broadcast television,<sup>208</sup> that conclusion is simply not supported by the reality of the Internet market or the architecture of the Internet itself. With respect to Internet access in general, cable ISPs are only a few of the thousands of Internet service providers, and the vast majority of Americans access the Internet through the simplest and least expensive avenue—the telephone.<sup>209</sup> Cable access accounts for only two percent of the ISP market.<sup>210</sup> In contrast, national ISPs like AOL have captured sixty-nine percent of the market through traditional dial-up systems.<sup>211</sup> Even if we limit ourselves to broadband Internet access, cable ISPs in no way control the essential pathway for speech. Fiber-optic cable, T1 lines, DSL, microwave, and satellite technologies are all capable of providing the public with broadband access to the

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203. *Id.*

204. In *Turner II*, the Supreme Court concluded that there was substantial evidence to support Congress's finding that it was not practically possible for cable subscribers to simply switch back and forth between cable and broadcast. 520 U.S. 180, 219-20 (1997). Accordingly, television viewers are left with a bipolar choice for television service: cable or broadcast.

205. *See id.* at 208-09.

206. *See Turner I*, 512 U.S. at 656-57.

207. *See* Sunstein, *supra* note 21, at 1780 ("Many of the other new technologies raise questions not involving anything like 'bottleneck control,' which was central to the resolution in *Turner*. In general, regulation of the Internet raises no such problem.")

208. *See* Hammond, *supra* note 59, at 208; Maher, *supra* note 4, at 219-21.

209. *See* FALLING THROUGH THE NET, *supra* note 13, at 38.

210. *Id.*

211. *Id.*

Internet.<sup>212</sup> Similarly, individuals may skip local ISPs entirely, either by becoming their own ISP,<sup>213</sup> or by using the various free services, including free DSL service, available to the public.<sup>214</sup> In light of these alternative connections to the Internet, it is difficult, if not impossible, to argue that cable ISPs can silence competing speakers through control of their own networks. As its designers intended, the power of the Internet is its ability to avoid bottlenecks and route around obstructions.<sup>215</sup>

Even if we considered cable an essential pathway to Internet access, cable ISPs, unlike broadcasters or cable television operators, do not have any special ability as the owner of the pathway to deny access to competing speakers. Even through TCI@Home's cable Internet service, Internet users can freely access the sites of competing companies such as Microsoft, AOL, Mindspring, or Earthlink.<sup>216</sup> The extent to which users are denied access to the content of competing ISPs is the choice of those ISPs and not the cable provider.<sup>217</sup> For example, AOL allows customers to access its content for a fee, even if the customer uses another access provider.<sup>218</sup> Cable ISPs, therefore, do not exercise gatekeeper control over the Internet that would justify treating them differently from other Internet service providers. Accordingly, even if the Oregon district court is correct that cable

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212. See *supra* Part II.B.

213. See *supra* note 55 and accompanying text. While it is currently not cost-effective to act as one's own ISP, given the pace of technological innovation and the resulting decrease in prices, it is more than likely that, in the near future, individuals will be able afford the equipment needed to be their own ISP.

214. See *supra* notes 40, 53.

215. Cf. James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 178 (1997) ("The Net interprets censorship as damage and routes around it." (emphasis omitted)).

216. See *supra* notes 155-156 and accompanying text. While it is possible for TCI@Home to censor or block the speech of others, this power is not specific to cable ISPs. Rather, the ability of an ISP to determine the content that its subscribers may access is an attribute of all ISPs. Every network has the ability to choose what services to make available or to establish firewalls (software security systems) that accept or block packets of information of the networks choosing. See GRALLA, *supra* note 36, at 53-55; KUROSE & ROSS, *supra* note 43, § 8.5, at 558-62 (discussing firewalls). For example, Apple recently announced that it will offer a variety of free Internet services that will only be accessible by individuals using computers equipped with Apple's OS 9 operating system. See Peter H. Lewis, *Apple Stakes Web Claim*, N.Y. TIMES, Jan. 27, 2000, at G1. Ironically, consumers have recently filed suit against AOL alleging that AOL 5.0 deceptively prevents them from using competing Internet access providers by reconfiguring their personal computers. See Peter H. Lewis, *AOL 5.0: Takeover Artist*, N.Y. TIMES, Feb. 10, 2000, at G1.

217. See GRALLA, *supra* note 36, at 53 ("Unlike most of the Internet, the content, areas, and services the online companies provide are not always free. In order to get them, you may have to pay a monthly subscription fee to the online service.")

218. See *Transfer Order*, 14 F.C.C.R. 3160, 3206, ¶ 95 (1999).

users would not associate the messages of competing ISPs with AT&T,<sup>219</sup> that factor alone does not justify limitations upon a cable ISP's "speech." Because cable ISPs do not have the same bottleneck control over the Internet as cable operators do over cable television, efforts to require cable ISPs to open their systems to competitors should be subject to strict scrutiny.

## 2. Open Access Under Intermediate Scrutiny

While open access requirements should be subject to strict scrutiny, they currently cannot satisfy even intermediate scrutiny. As articulated in *Turner I*, to satisfy intermediate scrutiny, open access must serve an important or substantial government interest unrelated to the suppression of speech, and cannot substantially burden more speech than is necessary to further that interest.<sup>220</sup> Given the current state of the Internet market and communications technology, open access cannot satisfy either requirement.

Initially, we may ask what genuine, important government interest is served by a policy of open access? Proponents of open access have identified three interrelated interests served by such a policy: (1) without it, cable ISPs "will have a substantial head start in the provision of high-speed Internet access and could develop an insurmountable position as a monopoly provider (or duopoly provider together with incumbent [local exchange carriers]) of broadband Internet access services to residential customers,"<sup>221</sup> (2) open access is needed to protect competing ISPs who would otherwise be "driven out of business, eliminating several hundred jobs and costing the local economy \$20 million,"<sup>222</sup> and (3) "[t]he incentives of the cable industry, coupled with their superior positioning, will lead to decreased choice and access to local content."<sup>223</sup> In other words, supporters of open access have attempted to mirror the governmental interests at stake in cable television must-carry provisions.<sup>224</sup> As the Supreme Court recognized in *Turner I*, while these interests may be substantial in the abstract, to justify abridging the free speech rights of cable ISPs,

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219. See *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1154 (D. Or. 1999), *rev'd*, 216 F.3d 871 (9th Cir. 2000).

220. *Turner I*, 512 U.S. 622, 662 (1994).

221. *Transfer Order*, 14 F.C.C.R. at 3197, ¶ 75.

222. *AT&T*, 43 F. Supp. 2d at 1150.

223. Maher, *supra* note 4, at 225.

224. See *Turner I*, 512 U.S. at 662 ("[M]ust-carry provisions serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources; and (3) promoting fair competition in the market for television programming.").

the harms must be real and the regulations must directly and materially alleviate those harms.<sup>225</sup>

The harms identified by open access supporters are purely conjectural. First, as the FCC recognized when asked to approve the AT&T and TCI merger, the market for Internet service is “quite competitive today.”<sup>226</sup> This is true whether the market is defined as Internet service in general, which would include traditional telephone access, or is limited to broadband Internet access.<sup>227</sup> With respect to Internet service in general, ninety-five percent of the country has access through a local telephone call to at least one ISP, while ninety percent can access multiple ISPs.<sup>228</sup> Furthermore, any ISP can compete for customers through telephone access.<sup>229</sup> The same is true for broadband Internet service as well.<sup>230</sup> In addition to cable, public utilities, competitive telephone companies, wireless cable, local telephone companies, mobile wireless companies, and eventually satellite providers are all offering or will offer broadband access to residences through different technologies.<sup>231</sup> The FCC has said, “The facts that different companies are using different technologies to bring broadband to residential consumers and that each existing broadband technology has advantages and disadvantages as a means of delivery to millions of customers opens the possibility of intermodal competition, like that between trucks, trains, and planes in transportation.”<sup>232</sup>

Similarly, in a recent conference, telecommunications technology experts hypothesized that, by 2010, as a result of competing technologies and new market entrants, businesses and residences may have “at least three and usually five options for high speed access,” with several being wireless options.<sup>233</sup> Furthermore, the FCC predicts that these alternative broadband technologies “might even be capable of creating competition for the telephone and cable incumbents” in

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225. *Id.* at 664.

226. *Transfer Order*, 14 F.C.C.R. at 3205-06, ¶ 93.

227. *Id.* at 3205-06, ¶¶ 93-94.

228. *Advanced Servs. Report*, 14 F.C.C.R. 2398, 2432, ¶ 64 (1999).

229. *See Transfer Order*, 14 F.C.C.R. at 3198-99, 3205-06, ¶¶ 77, 93.

230. *See id.* at 3206, ¶ 94.

231. *Advanced Servs. Report*, 14 F.C.C.R. at 2427-30, ¶¶ 55-60; *see also* James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 *YALE J. ON REG.* 39, 39 (2000) (arguing that alternative broadband options make open access unnecessary).

232. *Advanced Servs. Report*, 14 F.C.C.R. at 2423-24, ¶ 48 (footnotes omitted).

233. *See* Scenario Task Group 3, *Many New Entrants—A Retrapolating View*, at <http://www.johnson.cornell.edu/faculty/mcadams/workshop/entrants.html> (last visited Oct. 4, 2000).

their core markets.<sup>234</sup> At the very least, they will help serve the remaining five percent of the population who currently does not have access to the Internet.<sup>235</sup> Moreover, the FCC recently adopted rules that will require local telephone companies to share their existing phone lines with competitors who want to provide DSL service.<sup>236</sup> As such, competing ISPs not only have normal telephone access to their customers, they also have the ability to offer broadband telephone access. As long as the market for Internet service is competitive, protecting those who are unable to compete with cable ISPs because they are either unable to offer high-speed access on their own or in a partnership with a broadband provider,<sup>237</sup> or because they are unable to offer it as quickly, does not rise to the level of a substantial governmental interest. It is an axiom of antitrust law that the law protects competition not competitors.<sup>238</sup> Accordingly, while the market for Internet access may have the potential to become uncompetitive at some point, any conclusion that it is or will become so soon is both premature and speculative.<sup>239</sup>

Even assuming that cable ISPs come to dominate the Internet service market, any reduction of local or competing content cannot be attributed to their control over the cable pipeline.<sup>240</sup> As discussed

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234. *Advanced Servs. Report*, 14 F.C.C.R. at 2425, ¶ 51.

235. *See id.* at 2432, ¶ 64. Allowing broadband ISPs to bundle Internet access with other services may also encourage new competitors to install competing high-speed networks because of the potential to capture greater revenues. Prior to the Internet, a cable or telephone company's investment in infrastructure had to be justified by the monthly revenues it could capture from the limited services available. For example, with respect to cable, if a new company could only hope to collect approximately \$50/month per user for television service, it would hardly seem worthwhile to invest millions, if not billions, of dollars to compete with the incumbent cable operator. However, if a company could generate revenue not only from television service, but from Internet access, telephony, on-demand movies, and music, such an investment in infrastructure might be worthwhile.

236. *See FCC Makes Telcos Share Phone Lines with DSL Service Providers*, E-COMMERCE L. WKLY. (Nov. 24, 1999), at <http://www.law.com>.

237. For example, prior to its plans to acquire Time Warner, AOL announced joint ventures with telephone providers such as Bell Atlantic, SBC Corp., and GTE to provide Internet access through DSL. *See Bickerstaff, supra* note 35, at 78; *see also supra* notes 62-63 (discussing alliances).

238. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

239. For example, while telecommunications experts at a recent conference hypothesized that in ten years, as a result of acquisitions and mergers, the U.S. telecommunications market may be dominated by an oligopoly of three broadband providers, it is only one scenario among three. *See Scenario Task Group 2, Dominant Firm(s) Control Connectivity and Services*, at <http://www.johnson.cornell.edu/faculty/mcadams/workshop.html> (last visited Oct. 4, 2000); *see also Scenario Task Group 1, Stasis, Plus*, at <http://www.johnson.cornell.edu/faculty/mcadams/workshop.html> (last visited Oct. 4, 2000) (describing a scenario in which the telecommunications market remains unchanged); Scenario Task Group 3, *supra* note 233 (describing a highly competitive broadband market).

240. *See supra* notes 207-222 and accompanying text.

above, user access to competing speech is not denied by the cable ISPs. Instead, access to content is denied by the competing ISPs themselves by making their content unavailable unless individuals use them for all of their Internet services or by requiring the payment of a fee to access their content.<sup>241</sup> While it may be that cable Internet users will refuse to pay “even a reasonable amount of money for content” from other ISPs,<sup>242</sup> under these circumstances, any loss of speech is a result of the competing ISP’s decision not to provide its speech on an open and equal basis or its inability to offer sufficiently attractive content.<sup>243</sup> Any loss is not the result of actions taken by a cable ISP.<sup>244</sup> While the First Amendment is concerned with maintaining a multiplicity of speakers, one cannot successfully argue that the loss of speakers who choose to provide speech only to those willing to pay rises to the same level of concern as ensuring that forty percent of the U.S. population continues to have access to television as a free source of information.<sup>245</sup>

Furthermore, open access may in fact undermine both the rapid deployment of broadband technologies and competition within the broadband market.<sup>246</sup> As the FCC recognized, “[b]efore broadband capability can be made available to customers, communication companies must modify existing facilities or construct new ones, both of which can require substantial investment.”<sup>247</sup> According to the National Cable Television Association, the cable industry spent six billion dollars to upgrade its systems in 1997 alone, and by one estimate, only sixty-three percent of cable systems will be broadband

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241. See *supra* notes 155, 216-218 and accompanying text.

242. Maher, *supra* note 4, at 226.

243. In fact, many Internet providers such as Yahoo make their content available to the public free of charge, hoping, much like broadcast television, that it will attract visitors to their site, which in turn will generate revenue from advertising or information collection. See Yahoo!, at <http://www.Yahoo.com> (last visited Oct. 4, 2000).

244. This is analogous to a publisher complaining that the patrons of a particular bookstore are not purchasing its books and blaming the bookstore for the decisions made by the publisher and the consumer.

245. There is also no evidence to indicate that ISP service through traditional telephone lines will actually disappear as a result of cable or any other broadband Internet service. Unlike free broadcast television, which is dependent upon advertising revenue for its survival, ISPs rely upon user fees. See *Inter-Carrier Comp. for ISP-Bound Traffic*, 14 F.C.C.R. 3689, 3691, ¶ 4 (1999); Sunstein, *supra* note 21, at 1789. Accordingly, as long as there are individuals who cannot obtain, do not want, or cannot afford broadband service, competing ISPs will continue to have a source of revenue to support their operations. See generally *FALLING THROUGH THE NET*, *supra* note 13 (discussing statistics regarding use of the Internet).

246. See *Transfer Order*, 14 F.C.C.R. 3160, 3204-05, ¶¶ 89-90 (1999).

247. *Advanced Servs. Report*, 14 F.C.C.R. 2398, 2414, ¶ 34 (1999).

ready by 2001.<sup>248</sup> In light of these costs, AT&T and others argue that the bundling of Internet service with cable access is necessary to reduce the risk of its investment in broadband and to provide adequate revenue streams for continued upgrades, and that rate regulation could deter such substantial investment.<sup>249</sup> It is important to remember that, despite the hype over broadband and the Internet, only a fraction of households in this country currently access the Internet from home.<sup>250</sup> Additionally, AT&T has argued that open access is impractical due to technological limitations upon sharing coaxial cable.<sup>251</sup> Cable, unlike other broadband technologies such as DSL, is a shared pipeline, which means that increased use will affect the data transmission rate.<sup>252</sup> If open access increases usage of the cable pipeline, it is possible that transmission rates would be slowed to the point that the cable network would not be able to effectively support broadband services.<sup>253</sup>

Whatever the merits of these claims, any potential loss of cable operators as providers of broadband access is cause for serious concern. Broadband service provided by cable companies benefits the public in two ways: (1) cable provides high-speed access to consumers where none existed before, and (2) the existence of high-speed cable access spurs competition from competing broadband providers.<sup>254</sup> While losing cable as a means of broadband access to the Internet would certainly have a direct impact upon the public, the loss of cable as a competitive provider of high-speed access may be even greater. Prior to cable's entry into the market, local telephone providers had been either unwilling or unable to deploy broadband services.<sup>255</sup> As one commentator notes, the increased "availability of digital transmission capacity (*e.g.*, DSLs) in the local telephone network is at least in part a direct response to the potential of competition from AT&T's multifunctional cable plan."<sup>256</sup> As such, policies that threaten the economic viability of cable "can further retard the development of digital capability" from competitors by reducing the competitive incentives for rapid deployment of

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248. *Id.* at 2415, ¶ 37.

249. *See Transfer Order*, 14 F.C.C.R. at 3204-05, ¶¶ 89-90.

250. *See FALLING THROUGH THE NET*, *supra* note 13, at 5 (stating that in 1998, 26.2% of U.S. households had Internet access, up from 18.6% in 1997).

251. *See Transfer Order*, 14 F.C.C.R. at 3203-04, ¶¶ 87-88.

252. *See KUROSE & ROSS*, *supra* note 43, § 1.5; Bickerstaff, *supra* note 35, at 92.

253. *See KUROSE & ROSS*, *supra* note 43, § 1.5; *Transfer Order*, 14 F.C.C.R. at 3203-04, ¶ 88.

254. *See Advanced Servs. Report*, 14 F.C.C.R. 2398, 2400, ¶ 2 (1999); *Transfer Order*, 14 F.C.C.R. at 3205-06, ¶¶ 93-94.

255. *See supra* note 95 and accompanying text.

256. Bickerstaff, *supra* note 35, at 92.

broadband digital capacity.<sup>257</sup> Moreover, cable is currently the only technology capable of competing with the incumbent local telephone companies in both Internet service and eventually telephony.<sup>258</sup> Open access, therefore, may in fact undermine Congress's goal that broadband be "deployed on a reasonable and timely basis to all Americans."<sup>259</sup> In light of these concerns, there are serious reasons to question whether open access actually furthers a substantial government interest.<sup>260</sup>

Lastly, open access is substantially broader than necessary to achieve the government's interests. As discussed above, the existence of competing ISPs in general, and broadband ISPs in particular, undermines any argument that open access is adequately tailored. Moreover, competing ISPs currently have other pipelines, including broadband, available to them,<sup>261</sup> and their messages reach their intended audiences. Accordingly, through their control of the cable pipeline, cable ISPs can no more prevent competing ISPs from speaking than ABC can squelch the speech of NBC or the *Wall Street Journal* can stifle the *New York Times*. Imposing open access requirements upon cable operators, therefore, is "substantially broader than necessary to achieve the government's interest."<sup>262</sup>

Moreover, by requiring cable companies to open their systems to competitors, there is a substantial likelihood that it will in fact reduce the amount and kinds of speech that cable ISPs will be able to provide. As previously discussed, existing Internet service over cable is a shared service in which increases in the number of users decreases the rate at which any given piece of information is transmitted.<sup>263</sup> Given this technological limitation, open access could effectively reduce, if

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257. *Id.*

258. *See id.* at 91.

259. *Advanced Servs. Report*, 14 F.C.C.R. at 2401, ¶ 4.

260. In fact, we may question whether open access serves a public interest at all. When one considers the market power of competing ISPs and their access to alternative sources of broadband communication, one may question whether open access is a product of private self-interest or actually for the public good. As noted by Professor Sunstein, "industries will often seek government help against the marketplace, invoking public-spirited justifications for self-interested ends." Sunstein, *supra* note 21, at 1768; *see also* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991) (discussing the public choice theory).

261. *See supra* notes 226-236 and accompanying text.

262. *Turner II*, 520 U.S. 180, 217 (1997) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)). In contrast, alternative remedies include subsidies for competing ISPs to invest in infrastructure deployment, providing access to government-owned technology, and even legislation preventing ISPs from censoring content available from other ISPs. *See* Sunstein, *supra* note 21, at 1796-1803.

263. *See supra* notes 252-253 and accompanying text.

not undermine, cable's ability to provide high-speed access to the Internet. Consequently, given the current state of the Internet market and access technology, policies of open access are unconstitutional under the First Amendment. This conclusion, however, is premised upon the assumption that Internet access providers in general and cable access providers in particular are speakers under the First Amendment. The following Part examines that assumption and what that may mean for ISPs under the First Amendment.

#### V. SHOULD INTERNET SERVICE PROVIDERS BE CONSIDERED SPEAKERS?

While Part IV assumed that all ISPs are speakers for purposes of the First Amendment, this Part questions that assumption and outlines how the answer to that question influences the open access inquiry. Traditionally, when considering communication technology and issues of access, courts have adopted an all-or-nothing approach.<sup>264</sup> For example, the First Amendment regimes governing print, broadcast, and cable protect the speech rights of medium owners and operators while generally denying a public right of access.<sup>265</sup> In contrast, the laws governing telephone services assure public speech rights by depriving the network owners of all speech rights associated with their property.<sup>266</sup> As the following discussion demonstrates, with respect to the Internet, it is possible to conceptually sever the various services provided by ISPs, treating some as protected speech and others as nonspeech interests.<sup>267</sup> Under an approach employing conceptual severance, one might argue that cable ISPs do not have First Amendment rights with respect to the transmission of data through their cable systems. Employing such an approach with respect to open access, however, also strips away the First Amendment claims of competing ISPs.

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264. See ZUCKMAN ET AL., *supra* note 100, § 2.3, at 197 (discussing different First Amendment standards for different technologies); Hammond, *supra* note 59, at 204-10 (same).

265. See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (access to print); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (access to broadcast); *Turner I*, 512 U.S. 622 (1994) (access to cable); see also *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 5043, 5054, ¶¶ 72-74 (1987) (mem. op. & order) (rejecting the fairness doctrine for broadcast).

266. See ZUCKMAN ET AL., *supra* note 100, § 2.3, at 209-11.

267. This appears to be the approach adopted by the FCC in its Universal Service Report when it distinguished access, content, and backbone providers. See *supra* note 118.

A. *Internet Service Providers: Conduit, Gatekeeper, or Speaker?*

As already discussed, current First Amendment doctrine determines the level of protection afforded a media entity based upon certain conceptual categories. Accordingly, under this framework, we must ask whether Internet service providers are more like common carriers, speakers, or gatekeepers. Unfortunately, the answer to this question is an unenlightening, yes. ISPs, cable and otherwise, perform functions and provide services similar to telephone companies, newspapers, broadcasters, and cable television providers.<sup>268</sup> To the extent that, without interference from the ISP, users determine what information they will send and what they want to receive, ISPs function as conduits for information.<sup>269</sup> Examples of such conduit services include access to the World Wide Web, e-mail, chat rooms, hosting user webpages, and telephony.<sup>270</sup> Similarly, as discussed in the context of FCC regulation, with respect to the underlying facilities and services that allow ISPs to transmit their data for all of their information services, ISPs also act as conduits for information as opposed to speakers.<sup>271</sup>

To the extent that ISPs determine the information that users may receive, they are speakers. This occurs, for example, when ISPs provide content to their users through webpages, provide links to other content providers, determine what pop-up displays will appear to users, select the news groups that are available to their users, and when they edit information placed on their system by others.<sup>272</sup> Under those circumstances, ISPs arguably exercise the kind of editorial control treated as speech and traditionally protected under the First Amendment.<sup>273</sup>

Lastly, since ISPs can ultimately censor and block everything that occurs over their networks, they are potent, though limited, Internet gatekeepers. They are potent in the sense that they may control and silence all speech on their networks. Through firewalls and

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268. See Hammond, *supra* note 59, at 205 (stating that broadband Internet technology "combines many of the capacities of its predecessors").

269. See *Universal Serv. Report*, 13 F.C.C.R. 11,501, 11,537-38, ¶ 76 (1998); *Transfer Order*, 14 F.C.C.R. 3160, 3192-93, ¶ 64 (1999).

270. See *Universal Serv. Report*, 13 F.C.C.R. at 11,537, ¶¶ 76-80.

271. See *supra* notes 134-138 and accompanying text.

272. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*5 (N.Y. Sup. Ct. May 24, 1995) (concluding that an ISP's exercise of editorial control represented the actions of a publisher).

273. Cf. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (recognizing the editorial rights of newspapers).

passwords, ISPs can control access to their networks.<sup>274</sup> Once users are on those networks, ISPs have the ability to prescreen and monitor their activity. For example, AOL requires users to comply with its Rules of User Conduct and Community Guidelines which prohibit, among other things, users from “posting information in or otherwise using any communications service [available] on or through this site” that contains “explicit or graphic descriptions or accounts of sexual acts,”<sup>275</sup> and “reserves the right, in its sole discretion, to terminate [user] access to all or part of [its network], with or without notice.”<sup>276</sup> In addition to controlling user conduct, ISPs assert the right to use and control the information available on their networks. For example, AOL reserves the right to remove any content at its discretion,<sup>277</sup> and to “use, reproduce, display, perform, adapt, modify, distribute, have distributed, and promote” any content posted or submitted by users on its system.<sup>278</sup> ISPs may also be considered limited gatekeepers, however, because they have absolutely no control over speech on the other networks of the Internet and because users can always change ISPs or become ISPs themselves.<sup>279</sup> Any attempt to fit ISPs into the rigid categories of traditional First Amendment jurisprudence, therefore, would either oversimplify the complexity of Internet service or ignore the unique characteristics of this new form of communication.

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274. See *supra* note 216. Through software, ISPs may even be able to control user activity outside of their network. For example, a recent lawsuit alleges that AOL's new software prevents users from accessing competing ISP accounts. See Associated Press, *Lawsuit Claims AOL 5.0 Blocks Rival Services*, CNET NEWS.COM, Feb. 2, 2000, at <http://news.cnet.com/news/0-1005-200-1540024.html>; *Class-Action Suit Calls on AOL*, WIRED NEWS, Feb. 2, 2000, at <http://www.wired.com/news/print/0,1294,34063,00.html>.

275. *AOL Rules of User Conduct*, at <http://www.aol.com/copyright/rules.html> (last visited Aug. 25, 2000) [hereinafter *AOL Rules of Conduct*]; see also AOL Hometown, *Community Guidelines* (prohibiting users from using AOL Hometown to distribute certain content), at <http://hometown.aol.com/flanker.adp> (last visited Oct. 4, 2000).

276. *AOL.COM Terms and Conditions of Use*, at <http://www.aol.com/copyright.html> (last visited Aug. 25, 2000) [hereinafter *AOL Terms of Use*]; see also *AOL Rules of Conduct*, *supra* note 275 (noting its ability to “pre-screen, monitor, or edit” content posted by users); Prodigy.com, *Terms of Use* (noting that any communication or material transmitted to Prodigy.com is considered nonconfidential and nonproprietary, and may be used by Prodigy for any purpose), at [http://prodigy.com/pcom/company\\_information/copyright.html](http://prodigy.com/pcom/company_information/copyright.html) (last visited Aug. 26, 2000) [hereinafter *Prodigy Terms of Use*].

277. *AOL Rules of Conduct*, *supra* note 275.

278. *AOL Terms of Use*, *supra* note 276; see also *Prodigy Terms of Use*, *supra* note 276 (“Prodigy is free to use any ideas, concepts, know-how, or techniques contained in any communication you send to the Site for any purpose whatsoever . . .”).

279. See *supra* notes 207-215 and accompanying text.

B. *Three Methods for Analyzing ISPs Under the First Amendment*

In light of the different functions and services provided by ISPs, three approaches for analyzing the First Amendment claims of ISPs are possible: categorical, functional, and editorial. Each has substantive roots in existing First Amendment law, and all three have been applied in other contexts. The differences between these methodologies reflects how each weighs the competing values at stake in open access. Before we can determine which approach, if any, is called for under the First Amendment, a determination must be made as to the First Amendment significance of those values. A detailed discussion of that question, however, is beyond the scope of this Article.

1. The Categorical Approach

The categorical approach treats ISPs as speakers for all purposes.<sup>280</sup> The basis for this approach is an ISP's ownership and ultimate power to control its networks.<sup>281</sup> In other words, an ISP's ownership and control of its networks would be treated as the equivalent of the ownership and editorial control of newspaper publishers, without any corresponding limitation due to the means of dissemination or the type and source of information disseminated.<sup>282</sup> The fact that the services of an ISP may be divided into distinct functions such as telecommunications services, e-mail, access to the World Wide Web, and presentation of original content, is subordinated to the ISP's ownership and control of its network. Justice Thomas proposed a similar approach in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, when he argued that a cable operator's right to decide what programming to carry over its network is "preeminent."<sup>283</sup> The categorical approach would justify

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280. While it is theoretically possible to argue for a categorical approach that would strip ISPs of all First Amendment rights, given that most ISPs do in fact provide content and exercise editorial control over what is made available on their networks, such an approach would be inherently inconsistent with the First Amendment.

281. *Cf. CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1017 (S.D. Ohio 1997) (holding that an online service provider could sue the transmitter of unsolicited e-mail advertisements for trespass to personal property); *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 437 (E.D. Pa. 1996) (holding that a private online company may block unsolicited e-mail advertisements from reaching its privately owned e-mail server); *supra* notes 218, 274-278 and accompanying text.

282. See generally *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (discussing a newspaper publisher's control of the content of the newspaper and its First Amendment protection).

283. 518 U.S. 727, 816 (1996) (Thomas, J., dissenting in part). According to Justice Thomas, a cable operator, as the owner of the property, is in the same position as the owner of a bookstore, and is entitled to the same First Amendment protection. *Id.*

the ISP's corresponding power to privately censor or restrict speech on its network because no single ISP has the power to reduce speech over the Internet as a whole.<sup>284</sup> Given the Supreme Court's current reluctance to adopt an absolutist approach to new technology, however, it appears unlikely that it would adopt such an approach with respect to the Internet.<sup>285</sup> Furthermore, a weakness of the categorical approach is its dependence upon the factual predicate that Internet users have alternative means of accessing the Internet to alleviate concerns over private censorship.<sup>286</sup>

## 2. The Functional Approach

In contrast, the functional approach would conceptually sever the services offered by ISPs and assign fixed First Amendment rights and duties to each distinct Internet service.<sup>287</sup> The functional approach would distinguish between services in which the ISP can be treated as a mere conduit for the speech of others and those in which the ISP can be considered the speaker. For example, with respect to the transmission of data through the underlying network, e-mail, and World Wide Web access, ISPs could be treated as computer-mediated common carriers, and prohibited from exercising editorial control over these services.<sup>288</sup> In contrast, ISPs as website publishers would be

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284. See *supra* notes 155, 216-218, 241-243 and accompanying text.

285. See *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 741-42 (plurality opinion) (declining to make a "definitive choice among competing analogies (broadcast, common carrier, bookstore)" or "to declare a rigid single standard, good for now and for all future media and purposes"); *id.* at 768 (Stevens, J., concurring) ("[I]t would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this.").

286. See *supra* text accompanying notes 201-220.

287. See Philip H. Miller, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 *FORDHAM L. REV.* 1147, 1198-99 (1993); see also Hammond, *supra* note 59, at 212-13, 216-17 (discussing channel functionalism, which "allow[s] the government to regulate the use of channels or transmission paths based on the type of information transmitted," and operational functionalism, which separates the transmission medium and the message transmitted, regulating the former and not the latter); Timothy Wu, *Application-Centered Internet Analysis*, 85 *VA. L. REV.* 1163 (1999) (arguing that the First Amendment analysis should vary depending upon the application involved).

288. See Harold Feld, *Whose Line Is It Anyway? The First Amendment and Cable Open Access*, 8 *COMMLAW CONSPECTUS* 23, 24 (2000) (arguing that cable ISPs should be treated as common carriers); *cf.* *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 n.9 (1979) (noting that a "cable system may operate as a common carrier with respect to a portion of its service only"); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.").

given full First Amendment protection.<sup>289</sup> In exchange for the ISP's loss of editorial control over services like e-mail, legislatures or courts could correspondingly immunize ISPs from certain liabilities arising from the regulated services.<sup>290</sup> However, unless ISPs agree to these limitations,<sup>291</sup> the functional approach requires either a judicial determination that ISPs categorically have no First Amendment rights with respect to the regulated services, or that legislative efforts restricting the rights of ISPs satisfy heightened scrutiny.

### 3. The Editorial Approach

Like the functional approach, the editorial approach also conceptually severs the services offered by ISPs. Unlike the functional approach, in which First Amendment rights and duties would be fixed depending upon the particular function, under the editorial approach, the extent of First Amendment protection would vary depending upon whether the ISP actually exercised editorial control over the particular service in question.<sup>292</sup> The decision whether to provide certain

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289. See Hammond, *supra* note 59, at 216 (stating that, under operational functionalism, the act of creating or editing messages would enjoy full First Amendment protection).

290. This is in part the approach adopted by Congress in the Communications Decency Act (CDA) which states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” 47 U.S.C. § 230(c)(1) (Supp. III 1997), because ISPs offer “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” *Id.* § 230(a)(3). See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”). See also Hammond, *supra* note 59, at 221, who argues that public fora could be created by

extending the limited liability protections currently enjoyed by common carriers to the providers of broadband public fora. Limitations on liability would include the absence of responsibility or liability for the speech of any user of the forum and a limitation of liability for service failures to the charge made for the service provided.

The CDA, however, also immunizes ISPs even when they exercise editorial control over content created by third parties, see *Zeran*, 129 F.3d at 331 (“Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services.”), creating a dangerous incentive for private censorship.

291. See Caruso, *supra* note 2 (discussing the need for industry cooperation with government in establishing public policy with respect to broadband networks).

292. In *Miami Herald Publishing Co. v. Tornillo*, the Court discussed the issue with respect to newspapers:

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.

services or functions would not be treated as an exercise of editorial discretion under this approach. Otherwise, the editorial approach would be no different than the categorical approach. Instead, decisions to offer a particular communication service would be treated as an economic decision similar to decisions to offer telephony, three-way calling, or call waiting.<sup>293</sup> Under this approach, if an ISP desired to edit the content of e-mail or limit the pages that Web surfers could access and thus become to some degree responsible for the content of those services, it would be entitled to heightened First Amendment protection.<sup>294</sup> Correspondingly, if an ISP refrains from exercising editorial control over services such as e-mail, its First Amendment rights would diminish along with its liability for the content provided by others.<sup>295</sup> The choice would be the ISP's. Ultimately, this approach is based upon the conclusion that the exercise of editorial control over a computer network, as opposed to control in general, represents protected speech. Like the categorical approach, however, the editorial approach raises the specter of private censorship.

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418 U.S. 241, 258 (1974). By focusing upon the editorial control of an ISP, this approach differs from attempts to impose public/private fora doctrine upon new technologies by determining whether the network owners have opened up their property for expressive purposes and to what extent they may be exercising monopoly power. See Hammond, *supra* note 59, at 217-23 (arguing that the public forum doctrine is the appropriate means for analyzing the claims of broadband providers).

293. See *Universal Serv. Report*, 13 F.C.C.R. 11,501, 11,530, ¶ 60 (1998) (stating that a local exchange carrier's decision to provide an information-storing service such as voice mail does not change its status from a telecommunications provider to an information service provider).

294. In *Blumenthal v. Drudge*, the district court recognized that AOL has the right "to exercise editorial control over those with whom it contracts with and whose words it disseminates," hence it "is not a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility for what is said over the telephone wires." 992 F. Supp. 44, 51 (D.D.C. 1998). Thus, "it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor." *Id.* at 51-52; see *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*5 (N.Y. Sup. Ct. May 24, 1995) (holding that Prodigy should be held to strict liability as an original publisher of defamatory material because it advertised its practice of controlling the content on its service and because it actually screened and edited messages on its bulletin board).

295. See *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991) (treating an ISP as a distributor of publications under defamation law because it had "little or no editorial control over [the] contents"). In contrast to the CDA, see *supra* note 290, this appears to be the approach adopted by Congress in the Online Copyright Infringement Liability Limitation Act, in which online service providers are immune from claims of copyright infringement as long as they do not exercise any control over the infringing material. See 17 U.S.C. § 512(a) (Supp. IV 1998); see also *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 541-42 (N.Y. 2000) (holding that Prodigy could not be held liable for defamatory e-mail or bulletin board messages when it did not exercise any editorial control over the content).

C. *Severance and Open Access: What's Good for the Goose Is Good for the Gander*

While the FCC could avoid unbundling the various Internet services and treat ISPs as an information service under the Telecommunications Act,<sup>296</sup> a distinct choice must be made with respect to the First Amendment. Accordingly, before any effort to impose access requirements upon ISPs can be considered constitutional, a decision must be made as to how ISPs are to be treated under the First Amendment. With respect to open access, the decision leads to a First Amendment catch-22. If we adopt the categorical approach, open access is inconsistent with the First Amendment for the reasons set forth in Part IV.<sup>297</sup> If instead, we adopt the functional or editorial approach and conclude that cable systems are not speakers with respect to the information carried through their property,<sup>298</sup> then competing ISPs are stripped of any free speech claims as well. While competing ISPs may claim that the vertical integration of broadband providers with ISPs, such as TCI and @Home, may raise antitrust concerns by reducing the ability of ISPs to compete for the opportunity to provide Internet access,<sup>299</sup> they cannot argue that it limits their ability to speak.

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296. See *supra* Part III.A. The FCC's conclusion that ISPs are not common carriers subject to Title II requirements does not address whether the enhanced services provided by ISPs actually represent speech on the part of ISPs.

297. See *supra* Part IV.B.

298. See *supra* notes 261-296 and accompanying text. Such a conclusion effectively turns cable ISPs' claims into property claims, as opposed to First Amendment claims.

299. See *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1150 (D. Or. 1999), *rev'd*, 216 F.3d 871 (9th Cir. 2000); *Transfer Order*, 14 F.C.C.R. 3160, 3197-98, ¶ 75 (1999).

The arrangement between AT&T and @Home represents in the language of antitrust, a potential vertical restraint of trade. "An economic relationship is "vertical" where it links two markets in the same chain of manufacture and distribution, usually through the linkage of two firms that either do or could stand in the relationship of supplier and customer." ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 99-100 (3d ed. 1992). The Supreme Court has recognized, however, that vertical agreements that do not restrain prices have "potential for . . . stimulation of interbrand competition." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 (1988). In fact, the Court has stated:

[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. If the restraint stops at that point—if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.

*United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967). Accordingly, the existence of alternative sources of broadband communication capable of competing with cable would mitigate if not undermine any antitrust claim.

In general, First Amendment concerns with respect to access to private property are limited to the public's ability to disseminate and receive information against the wishes of the property owner.<sup>300</sup> The issue is determining when private property owners, such as mall owners, can be forced to allow the public to use their property for expressive purposes.<sup>301</sup> Under certain circumstances, the Supreme Court has recognized that free speech concerns may outweigh a property owner's right to control the use of his or her property.<sup>302</sup> However, any approach that conceptually severs the various services and functions provided by cable ISPs into speaking and nonspeaking elements must necessarily sever the functions and services of the ISPs seeking access as well. In so doing, competing ISPs are stripped of any claims that the First Amendment entitles them to a right of access. As discussed above, given the architecture of the Internet, competing ISPs are not seeking access in order to speak.<sup>303</sup> Furthermore, competing ISPs have access to alternative means for delivering their messages to the Internet, and their speech is readily accessible over the Internet and through the cable networks.<sup>304</sup> Instead, competing ISPs

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300. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-25, at 998-1010 (2d ed. 1988) (examining the free speech rights of the public in private forums); David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway*, (*Where Are the Public Forums on the Information Superhighway?*) 46 HASTINGS L.J. 335, 350-54 (1995) (discussing whether the private networks of the Internet could be considered public forums); David Ehrenfest Steinglass, *Extending Pruneyard: Citizens' Right to Demand Public Access Cable Channels*, 71 N.Y.U. L. REV. 1113, 1114-15 (1996) (arguing that the public forum doctrine should be extended to cable television in order to provide the public with an opportunity to speak through cable); Noah D. Zatz, Comment, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 151-52 (1998) (arguing that the First Amendment requires the creation of spaces in Cyberspace where public speech can occur).

301. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77-101 (1980) (analyzing whether state recognition of the free speech rights of mall patrons violated the U.S. Constitution); *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 445-47 (E.D. Pa. 1996) (analyzing whether a commercial transmitter of unsolicited e-mail advertisements had a free speech right to reach the members of AOL through AOL's privately owned e-mail server).

302. See *PruneYard*, 447 U.S. at 83 (holding that states may recognize the public's right to speak in a private mall without violating the mall owners' federally protected property rights because the shopping center was a commercial establishment spanning several city blocks and was "open to the public at large"); *Cyber Promotions*, 948 F. Supp. at 445-47 (rejecting claim that a commercial transmitter of unsolicited e-mail advertisements had a free speech right to reach the members of AOL through AOL's privately owned e-mail server because "AOL has never presented its e-mail servers to the public at large for dissemination of messages"); *N.J. Coalition Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 766-68 (N.J. 1994) (noting that "shopping centers . . . have in fact significantly displaced downtown business districts as the gathering point of citizens").

303. See *supra* notes 155, 216-218, 241-243 and accompanying text.

304. See *supra* notes 155, 216-218, 226-236, 241-243 and accompanying text.

are seeking access to cable networks in order to sell the public broadband access to the Internet.<sup>305</sup> In other words, competing ISPs are not attempting to make their speech available to customers, they are seeking to become broadband conduits themselves by using the property of cable companies.<sup>306</sup>

The following hypothetical illustrates why open access does not implicate the First Amendment rights of noncable ISPs. Assume that in Washington, D.C. the only way for speakers to get to and from Congress is by automobile, and while it is possible to drive your own car to Congress, it is currently prohibitively expensive. While the members of Congress have their own personal car services and large corporations have limousines for their executives, most people rely upon taxis to take them to and from Congress. Aside from the investment, there are no barriers to becoming a taxi driver. As a result, speakers have a choice of taxis to take them to their speaking engagements, each with its own advantages and disadvantages: some taxis are newer, some are faster, some are larger, some bombard their passengers with advertisements, others leave the passenger alone, some are more expensive, and some even offer their services for free. Open access does not seek to require all of these taxis to transport people to Congress on a nondiscriminatory basis, or to carry indigent speakers for free, or to give competitors an opportunity to speak to their passengers while in transit. Arguably, each of these efforts may be seen as an attempt to protect or improve free speech on Capitol Hill by limiting the property rights of the taxi owner.<sup>307</sup> Instead, open access is an effort to force some taxi drivers to share their taxis with competing drivers simply because they are faster. Substitute the Internet for Congress and ISP networks for taxis, and the analogy is complete. Again, while this may raise concerns about competition in

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305. See *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1150 (D. Or. 1999), *rev'd*, 216 F.3d 871 (9th Cir. 2000); *Transfer Order*, 14 F.C.C.R. 3160, 3197-98, ¶ 75 (1999).

306. As such, open access may represent an unconstitutional taking of property under the Fifth Amendment to the U.S. Constitution, see U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”), and unlike the Supreme Court’s decision in *PruneYard*, 447 U.S. at 82-84, open access would not be justified as an effort to protect the free speech of the ISPs seeking access.

307. Cf. 47 U.S.C. § 315 (1994) (requiring broadcasters to make equal time available to candidates for political office); *PruneYard*, 447 U.S. at 82-85 (holding that states may limit private property owners’ rights to exclude individuals seeking to speak on their property); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387-90 (1969) (upholding the fairness doctrine which required broadcasters to carry the response of individuals responding to a personal attack); *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 962 (D.C. Cir. 1996) (upholding the requirement that cable companies set aside channels for public, educational, or governmental programming).

the Internet service market, it does not raise any countervailing First Amendment claims. Open access for competing ISPs, therefore, cannot be justified by principles of free speech.

## VI. CONCLUSION

We are poised on the brink of what many are calling the second industrial revolution—the Internet revolution.<sup>308</sup> Even though the Internet has already begun to transform how we communicate, do business, entertain ourselves, and obtain information, it is only the beginning. And while many of us may feel as though we are already left behind by the rapid advances in computer and telecommunications technology, we may take solace in the fact that the law is often even further behind. In our effort to catch up to technology, however, we must take care. In this Article, I have attempted to demonstrate that we must not rush to judgment in our effort to fit the Internet and its players into preexisting conceptual boxes. This is especially true when dealing with policies such as open access that have the potential to affect free speech in the “most participatory form of mass speech yet developed.”<sup>309</sup>

As this Article demonstrates, Internet service providers play an important and complex role in connecting the public to the Internet.<sup>310</sup> They simultaneously provide the public with access to e-mail, the World Wide Web, content of their own creation, and the underlying telecommunications networks that transport all of that information.<sup>311</sup> Furthermore, the complexity of Internet service will only increase in the future as the currently disparate media (i.e., print, radio, broadcast, and cable) converge, making the Internet the principal medium for the delivery of all digital information.<sup>312</sup> Given the various services and functions performed by ISPs, evaluating their First Amendment claims is no simple matter. While I have outlined three potential approaches to analyzing those claims (i.e., categorical, functional, and editorial), Professor Lessig may be right when he suggests that, ultimately, in some areas of cyberspace, the Constitution may not dictate any particular approach, and we will have to choose which path to take.<sup>313</sup>

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308. See INFORMATION INFRASTRUCTURE TASK FORCE, *supra* note 12, at 1.

309. *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J., concurring).

310. See *supra* Part II.

311. See *Universal Serv. Report*, 13 F.C.C.R. 11,501, 11,536-38, ¶¶ 73-76 (1998).

312. See Hammond, *supra* note 59, at 215.

313. See LESSIG, *supra* note 32, at 211-12 (“[T]he words of the framers will not carry us far in making the necessary choices. Where translation gives out, a choice must be made.”).

However, regardless of which approach we eventually choose for evaluating the First Amendment rights of ISPs, supporters of open access are caught in a First Amendment catch-22. Under the approaches outlined above, open Internet access is either inconsistent with or unsupported by principles of free speech.