

cost forty dollars a month, plus one hundred dollars for installation.⁷⁴ ISDN lines cost between ninety and one hundred sixty dollars to install, and between thirty and fifty dollars a month for service.⁷⁵ DSL access costs approximately fifty dollars per month for data speeds of 1.5 Mbps, or up to one hundred eighty dollars per month for 6 Mbps, plus an installation fee of two hundred dollars.⁷⁶ Land-based wireless services capable of speeds up to 1.5 Mbps cost approximately two hundred dollars for installation and fifty dollars per month.⁷⁷ As such, accessing the Internet at home is by no means cheap, and faster service comes at a significantly higher price, if it is available at all.⁷⁸

Given the cost, what do these differences in speed mean in practical terms? The bandwidth available to a residential user influences both Internet performance and function.⁷⁹ In short, downloading the latest version of AOL with a traditional telephone line and 56 Kpbs modem takes approximately one hour.⁸⁰ In contrast, with a high-speed T1 line or cable modem running at 1.5 Mbps, it would only take two minutes to download the same software.⁸¹ The speed of data transmission translates, therefore, into the amount of time someone must spend on-line to perform even the simplest of functions such as retrieving e-mail. Additionally, bandwidth translates into more types of informational services practically available to the residential user.⁸² At slower rates of transmission, while it is possible to change webpages, download video and music, or watch streaming programming, the process can be painfully slow, making it either unappealing or practically impossible.⁸³ In contrast, the high-speed data transmission promised by cable and other services makes it possible for information providers to deliver true multimedia

74. See *Advanced Servs. Report*, 14 F.C.C.R. at 2444 chart 3 (totaling \$593 in the first year); Clark, *supra* note 73, at 153.

75. See *Advanced Servs. Report*, 14 F.C.C.R. at 2444 chart 3 (totaling \$1,385 in the first year); Pacific Bell, *Personal ISDN* (2000), at http://www.pacbell.com/Products_Services/Residential/ProdInfo_1/1,1973,123-3-,00.html (last visited Oct. 1, 2000).

76. See *Advanced Servs. Report*, 14 F.C.C.R. at 2444 chart 3 (totaling \$960 in the first year); SBC Global Network, *Digital Subscriber Line* (2000), at <http://www.pacbell.com/DSL/content/1,2546,11,00.html> (last visited Oct. 1, 2000).

77. See *Advanced Servs. Report*, 14 F.C.C.R. at 2444 chart 3 (totaling \$1,700 in the first year).

78. See *id.* As discussed previously, some services do provide free Internet access through traditional telephone lines. See *supra* note 53.

79. See Clark, *supra* note 73, at 153.

80. *Id.*

81. *Id.*

82. See *Advanced Servs. Report*, 14 F.C.C.R. at 2401, 2406, ¶¶ 3, 20.

83. See *id.* at 2406, ¶ 20 (noting that 200 Kbps is the minimum bandwidth necessary for the most popular forms of broadband).

programming.⁸⁴ With high-speed access, individuals can change webpages as easily as changing channels on a television.⁸⁵ They can communicate with loved ones through telephony with audio and real-time video.⁸⁶ Broadband Internet access would permit us to watch the latest CNN report without purchasing a special video card, listen to radio stations outside their areas of service, or download the latest hit movie for home viewing in a matter of minutes.⁸⁷ In short, broadband technology has the potential to radically transform the ways in which we receive, send, and manipulate information.

C. *The "Last Mile"*

The major obstacle to universal broadband access is the physical connection linking the home to the network—what is commonly referred to as the “last mile.” The regional and national networks that provide Internet service already utilize broadband technologies.⁸⁸ Similarly, businesses have had no difficulty obtaining broadband service.⁸⁹ Residential users, however, are a different story. According to the Federal Communications Commission (FCC), “the connection to the consumer has historically been the least competitive, and most bandwidth-constrained, part of the communications network.”⁹⁰ This is in part due to the fact that wiring the “last mile” requires the modification of existing facilities or the construction of new ones.⁹¹ In 1997 alone, the cable industry reportedly spent six billion dollars to upgrade its systems for cable modems.⁹² Similarly, utilities in Boston, New York, Philadelphia, Washington, and San Francisco budgeted \$850 million to expand fiber-optic connections in 1998 and 1999.⁹³ Local exchange carriers have also invested billions of dollars in DSL and other broadband technologies.⁹⁴ In addition to the cost, the delay in providing residential users with broadband access can also be attributed to the fact that “the Bell System and independent telephone

84. *See id.* at 2401, ¶ 3 (stating that high-speed data transmission allows for real time video); *id.* at 2406, ¶ 20 (stating that high-speed access would allow the transmission of full motion video).

85. *Id.* at 2401, ¶ 3.

86. *Id.*

87. *See id.*; *Transfer Order*, 14 F.C.C.R. 3160, 3192, ¶ 63 (1999).

88. Bickerstaff, *supra* note 35, at 58.

89. *Advanced Servs. Report*, 14 F.C.C.R. at 2403, 2408, ¶¶ 11, 26.

90. *Id.* at 2404, ¶ 13.

91. *Id.* at 2414, ¶ 34.

92. *Id.* at 2418, ¶ 37.

93. *Id.* at 2418, ¶ 40.

94. *Id.* at 2418-19, ¶¶ 41-42.

companies had no incentive [under existing regulations] to incur the significant cost of upgrading the local network[s].”⁹⁵

III. THE REGULATORY CONTEXT

Conventional wisdom tells us that the Internet arose in the absence of government regulation, but that belief is more myth than reality.⁹⁶ The Internet as we know it did not evolve in a regulatory void or modern day state of nature. Instead, the Internet is what it is today largely because of government regulation. As Professor Bickerstaff explains, the current structure of the Internet—comprised of personal computers, ISPs, and the tens of thousands of loosely connected networks—was a result, in part, of federal policies preventing AT&T and, after its break-up, the Bell Operating Companies, from creating a computer utility.⁹⁷ A computer utility would provide users with data processing, storage, retrieval, and information services without the need to purchase an expensive home computer by allowing the user to remotely access the utility’s centralized computers.⁹⁸ “In effect, the FCC directly and indirectly went about creating a regulatory structure that, despite numerous intervening decisions over almost thirty years, still shapes the computer services marketplace and effectively subsidizes public use of the Internet.”⁹⁹ Any discussion of whether ISPs can be required to provide competing ISPs with access to their networks, therefore, would be incomplete without considering whether such access is permissible under the current statutory and regulatory regime. The following Part examines the relevant FCC decisions with respect to ISPs in general, and access to cable ISPs in particular, and demonstrates that the FCC has refused to regulate ISPs as common carriers or to impose special obligations upon cable ISPs.

95. Bickerstaff, *supra* note 35, at 58. As discussed *infra* notes 96-110 and accompanying text, the Bell Operating Companies were denied the opportunity to furnish computer services that required broadband access and had no incentive to make broadband available to the general public when it “could be used by a nonregulated firm to furnish the computer services denied to the Bell System and to transmit communications in competition with the Bell System.” Bickerstaff, *supra* note 35, at 58.

96. See generally Bickerstaff, *supra* note 35 (discussing the regulatory decisions that influenced the development of the Internet); Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPPECTUS 37 (1999) (examining the FCC’s regulation of telecommunications, cable, and Internet service).

97. Bickerstaff, *supra* note 35, at 13-19.

98. See *id.* at 4.

99. *Id.* at 6.

A. *ISPs and Common Carrier Status*

In several key decisions over the last thirty years, the FCC has consistently concluded that providers of services such as Internet service should not be treated as common carriers.¹⁰⁰ This trend began with the FCC's initial inquiry into the relationship between computers and communications, commonly referred to as *Computer I*.¹⁰¹ In *Computer I*, the FCC distinguished data processing services and communication services, leaving the former unregulated because it was essentially competitive.¹⁰² This position led directly to the conclusion that the Bell Systems would be prevented from providing data processing services, and indirectly to the conclusion that data processing services are not common carrier services.¹⁰³ The reason will soon become clear. As part of a 1956 consent decree, the Bell Systems agreed to limit themselves to providing "regulated common carrier services."¹⁰⁴ By concluding that data processing service would not be regulated, the FCC "acknowledged that it was simultaneously deciding that the Bell System would be barred from providing such services."¹⁰⁵ In other words, the FCC decided that data processing services are not regulated common carrier services.

The distinction between data processing services and communications services was subsequently refined by the FCC in its

100. In communications law, common carriers are businesses that make "a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (alteration in original) (quoting *Indus. Radiolocation Serv.*, 5 F.C.C.2d 197, 202 (1966) (report & order)). In other words, a common carrier holds itself "out indiscriminately to the clientele [it] is suited to serve." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976). More importantly, common carriers "receive the lowest level of First Amendment protection by definition, for they do not have a recognized right to speak on their own and are denied editorial control over their communication traffic." HARVEY L. ZUCKMAN ET AL., 1 MODERN COMMUNICATION LAW § 2.3, at 211 (practitioner's ed. 1999).

101. See *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communication Servs. & Facilities*, 28 F.C.C.2d 291 (1970) (tentative decision) [hereinafter *Tentative Computer I*]; *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communication Servs. & Facilities*, 28 F.C.C.2d 267 (1971) (final decision) [hereinafter *Computer I*].

102. See *Tentative Computer I*, 28 F.C.C.2d at 297-98, ¶¶ 20-21; Bickerstaff, *supra* note 35, at 14-15.

103. See *Tentative Computer I*, 28 F.C.C.2d at 298-301, ¶¶ 24-29; Bickerstaff, *supra* note 35, at 14-15.

104. *Tentative Computer I*, 28 F.C.C.2d at 298-99, ¶ 24; Bickerstaff, *supra* note 35, at 14.

105. Bickerstaff, *supra* note 35, at 15; see also *Tentative Computer I*, 28 F.C.C.2d at 298-99, ¶ 24 (recognizing that the Bell Systems would be barred from providing data processing services).

historically translates into low-cost, flat rate service instead of the usage-sensitive access fees charged to other access providers, such as long distance companies.¹¹⁴ This means that local telephone companies provide ISPs and their customers with local connections "at a cost that is probably less than would be justified based on actual usage."¹¹⁵ The FCC continues to maintain this position as a means of fostering the growth of the Internet, despite arguments that data transmissions involve longer connection times, that they cause congestion on the telephone network, and that the rate structure represents an unconstitutional taking of property.¹¹⁶

Following the Telecommunications Act of 1996, the FCC continued to consider ISPs enhanced or information services, rather than basic or telecommunications services.¹¹⁷ The Commission maintained this position despite arguments that Internet access providers often do nothing more than allow their subscribers to transmit and receive information.¹¹⁸ For example, Senators Stevens and Burns suggested that when ISPs transmit e-mail messages, they are simply transmitting "information of the user's choosing, without change in the form or content of the information as sent or received."¹¹⁹ Under those circumstances, the Senators argued that ISPs are merely conduits for other people's information, and should, therefore, be presumptively treated as a telecommunications service.¹²⁰

The conclusion that Internet access is an information service rather than a telecommunications service has important consequences under the 1996 Act. At stake in the Universal Service Report was whether providers of Internet access would be required to contribute to the Universal Service Fund, which is used to ensure affordable,

114. See *MTS & WATS Mkt. Structure*, 97 F.C.C.2d 682, 685, ¶¶ 75-83 (1983) (mem. op. & order); *Amendments of Part 69 of the Comm'n's Rules Relating to Enhanced Serv. Providers*, 3 F.C.C.R. 2631, 2633, ¶¶ 17, 20 (1988) (order); see also Bickerstaff, *supra* note 35, at 49-50; Esbin, *supra* note 96, at 76-77.

115. Bickerstaff, *supra* note 35, at 50.

116. See *Access Charge Reform; Price Cap Performance Review for Local Exch. Carriers; Transp. Rate Structure & Pricing; End User Common Line Charges*, 12 F.C.C.R. 15,982 (1997) (upholding the exemption of ISPs from usage sensitive charges); see also Bickerstaff, *supra* note 35, at 50-51 (noting the FCC's policy and the complaints of local exchange carriers); J. Gregory Sidak & Daniel F. Spulber, *Cyberjam: The Law and Economics of Internet Congestion of the Telephone Network*, 21 HARV. J.L. & PUB. POL'Y 327, 329-30, 362, 371 (1998) (discussing the arguments in favor of local exchange carriers).

117. *Universal Serv. Report*, 13 F.C.C.R. at 11,532-33, ¶ 66.

118. The FCC distinguished between "(1) end users; (2) access providers; (3) application providers; (4) content providers; and (5) backbone providers," and recognized that many companies fall into more than one category. *Id.* at 11,531, ¶ 62.

119. *Id.* at 11,536, ¶ 73.

120. *Id.*

national telephone service.¹²¹ Under the 1996 Act, telecommunications services must contribute either directly or indirectly, while information services are exempt from contributions.¹²² More importantly, the classification of ISPs as information services rather than telecommunications services is significant because the 1996 Act presumes that providers of telecommunications services should be treated as common carriers.¹²³ Accordingly, by classifying ISPs as information services, the FCC concluded that they should not be treated as common carriers under federal law.¹²⁴ While the FCC could have concluded that ISPs are telecommunications services and still exercised its discretion to exempt ISPs from common carrier obligations,¹²⁵ it chose not to do so.¹²⁶ If it had concluded that Internet access is a telecommunications service, ISPs could have become subject to state common carrier regulations.¹²⁷

In concluding that Internet access providers should not be treated as telecommunications services, the FCC employed a functional approach toward distinguishing telecommunications services from information services by carefully examining each element of the Internet service package.¹²⁸ According to the Commission, a service is considered a telecommunications service if the user can receive nothing more than pure transmission.¹²⁹ If the user can manipulate information or interact with stored data, the service is deemed an information service.¹³⁰ Internet access is treated as an information or

121. *Id.* at 11,505-07, ¶¶ 8-12.

122. *Id.* at 11,509, ¶ 16.

123. *See* 47 U.S.C. § 153(44) (Supp. III 1997) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . .").

124. *See Universal Serv. Report*, 13 F.C.C.R. at 11,538-39, ¶ 78; Bickerstaff, *supra* note 35, at 32.

125. *See* 47 U.S.C. § 160(a) (Supp. III 1997) (providing the FCC with the authority to "forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service" if in the public interest); *see also Universal Serv. Report*, 13 F.C.C.R. at 11,525, ¶ 47 ("Notwithstanding the possibility of forbearance, we are concerned that including information service providers within the 'telecommunications carrier' classification would effectively impose a presumption in favor of Title II regulation of such providers. Such a presumption would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act.").

126. *See Universal Serv. Report*, 13 F.C.C.R. at 11,525, ¶¶ 47-48.

127. *See id.* at 11,525, ¶ 48 ("The classification of information service providers as telecommunications carriers, moreover, could encourage states to impose common-carrier regulation on such providers.").

128. *See id.* at 11,530, ¶ 59.

129. *Id.* ("[I]f the user can receive nothing more than pure transmission, the service is a telecommunications service.").

130. *Id.* ("If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.").

enhanced service because an ISP provides the user with more than a simple transmission path.¹³¹ Internet access users are given a variety of applications, such as e-mail, Web browsing, and Usenet newsreaders, as well as advanced capabilities including data manipulation and storage.¹³² While the service includes data transport, according to the FCC, the data transport is inextricably intertwined with information processing.¹³³

In contrast, the FCC carefully distinguished Internet access providers from the technologies used to carry their informational services. In so doing, the FCC recognized that an ISP's "underlying inputs" constitute telecommunications services.¹³⁴ After all, "Internet access, like all information services, is provided 'via telecommunications.'" ¹³⁵ For example, the provision of leased lines to ISPs and the operation of backbone facilities would be considered telecommunications services, subject to common carrier obligations, even though they are being provided for Internet service.¹³⁶ The fact that informational services are being carried on the links does not change their function.¹³⁷ As most ISPs do not own the lines that connect their networks, this conclusion does not bother them because they are not directly involved in the provision of telecommunications services.¹³⁸

What happens when, as in the case of cable and eventually other broadband technologies, the ISP owns the underlying telecommunications facilities and does not open those facilities to the general public? According to the FCC, the underlying facilities are

131. *Id.* at 11,504, ¶ 7.

132. *Id.* at 11,537-40, ¶¶ 76-80 (describing services provided by Internet access providers).

133. *Id.* at 11,539-40, ¶ 80 (explaining that, while "an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact[,] the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport").

134. *See id.* at 11,533, ¶ 66 ("[T]o the extent that any of their underlying inputs constitutes interstate telecommunications, we have authority under the 1996 Act to require that the providers of those inputs contribute to federal universal service mechanisms."). In arguing that cable-based Internet access should be considered an information service, Duffy misses the important distinction that, while Internet access is an enhanced service, the underlying data transmission may still be considered a telecommunications service. *See Duffy, supra* note 11, at 1262-75.

135. *Universal Serv. Report*, 13 F.C.C.R. at 11,533, ¶ 68.

136. *See id.* at 11,533, 11,535, ¶¶ 67-68, 71 (noting that the provision of leased lines and backbone services to ISPs constitutes a provision of interstate telecommunications).

137. *See id.* at 11,529, 11,533-34, ¶¶ 57, 67-68.

138. *See id.* at 11,532-33, ¶¶ 66-67.

clearly telecommunications services.¹³⁹ The ISP is simply providing that “transmission capacity to itself,” or its exclusive partner.¹⁴⁰ This does not mean, however, that the ISP should be treated as a telecommunications provider. The FCC’s focus is on the function or service offered by the provider to others.¹⁴¹ While the FCC notes that this conclusion should be subject to further evaluation, currently, the key question remains: What is the core of the business?¹⁴² Under this approach, as long as the ISP is providing telecommunications services as a non-common carrier, the FCC does not treat the ISP as a telecommunications service provider.¹⁴³ The underlying assumption is that unless a company is in the business of providing telecommunications services to the public, those services simply support the information services.¹⁴⁴ This conclusion is significant given that common carriers such as incumbent local exchange carriers are subject to “interconnection, unbundling, and resale requirements” that mandate access for competing ISPs.¹⁴⁵ Accordingly, most, if not all, of the private networks that form portions of the Internet do not have an obligation to provide telecommunications services to anyone seeking to use their networks.¹⁴⁶ As the preceding demonstrates,

139. See *id.* at 11,534, 11,535, ¶¶ 69 n.138, 71.

140. *Id.* at 11,534, ¶ 69.

141. See *id.* at 11,534, ¶ 69 n.138 (“When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications. That conclusion, however, speaks only to the relationship between the facilities owner and the information service provider (in some cases, the same entity); it does not affect the relationship between the information service provider and its subscribers.”).

142. See *id.* at 11,534-35, ¶¶ 69-70.

143. See *id.*; see also *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-02 (1979) (discussing the cable system’s classification as a common carrier); *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 640-42 (D.C. Cir. 1976) (discussing the statutory definition of common carrier).

144. As recognized by the D.C. Circuit:

This does not mean a given carrier’s services must practically be available to the entire public. One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier’s capacity has been exhausted. But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.

Nat’l Ass’n of Regulatory Util. Comm’rs, 525 F.2d at 641.

145. See *Transfer Order*, 14 F.C.C.R. 3160, 3147-48, ¶ 75 (1999); see also *supra* note 109 and accompanying text (quoting the FCC’s declaration of these requirements in *Computer II*).

146. This conclusion applies to the provision of telecommunications services and whether ISPs should be considered common carriers. See *Universal Serv. Report*, 13 F.C.C.R. at 11,524-26, ¶¶ 46-48. Whether ISPs are public accommodations, prohibited from certain forms of discrimination, may well be a different issue. See *AOL Is “Public*

believing that the markets for Internet service in general and broadband service in particular are essentially competitive, the FCC has consistently refused to impose common carrier obligations or access requirements upon ISPs.¹⁴⁷

B. The FCC and Open Cable Access

Not only is a policy of open access inconsistent with the existing statutory and regulatory regime in general, but, on two separate occasions, the FCC specifically rejected proposals to force cable companies to open their networks to competing ISPs. First, in the Advanced Services Report, the FCC was asked by companies such as AOL, Mindspring, and GTE, to give ISPs "rights of access to broadband systems operated by cable television companies."¹⁴⁸ In rejecting this request, the FCC observed that "the record, while sparse, suggests that multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers."¹⁴⁹ The FCC believed that open access was not necessary to ensure greater residential access to broadband, because competition among different technologies and facilities-based providers would occur.¹⁵⁰

Similarly, the FCC rejected the request that AT&T, in particular, be required to open its cable system.¹⁵¹ According to AOL, MCI WorldCom, and others, "AT&T-TCI (through @Home) 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 [telephone companies]) of broadband Internet access services to residential customers."¹⁵² In response, AT&T argued, *inter alia*, that: (1) the Internet service market in general is competitive, (2) open access could not be implemented due to the technical limitations of coaxial cable broadband networks, and (3) open access would likely delay the deployment of broadband services.¹⁵³ In rejecting open access, the FCC noted that, generally, the market for residential Internet access is quite competitive, and that the

Accommodation" Under ADA, Must Become Accessible to Blind, Suit Avers, 4 ELECTRONIC COM. & L. REP. 1027, 1027 (1999).

147. See *Computer I*, 28 F.C.C.2d 267, 273-74, ¶ 20 (1971) (final decision); *Computer II*, 77 F.C.C.2d 384, 496, ¶ 284 (1980) (final decision).

148. *Advanced Servs. Report*, 14 F.C.C.R. 2398, 2449, ¶ 100 (1999).

149. *Id.* at 2449, ¶ 101.

150. See *id.* at 2447, ¶ 94; see Grice, *supra* note 72 (describing alternative broadband technologies).

151. See *Transfer Order*, 14 F.C.C.R. 3160, 3207, ¶ 96 (1999).

152. *Id.* at 3197, ¶ 75.

153. See *id.* at 3198, ¶ 76.

market for broadband Internet access was or will be subject to significant competition from a “range of other distribution technologies.”¹⁵⁴ Moreover, the FCC found it important that even if an ISP did not enter into an arrangement with AT&T, customers of TCI@Home could, nonetheless, have access to those providers through the Internet.¹⁵⁵ In other words, there was no evidence that in the absence of open access requirements, any customers would be denied the “ability to access the Internet content or portal of his or her choice.”¹⁵⁶

C. *Some Conclusions*

So what does this all mean? First, under the existing federal regulatory regimes, ISPs are not considered regulated telecommunications providers subject to common carrier obligations under federal law.¹⁵⁷ As we will see later, this conclusion has important implications with respect to how the First Amendment is applied to ISPs because, unlike telephone service providers, there is a possibility that ISPs have First Amendment interests in their networks and the services they provide through those networks.¹⁵⁸ Second, it means that Portland and other municipalities are preempted from requiring cable companies to open their cable pipeline to competing ISPs.¹⁵⁹ While TCI@Home is not considered a telecommunications provider, the underlying cable facilities it utilizes clearly provide it with telecommunications services. Under the Telecommunications Act of 1996, local franchising authorities such as Portland are expressly prohibited from requiring a cable operator to “provide any telecommunications service or facilities.”¹⁶⁰ Lastly, consistent with these two conclusions, the FCC specifically refused to adopt a policy under existing law that would force cable companies to give competing ISPs a right of access, because there are or will soon be multiple alternative methods for providing broadband access.¹⁶¹ These

154. *Id.* at 3205-06, ¶¶ 93-94; see also Grice, *supra* note 72.

155. See *Transfer Order*, 14 F.C.C.R. at 3206-07, ¶¶ 95-96.

156. *Id.* at 3206, ¶ 96.

157. See *Universal Serv. Report*, 13 F.C.C.R. 11,501, 11,525, ¶ 47 (1998).

158. See *infra* Part V.

159. See 47 U.S.C. § 541(b)(3)(D) (Supp. III 1997).

160. *Id.*; accord *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-80 (9th Cir. 2000); cf. *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 714-16 (E.D. Va. 2000) (concluding that open access is preempted, but not because MediaOne Group is a telecommunications or cable service); Duffy, *supra* note 11, at 1262-75 (arguing that open access should be preempted as an information service).

161. See *supra* Part III.B.

decisions represent a clear federal policy against open access. This policy, however, is based upon the existing statutory and regulatory regime as interpreted by the FCC, and as such, is subject to change either by Congress or the FCC.¹⁶² The following Parts examine whether the First Amendment precludes such a policy shift.

IV. INTERNET SERVICE PROVIDERS AS SPEAKERS

In the United States, the First Amendment and state analogues represent our commitment to the value of free speech. As new technologies, such as the Internet, provide us with new means and forms of communication, we are forced to examine how these innovations fit within our existing value system.¹⁶³ In arguing that Portland's actions violate its First Amendment rights, AT&T assumes that cable ISPs are speakers and, thus, functionally equivalent to cable operators as purveyors of cable programming.¹⁶⁴ In making this assumption, AT&T relied upon the Supreme Court's conclusion that "[c]able 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."¹⁶⁵ In rejecting the First Amendment challenge, the *AT&T* court did not question either the assumption or conclusion that cable ISPs are entitled to First Amendment protection.¹⁶⁶ As the following discussion demonstrates, assuming that cable ISPs are speakers for First Amendment purposes is fatal to current efforts to require cable companies to open their networks to competing Internet service providers. Part V subsequently examines whether such an assumption is justifiable.

162. As of the publication of this Article, Congress was considering several bills that would require open access of cable and other broadband networks, including one that would designate cable systems as common carriers. See *supra* note 6. Likewise, the FCC is reconsidering the open access issue. See *supra* note 11.

163. See Ira Glasser, *The Struggle for a New Paradigm: Protecting Free Speech and Privacy in the Virtual World of Cyberspace*, 23 NOVA L. REV. 625, 628 (1999) ("[T]echnological advances always change the circumstances under which basic values exist, sometimes nourishing those values and sometimes threatening them."); LESSIG, *supra* note 32, at 114 (noting that one approach to constitutional interpretation is translation, which attempts to find "a current reading of the original Constitution that preserves its original meaning in the present context"); Sunstein, *supra* note 21, at 1759 (noting that "technological change promises to test the system of free expression in dramatic ways").

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

165. *Turner I*, 512 U.S. 622, 636 (1994).

166. See *AT&T*, 43 F. Supp. 2d at 1154.

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.¹⁶⁷ 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 1992.¹⁶⁸ 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.¹⁶⁹ 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.'"¹⁷⁰ 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.¹⁷¹ 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.¹⁷² 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.¹⁷³ In contrast, the dissent argued that

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.¹⁷⁴ 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."¹⁷⁵ Fortunately, for the purposes of this discussion, we need not resolve the Justices' disagreement,¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹ 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."¹⁸⁰

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

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."¹⁸¹ In contrast, cable operators can "silence the voice of competing speakers with a mere flick of the switch."¹⁸² 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.¹⁸³

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."¹⁸⁴ 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.¹⁸⁵

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.¹⁸⁶ 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."¹⁸⁷ 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.¹⁸⁸ 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-

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.”¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ 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.¹⁹²

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.¹⁹³ 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.¹⁹⁴

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.”¹⁹⁵

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.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ *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.²⁰⁰ 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*.²⁰¹ 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."²⁰² In contrast, "when a newspaper asserts exclusive control

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."²⁰³ 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;²⁰⁴ and (2) cable television could ostensibly destroy free broadcasting as a whole by competing for advertising revenues.²⁰⁵ In contrast, newspapers have no such control over access to the newspaper market.²⁰⁶ 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.²⁰⁷ While it has been suggested that cable ISPs may silence competing ISPs just as effectively as cable television could silence broadcast television,²⁰⁸ 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.²⁰⁹ Cable access accounts for only two percent of the ISP market.²¹⁰ In contrast, national ISPs like AOL have captured sixty-nine percent of the market through traditional dial-up systems.²¹¹ 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

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.²¹² Similarly, individuals may skip local ISPs entirely, either by becoming their own ISP,²¹³ or by using the various free services, including free DSL service, available to the public.²¹⁴ 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.²¹⁵

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.²¹⁶ 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.²¹⁷ For example, AOL allows customers to access its content for a fee, even if the customer uses another access provider.²¹⁸ 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

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,²¹⁹ 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.²²⁰ 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;"²²¹ (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;"²²² and (3) "[t]he incentives of the cable industry, coupled with their superior positioning, will lead to decreased choice and access to local content."²²³ In other words, supporters of open access have attempted to mirror the governmental interests at stake in cable television must-carry provisions.²²⁴ 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,

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.²²⁵

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."²²⁶ 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.²²⁷ 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.²²⁸ Furthermore, any ISP can compete for customers through telephone access.²²⁹ The same is true for broadband Internet service as well.²³⁰ 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.²³¹ 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."²³²

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.²³³ Furthermore, the FCC predicts that these alternative broadband technologies "might even be capable of creating competition for the telephone and cable incumbents" in

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.²³⁴ At the very least, they will help serve the remaining five percent of the population who currently does not have access to the Internet.²³⁵ 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.²³⁶ 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,²³⁷ 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.²³⁸ 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.²³⁹

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.²⁴⁰ As discussed

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.²⁴¹ While it may be that cable Internet users will refuse to pay “even a reasonable amount of money for content” from other ISPs,²⁴² 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.²⁴³ Any loss is not the result of actions taken by a cable ISP.²⁴⁴ 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.²⁴⁵

Furthermore, open access may in fact undermine both the rapid deployment of broadband technologies and competition within the broadband market.²⁴⁶ 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.”²⁴⁷ 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

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 2001.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰ Additionally, AT&T has argued that open access is impractical due to technological limitations upon sharing coaxial cable.²⁵¹ Cable, unlike other broadband technologies such as DSL, is a shared pipeline, which means that increased use will affect the data transmission rate.²⁵² 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.²⁵³

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.²⁵⁴ 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.²⁵⁵ 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."²⁵⁶ 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

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

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,²⁶¹ 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."²⁶²

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.²⁶³ Given this technological limitation, open access could effectively reduce, if

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.²⁶⁴ 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.²⁶⁵ In contrast, the laws governing telephone services assure public speech rights by depriving the network owners of all speech rights associated with their property.²⁶⁶ 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.²⁶⁷ 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.

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. Tomillo*, 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.