

**CABLE MODEM SERVICE AND THE FIRST AMENDMENT:
ADVENTURES IN A “DOCTRINAL WASTELAND”**

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I. INTRODUCTION

Broadband communication facilities — whether provided by cable companies, telephone companies, wireless providers, or satellite operators — are commonly seen as a veritable panacea for all that ails America. A group of technology company CEOs recently advocated a massive government program, similar in scope to putting a man on the moon, to increase broadband deployment.¹ The group claimed wide-scale broadband deployment would have a \$500 billion impact on the economy (and coincidentally increase sales of their products).² Broadband also has President George W. Bush’s attention; he recently

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1. TechNet, A National Imperative: Universal Availability of Broadband by 2010 (Jan. 15, 2002), at <http://www.technet.org/news/newsreleases/2002-01-15.64.pdf> (last visited Nov. 19, 2002). See generally Yochi J. Dreazen & Jim VandeHei, *Plugging In: Tech Lobbyists Seek Bonanza in New Push for Speedy Internet*, WALL ST. J., Jan. 18, 2002, at A1.

2. See TechNet, *supra* note 1.

appointed a panel to advise him on ways in which broadband deployment may be increased.³

Notwithstanding its cachet as an opportunity for government subsidies, broadband has also triggered another response: communications firms have sought to use government regulation to impair their competitors. Telephone companies, legally required to lease their broadband facilities to unaffiliated Internet Service Providers ("ISPs"), have advocated that cable networks also be opened to unaffiliated ISPs.⁴ There is more to these initiatives than a desire for regulatory parity; the more bandwidth a cable operator is required to devote to multiple ISP use, the less bandwidth is available for local telephony.

The debate over multiple-ISP access to cable modem platforms has involved a very truncated discussion of cable providers' First Amendment rights. Proponents of mandated access characterize cable operators as "gatekeepers" poised to restrict the public's access to the wealth of information on the Internet,⁵ despite the lack of any evidence that cable operators have done so.⁶ Paradoxically, the supporters of mandated access claim that cable modem service does not

3. Jim VandeHei, *Bush Set to Name Advisory Panel to Shape Technology Issues*, WALL ST. J., Dec. 12, 2001, at B7. Currently, the Bush Administration is deeply divided over broadband policy. Yochi J. Dreazen, *Tech Firms Bemoan Bush Talk*, WALL ST. J., June 21, 2002, at A4.

4. *See, e.g.*, *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 364 (4th Cir. 2001) (noting that Verizon has an interest in having cable modem service categorized as a "telecommunications service" because this would trigger regulations not applicable to "cable" service); *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 696 (S.D. Fla. 2000) (finding that "open access" ordinance was adopted at the behest of a telephone company seeking to eliminate or hamper a competitor); Comments of Charter Communications, Inc. at 17, FCC GN Docket No. 00-185 (Dec. 1, 2000) (noting that local telephone companies have incentives to encourage technical solutions to the problem of multiple-ISP access consuming bandwidth intended for cable telephony).

Alternatively, local exchange carriers have backed legislation that would free them from the obligation to lease parts of their high-speed networks to competitors. *See* Internet Freedom and Broadband Deployment Act of 2001, H.R. 1542, 107th Cong., (1st Sess. 2001); Yochi J. Dreazen, *Verizon Plays Every Angle in Broadband Battle*, WALL ST. J., Aug. 15, 2001, at A16; Yochi J. Dreazen, *Battle Over Bells and Broadband Service Heats Up*, WALL ST. J., May 15, 2001, at A28. The battle over this legislation has generated huge campaign donations. *See* Yochi J. Dreazen, *House Backs Bill to Aid Bells' Broadband Sales*, WALL ST. J., Feb. 28, 2002, at B8; Stephan Lebaton, *Congressional Broadband Fight Intensifies*, N.Y. TIMES, Feb. 27, 2002, at C4; Juliet Eilpern, *A Contest of Connections: Millions Spent to Influence Bill on High-Speed Internet Access*, WASH. POST, Feb. 27, 2002, at A8.

5. *See, e.g.*, CENTER FOR DEMOCRACY & TECHNOLOGY, BROADBAND BACKGROUNDER: PUBLIC POLICY ISSUES RAISED BY BROADBAND TECHNOLOGY at 35 (2000) (arguing that if broadband becomes the proprietary domain of large companies, the rough equality among Internet speakers could be destroyed); Comments of Center for Democracy & Technology at 18, FCC GN Docket No. 00-185, (Dec. 10, 2000) ("free speech is too important to leave solely in the hands of private industry").

6. *See* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, FCC GN Docket No. 00-185, FCC 02-77, at ¶ 87 (Mar. 15, 2002) (Declaratory Ruling and Notice of Proposed Rulemaking) [hereinafter High-Speed Declaratory Ruling].

involve speech by a cable operator, but also claim that mandated access is necessary to protect the speech of unaffiliated ISPs.⁷ The Federal Communications Commission (“FCC”) has also largely ignored the impact of mandated access on cable operators’ First Amendment rights. In 2000, when the agency began a proceeding to determine the appropriate framework for regulating cable modem service, it did not even discuss the First Amendment’s application to this service.⁸ Nor did the FCC mention AOL Time Warner’s First Amendment rights in 2001 when the agency imposed conditions preventing the merged firm from discriminating against other ISPs.⁹ The FCC only began to pose questions about the First Amendment and cable modem service in 2002,¹⁰ when it sought comments on the regulatory implications of classifying cable modem service as an “information service.”¹¹

The lack of concern for the First Amendment rights of cable operators is not surprising given the Supreme Court’s uncertain pronouncements about cable’s constitutional status. Since 1986, the Supreme Court has addressed cable’s First Amendment protection on six occasions,¹² indicating that regulations aimed at cable content may or may not be subject to strict scrutiny,¹³ and that cable is regulated like broadcasting in some instances and not in others.¹⁴ This dis-

7. See, e.g., Reply Comments of Earthlink, Inc. at 57, FCC GN Docket No. 00-185 (Jan. 10, 2001) (arguing that the protected “speakers” in the cable modem context are the service’s users, not the service’s providers). But see Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87, 93 (2000) (arguing that a First Amendment approach which does not treat cable ISPs as “speakers” must not treat competing ISPs as “speakers”). Some scholars dismiss the First Amendment’s relevance to mandated access, focusing instead on the antitrust and regulatory issues. See, e.g., Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001).

8. Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities, FCC GN Docket No. 00-185, 15 F.C.C.R. 19,287 (2000) (Notice of Inquiry). Nonetheless, commentators discussed the First Amendment and cable modem services, but less extensively than they discussed the statutory classification issues. See, e.g., Comments of the National Cable & Telecommunications Association at 38–39, FCC GN Docket No. 00-185 (Dec. 1, 2000).

9. Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, FCC CS Docket No. 00-30, 16 F.C.C.R. 6547 (2001) (Memorandum Opinion and Order) [hereinafter AOL-Time Warner Merger Order].

10. High-Speed Declaratory Ruling, *supra* note 6, ¶ 80.

11. 47 U.S.C. § 153(20) (2002); see *infra* notes 75–83 and accompanying text.

12. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000); *Turner Broad., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner Broadcasting II*); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Turner Broad., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner Broadcasting I*); *Leathers v. Medlock*, 499 U.S. 439 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

13. Compare *Playboy*, 529 U.S. at 813 (applying strict scrutiny) with *Denver Area Educ.*, 518 U.S. at 742–43 (applying a less demanding standard).

14. Compare *Playboy*, 529 U.S. at 815 (distinguishing cable from broadcasting) and *Turner Broad. I*, 512 U.S. at 639 (noting the fundamental technological differences between

jointed approach has been defended by Justice Breyer, who claims that a definitive statement of cable's First Amendment protection should be avoided due to the rapid changes affecting telecommunications.¹⁵ Justice Thomas, however, believes the Court should stop avoiding the issue, claiming this piecemeal approach has created a "doctrinal wasteland."¹⁶

Due to the uncertainty surrounding cable's legal environment, it is understandable that cable modem service has perplexed lower courts. Courts disagree about the statutory classification of cable modem service,¹⁷ but more importantly, courts have provided very different answers to similar First Amendment questions about cable modem regulations. In *AT&T Corp. v. City of Portland*,¹⁸ local cable modem regulations were found to pass content-neutral scrutiny, but in *Comcast v. Broward County*,¹⁹ a different court believed that strict scrutiny should apply, while holding that the local regulation failed to pass the less demanding content-neutral standard. The *AT&T* and *Comcast* cases reflect contrasting perceptions of cable's First Amendment status, providing two very different views of the appropriate role of government in regulating new uses of the cable medium.

In this Article, I argue that there are serious First Amendment issues raised by government regulations affecting a cable operator's ability to determine how channel capacity is utilized. Despite cable's uncertain legal environment, some principles to frame this discussion have emerged from cases such as *Turner Broadcasting, Inc. v. FCC*.²⁰ Most notably, "the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation" from heightened First Amendment scrutiny.²¹ Thus, without addi-

cable and broadcasting) with *Denver Area Educ.*, 518 U.S. at 744 (applying the same accessibility standard to both cable programming and broadcast television).

15. *Denver Area Educ.*, 518 U.S. at 742–43.

16. *Id.* at 813 (Thomas, J., concurring in the judgment in part and dissenting in part); see also *Horton v. City of Houston*, 179 F.3d 188, 197 (5th Cir. 1999) ("much is uncertain about the scope of First Amendment benefits and burdens in the cable industry").

17. *Compare MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356 (4th Cir. 2001) (finding that an "open access" ordinance is preempted by 47 U.S.C. § 541(b)(3)(D) (2001) because it requires a cable operator to provide a "telecommunications" facility), with *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000) (finding that cable modem service comprises both a "telecommunications service" and an "information" service) and *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275–78 (11th Cir. 2000) (finding that cable Internet service is neither a "cable" service nor a "telecommunications service"), *rev'd sub nom.* *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (concluding that cable facilities commingling high-speed Internet and traditional cable television services are subject to pole attachment regulations of 47 U.S.C. § 224(a)(4) (2001)).

18. 43 F. Supp. 2d 1146 (D. Ore. 1999), *rev'd on other grounds*, 216 F.3d 871 (9th Cir. 2000); see *infra* notes 84–119 and accompanying text.

19. 124 F. Supp. 2d 685 (S.D. Fla. 2000); see *infra* notes 120–73 and accompanying text.

20. 512 U.S. 622 (1994) (*Turner Broadcasting I*).

21. *Id.* at 640.

tional factual support, predictions about cable's monopolization of the broadband market are not entitled to judicial deference.

This Article briefly discusses the emerging broadband market and explains how the FCC and other policy makers have responded to this market. The *AT&T* and *Comcast* decisions are critiqued; while the judges in both cases made significant mistakes, the *Comcast* opinion is more defensible than the opinion in *AT&T*. Cable modem platforms are not open to the public like shopping centers. Instead, decisions by cable operators about the configuration of modem service are entitled to strong First Amendment protection.

II. THE EMERGING BROADBAND MARKET

Despite predictions of broadband communications' potential to reshape American society, nearly three-fourths of American Internet households currently use narrowband "dial-up" connections.²² These connections use traditional telephone lines to transmit data at speeds of between 28 and 56 kilobits per second ("Kbps") — speeds which are well-suited for e-mail and chat rooms, but inadequate for advanced services such as interactive gaming. Cable modem service offers significantly faster transmission speeds, generally between several hundred Kbps and 1.5 megabits per second ("Mbps"),²³ — speeds which facilitate new services such as rapid downloading of music and movies. For a monthly fee of between \$40 and \$70, cable modem subscribers gain high-speed access to the Internet and the proprietary content of a cable modem service provider. Dial-up access is significantly less expensive than broadband access; for example, AOL, the largest dial-up ISP, offers subscribers its proprietary fea-

22. MORGAN STANLEY DEAN WITTER, *THE SEQUEL: OPEN ACCESS IS BETTER* at 10 (June 29, 2001) [hereinafter *SEQUEL*] (finding that 84% of Internet households used dial-up connections at year-end 2000, and an estimated 73% of Internet households will use dial-up connections at year-end 2001); see also U.S. DEPT. OF COMMERCE, *A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET* at 35 (Feb. 2002) [hereinafter *A NATION ONLINE*] (noting that a September 2001 survey reveals that 80% of Internet households use dial-up connections). However, the adoption rate for dial-up connections is slowing. Saul Hansell, *Can AOL Keep Its Subscribers in a New World of Broadband?*, N.Y. TIMES, July 29, 2002, at C1.

23. See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, FCC CC Docket No. 98-146, 15 F.C.C.R. 20,913 (2000) (Second Report) [hereinafter *Second Broadband Report*] (noting that because cable modem users share the local network, the speed of transmissions is affected by the number of simultaneous users. Thus, cable operators do not guarantee a stable speed of service).

Local facilities are only one component of cable modem service. For a discussion of other components, such as backbone networks and regional data centers, see Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, FCC CC Docket No. 98-146, FCC 02-33, at App. B (Feb. 6, 2002) (Third Report) [hereinafter *Third Broadband Report*]; Comments of Excite@Home, FCC GN Docket No. 00-185, at 5-10 (Dec. 1, 2000).

tures and access to the Internet for \$23.90 a month.²⁴ While dial-up Internet users are generally able to select among ISPs, most cable operators currently offer only one ISP to their customers.²⁵

Significant investments are required to upgrade cable systems for cable modem service,²⁶ and since the inception of cable modem service in late 1996, the cable industry has markedly increased the number of homes to which it can offer this service. Morgan Stanley estimates that by the end of 2002, cable modem service will be available to 95 million households.²⁷ In response to the roll-out of cable modem service, incumbent local exchange carriers (“ILECs”) have also been upgrading their local telephone networks to provide a broadband service known as DSL, and an estimated 64 million households will have access to DSL at the end of 2002.²⁸ Due to technical limitations and the costs of equipment and service, satellite-based Internet connections to date have attracted fewer than 1% of the 16 million Direct Broadcast Satellite (“DBS”) subscribers.²⁹ However, Echostar’s proposed acquisition of its primary DBS competitor, DirecTV, is being touted as a means of rapidly deploying the next generation of satellites that could offer stronger competition to cable and telephone broadband services.³⁰

Although broadband service is becoming increasingly available to residential customers, relatively few households currently choose broadband as their means of connecting to the Internet. Morgan

24. See *AOL Pricing Plans*, <http://www.aol.com/info/pricing.html> (last visited Oct. 19, 2002).

25. High-Speed Declaratory Ruling, *supra* note 6, ¶ 20.

26. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC CS Docket No. 01-129, FCC 01-389, ¶¶ 32–33 (Jan. 14, 2002) (Eighth Annual Report) [hereinafter Eighth Annual Assessment] (discussing cable industry capital expenditures); Second Broadband Report, *supra* note 23, at App. D-5 (showing cable Multichannel System Operators’ (MSOs’) capital expenditures for high-speed data facilities).

27. SEQUEL, *supra* note 22, at 10.

28. *Id.*; see also Third Broadband Report, *supra* note 23, ¶¶ 69–70 (discussing ILEC expenditures on infrastructure).

29. Eighth Annual Assessment, *supra* note 26, ¶ 62; Second Broadband Report, *supra* note 23, ¶¶ 56–59. The FCC estimates that there were between 50,000 and 150,000 subscribers to satellite and fixed wireless Internet services as of June 2001. Third Broadband Report, *supra* note 23, ¶¶ 55 & 60. This compares to 5.2 million cable modem subscribers and 2.7 million DSL subscribers. *Id.* ¶¶ 44 & 49.

30. Consolidated Application for Authority to Transfer Control, EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp., Transferors, and EchoStar Communications Corp., Transferee, FCC CS Docket No. 01-348, at 43–49 (Dec. 3, 2001); see also Andy Pasztor & Yochi J. Dreazen, *Hughes, EchoStar Offer to Span the U.S.*, WALL ST. J., Feb. 27, 2002, at B4 (describing plan to offer high-speed Internet access to every part of the United States). Recently, the FCC found that the claimed benefits of the merger for the broadband market were speculative. See Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp., Transferors, and EchoStar Communications Corp., Transferee, FCC CS Docket No. 01-348, ¶¶ 220–35 (Oct. 18, 2002) (Hearing Designation Order).

Stanley estimated that at the end of the second quarter in 2001, cable modem service was available to 66.1 million households, but only 5.4 million used the service.³¹ Currently, broadband lacks a “Killer App.” As a *Wall Street Journal* columnist recently wrote:

What’s so great about broadband? Sure, it’s a speedy on-ramp to the Internet. But what can you actually do with a high-speed connection that you can’t accomplish over a dial-up line?

Not enough. And that’s the problem. Most consumers don’t see a compelling reason to shell out an extra \$20 or \$30 a month for a zippier Net link.

...

“Build it, and they will come” is, in essence, the rallying cry of the broadband cheerleaders. But this time, it has been built, and the masses aren’t coming. Until efforts to promote broadband begin to address demand instead of supply, the big broadband push isn’t going anywhere.³²

Broadband faces a classic “chicken and egg” dilemma; as broadband subscribership increases, more content providers will develop advanced applications,³³ but the market is currently too small to justify large investments by content providers such as Disney.³⁴ Moreover, the pipes that permit rapid downloading of content also facilitate widespread illegal copying. Napster, now a shadow of its former self because of an injunction protecting copyrighted recordings,³⁵ proved there is vast audience interest in music downloading. Napster also heightened content providers’ fears about piracy. Those fears prompted a recent lawsuit by television and cable networks against SonicBlue’s Replay 4000, a digital video recorder which enables us-

31. MORGAN STANLEY DEAN WITTER, BROADBAND CABLE SECOND-QUARTER REVIEW 9 (2001); see also Third Broadband Report, *supra* note 23, ¶¶ 44–45.

32. Thomas E. Weber, *Broadband Advocates Should Fight to Increase Demand, Not Supply*, WALL ST. J., Jan. 28, 2002, at B1; see also INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, BUILDING A POSITIVE, COMPETITIVE BROADBAND AGENDA 9–10 (Oct. 2001) (noting that the high cost of broadband service and the lack of compelling applications are reasons cited by dial-up users for not switching to faster connections).

33. For a discussion of the reciprocal relationship between deployment of broadband facilities and the development of broadband content and services, see AOL-Time Warner Merger Order, *supra* note 9, ¶¶ 288–98.

34. See, e.g., Mark Heinzl, *Broadband Carriers Are Hunting for ‘Killer Apps,’* WALL ST. J., June 14, 2001, at B10; Jared Sandberg, *Broadband’s Chicken-and-Egg Bind*, WALL ST. J., Apr. 2, 2001, at B1.

35. *A&M Records, Inc. v. Napster, Inc.*, 2001 U.S. Dist. LEXIS 2186 (N.D. Cal. Mar. 5, 2001) (enjoining Napster from downloading, uploading, transmitting, or distributing uncensored copyrighted sound recordings).

ers to send copies of movies and television programs over the Internet to other Replay 4000 users.³⁶ Thus far, major content providers have devoted more effort to fighting copyright battles than to exploiting broadband as a means of distribution.³⁷

Like any emerging market, broadband is experiencing growing pains as companies search for viable business plans.³⁸ Cable modem pioneer @Home, which merged with Web portal Excite in 1999, "was heralded as the dominant broadband provider and the company with the biggest head start in marrying high-speed Internet access with Web content."³⁹ In 2001, however, the firm's advertising revenue dropped precipitously and, in one of the "high-tech world's most prominent flameouts,"⁴⁰ the company sold the Excite portal, finally shutting down its network on February 28, 2002. It has also become evident that DSL providers who lease facilities from ILECs have a difficult time competing with the ILECs' own DSL service. More than a dozen non-ILEC DSL providers filed for bankruptcy in 2000 and 2001 as investors began questioning their business models.⁴¹ Addi-

36. See *Newmark v. Turner Broad. Network*, No. CV 02-04445, renumbered CV 01-09358 (C.D. Cal. Aug. 15, 2002) (seeking declaratory judgment that SonicBlue use does not constitute copyright infringement, and consolidating this suit with the one filed by broadcasters); see also Jon Healey, *Company Town: Networks, Studios File Suit Against ReplayTV, Sonicblue*, L.A. TIMES, Nov. 1, 2001, § 3, at 4; Nick Wingfield, *Digital Video Recorders Stir Up a New Battle: SonicBlue's Replay 4000 Lets Users Zap TV Ads, Forward Shows via Web*, WALL ST. J., Dec. 17, 2001, at B4.

37. Media executives, such as Disney's Michael Eisner, have complained to Congress about Internet piracy, and several Congressional committees recently held hearings on this topic. See Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong., 2nd Sess. § 2(1) (2002) (claiming that adoption of broadband Internet service is hindered by lack of quality digital content); Amy Harmon, *Piracy, or Innovation? It's Hollywood vs. High Tech*, N.Y. TIMES, Mar. 14, 2002, at C1; Yochi J. Dreazen, *Media, Tech Officials Battle over Web Piracy*, WALL ST. J., Mar. 1, 2002, at B2.

38. The allure of broadband even captured the attention of Enron; the firm's collapse revealed that it had propped up its stock price by falsely claiming profits from broadband operations. See Rebecca Smith, *Show Business: A Blockbuster Deal Shows How Enron Overplayed Its Hand*, WALL ST. J., Jan. 17, 2002, at A1; John Schwartz, *Enron's Collapse: The Dot-Com Initiative; Exploring a Deal to Offer Sex Videos*, N.Y. TIMES, Jan. 17, 2002, at C8 (citing the deals and internal partnerships that Enron made to conceal the costs and increase the profits of the broadband unit as some of the most troubling examples of its labyrinthine finances).

39. Mylene Mangalindan, *Excite@Home Warns It May Shut Down*, WALL ST. J., Aug. 21, 2001, at A3.

40. Brian Bergstein, *ExciteAtHome to Fold Feb. 28*, AP, (Dec. 5, 2001), available at 2001 WL 31032755. See generally, Kara Swisher, *Who Is Guilty of Killing Off Excite@Home?*, WALL ST. J., Oct. 8, 2001, at A15 (describing the factors leading to the firm's demise).

Excite@Home's former cable affiliates have had to develop replacement facilities, and this capital expenditure has adversely affected their financial performance in the short-term. See, e.g., Christine Nuzum, *Cox Communications Posts Loss, Cites Excite@Home's Troubles*, WALL ST. J., Feb. 13, 2002, at B6; Christopher Grimes, *Comcast Reports Fall in Cash-flow*, FIN. TIMES, Feb. 7, 2002, at 16.

41. See, e.g., Tom Spring, *Broadband Users Still Sing the Blues*, PC WORLD, June 2001, at 42-44; Shawn Young, *Covad, One of Last DSL Competitors, Blames Troubles on Bell*

tionally, in an attempt to increase revenues from broadband operations, some cable operators are modifying their cable modem platforms from a single ISP design to one which accommodates multiple ISPs.⁴²

Industry analysts expect the early problems of broadband to be readily overcome, and predict that by year-end 2004 cable modem subscribers will number 15 million.⁴³ Analysts also forecast that by year-end 2004 the number of subscribers served by all forms of broadband — cable modem, DSL, satellite, and fixed wireless — will exceed the number of dial-up customers.⁴⁴ The potential of broadband was a major factor driving the merger of America Online (“AOL”) and Time Warner. These firms claimed that the combination of AOL’s Internet expertise and Time Warner’s cable systems and content services would hasten the development of broadband services such as video-on-demand, online music distribution, and interactive television.⁴⁵ The AOL-Time Warner merger, like AT&T’s earlier acquisitions of cable systems, prompted an intense fight over whether cable operators should be required to open their systems to unaffiliated ISPs. The fight is ongoing; its latest rounds involve Comcast’s acquisition of AT&T’s cable properties⁴⁶ and challenges to the FCC’s recent classification of cable modem service as an “information service.”⁴⁷

Tactics, WALL ST. J., Aug. 9, 2001, at B1. The FCC found that as of June 30, 2001, ILECs account for 93% of DSL subscribers. See Third Broadband Report, *supra* note 23, ¶ 51.

42. See Julia Angwin, *AT&T to Offer EarthLink Inc. on Cable Lines*, WALL ST. J., Mar. 13, 2002, at B7; Julia Angwin, *Comcast, United Online Set Deal For Internet Service on Cable Lines*, WALL ST. J., Feb. 27, 2002, at B4; High-Speed Declaratory Ruling, *supra* note 6, ¶¶ 26 & 28.

43. Second Broadband Report, *supra* note 23, App. D-1.

44. See SEQUEL, *supra* note 22, at 10; Third Broadband Report, *supra* note 23, ¶ 63. The adoption rate of broadband technologies compares favorably to adoption rates of other telecommunications technologies such as color television, cell phones, VCRs, and pagers. See A NATION ONLINE, *supra* note 22, at 37.

45. See AOL-Time Warner Merger Order, *supra* note 9, ¶¶ 288–98. But see *infra* notes 175–76 and accompanying text.

46. See Yochi J. Dreazen, *AT&T Comcast Is Likely to Get Regulators’ Nod*, WALL ST. J., Dec. 12, 2001, at A3. Just before this Article’s publication, the FCC approved the AT&T-Comcast merger. The agency concluded that the merger was likely to have a positive impact on deployment of broadband services. Also, the FCC refused to require unaffiliated ISP access to AT&T-Comcast cable modem facilities; the merger was unlikely to impede consumers’ access to Internet content, or allow AT&T-Comcast to dominate the broadband market. See Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee, FCC MB Docket No. 02-70, FCC 02-310 (Memorandum Opinion and Order) (Nov. 13, 2002).

47. See *Ninth Circuit Will Hear Landmark Case on Cable Modem Service*, COMMUNICATIONS DAILY, Apr. 2, 2002; *FCC Ruling on Internet Over Cable Challenged in Court*, WARREN’S CABLE REGULATION MONITOR, Apr. 1, 2002.

III. FCC POLICY

Until the FCC issued its recent Declaratory Ruling, the agency had declined to determine a regulatory classification for cable modem service, or to establish industry-wide policy for cable modem providers. In a series of merger reviews, however, the FCC made a number of assessments of this emerging market. These assessments, along with the classification of cable modem service as an “information service,” provide an important backdrop for First Amendment analysis of mandated access.

A. The AT&T Mergers

Little attention had been given to policy questions raised by cable modem service until AT&T’s June 1998 announcement of its acquisition of TCI, one of the nation’s largest cable companies. In addition to acquiring TCI’s cable systems, AT&T also acquired TCI’s large stake in cable modem provider @Home and inherited TCI’s contract, making @Home its exclusive ISP through May 2002.⁴⁸ AT&T’s plan to spend billions of dollars upgrading TCI’s cable systems to accommodate new services such as local telephony and high-speed Internet access threatened local telephone companies and ISPs such as AOL. As a result, these firms began lobbying local and federal regulators, claiming that an exclusive relationship between a cable company and an ISP would be harmful to competition.

Although AOL was — and remains — the dominant ISP,⁴⁹ the company feared it would be confined to narrowband forms of access while AT&T and other cable companies dominated the broadband market. AT&T countered that its cable modem customers would be able to access any Internet content. In particular, AT&T’s customers could use AOL’s “bring-your-own-access-plan” (“BYOA”), which allows customers of ISPs other than AOL to gain access to AOL’s proprietary content and features. Under the BYOA plan, customers pay AOL a fee, currently \$14.95 a month,⁵⁰ in addition to the fee paid

48. See Rebecca Blumenstein et al., *Inside the Tangles of AT&T’s Web Strategy*, WALL ST. J., Aug. 13, 1999, at B1; Saul Hansell, *A Hitch to Marital Web Bliss: Excite@Home Is Often at Odds with Its Cable Parents*, N.Y. TIMES, June 9, 1999, at C1.

49. For rankings of ISPs, see Patricia Fusco, *Top U.S. ISPs by Subscriber: 2001 Year End*, at <http://isp-planet.com/research/rankings/usa.html> (last visited Oct. 22, 2002).

50. See *AOL Pricing Plans*, at <http://www.aol.com/info/pricing.html> (last visited Oct. 22, 2002); see also High-Speed Declaratory Ruling, *supra* note 6, ¶ 25 (noting that cable modem subscribers, via “click-through” access, may obtain information such as proprietary content and e-mail from companies with whom the cable operator does not have a contractual relationship). AOL has four million subscribers who use its BYOA plan in conjunction with broadband service provided by unaffiliated cable operators or telephone companies. See Saul Hansell, *AOL Slips as It Tries to Get Grip on Market*, N.Y. TIMES, Apr. 15, 2002, at C1. In contrast, AOL has only about 200,000 customers using Time Warner cable sys-

to an ISP such as Road Runner. AOL's business, though, is built on controlling the first screen that users see and offering a package of services such as easy access to the Internet, e-mail, chat rooms, etc. Most importantly, BYOA customers are less profitable to AOL than the vast majority of customers who purchase AOL's full package of Internet access and features.⁵¹

The arguments of mandated access proponents such as AOL were well received by some local governments, most notably Portland, Oregon and Broward County, Florida. The FCC, however, was hesitant to regulate a rapidly changing nascent market. In its first Broadband Report, adopted January 28, 1999, the FCC rejected the suggestion that unaffiliated ISPs should have a right of access to cable modem platforms. In terms of the critical "last mile" to the residential consumer, the Commission stated:

We believe it is premature to conclude that there will not be competition in the consumer market for broadband. The preconditions for monopoly appear absent. Today no competitor has a large embedded base of paying residential customers. The record does not indicate that the consumer market is inherently a natural monopoly. Although the consumer market is in the early stages of development, we see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio.⁵²

Shortly after issuing this report, the FCC approved the AT&T-TCI merger without altering the firm's exclusive relationship with @Home.⁵³ Citing AT&T's commitment to allow customers to access any Internet content, along with the prospect of more rapid deployment broadband services, the FCC found the merger would benefit the public.⁵⁴ The Internet access market, defined as including both broad-

tems, and about 200,000 customers using DSL facilities leased by AOL. See Seth Schiesel, *How Does AOL Fit in the Grand Plan Now?* N.Y. TIMES, Apr. 21, 2002, §3, at 1; see also *infra* note 175.

51. AOL's president admitted that the company would lose money without the monthly fee that most of its customers pay for Internet access. See Nick Wingfield, *Free Web Services Challenge AOL's Dominance*, WALL ST. J., Sept. 23, 1999, at B8.

52. Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, FCC CC Docket No. 98-146, 14 F.C.C.R. 2398 (1999) (Report) [hereinafter First Broadband Report].

53. See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, 14 F.C.C.R. 3160 ¶ 1 (1999) (Memorandum Opinion and Order) [hereinafter AT&T-TCI Merger Order].

54. See *id.* ¶¶ 1, 94-96.

band and narrowband services, was found to be “quite competitive.”⁵⁵ Even if defined as only including broadband services, the market was still viewed as competitive. The FCC stated, “it appears that quite a few other firms are beginning to deploy or are working to deploy high-speed Internet access services using a range of other distribution technologies.”⁵⁶

The FCC expressed a similar theme in June 2000 when it approved the AT&T-MediaOne merger, again without requiring AT&T to open its cable systems to unaffiliated ISPs.

The FCC noted that “ISPs lacking direct access to provide broadband services over cable systems are entering into alliances with alternative broadband providers, thereby accelerating the deployment of these technologies.”⁵⁷ Mandated access was also unnecessary since AT&T had promised to negotiate access agreements with multiple ISPs when its exclusive contract with @Home expired in 2002.⁵⁸

B. The AOL-Time Warner Merger

On January 10, 2000, AOL announced its merger with Time Warner, the nation’s second largest cable operator. AOL, which had championed government-mandated access as a means of preventing cable operators from being “gatekeepers” between consumers and the Internet,⁵⁹ suddenly claimed that it favored private negotiations rather than government regulation.⁶⁰ Shortly after announcing their merger,

55. *See id.* ¶ 93.

56. *Id.*

57. *See* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, 15 F.C.C.R. 9816 ¶ 117 (2000) (Memorandum Opinion and Order) [hereinafter AT&T-MediaOne Merger Order].

58. *See id.* ¶ 120. On December 6, 1999, AT&T, MindSpring, and the head of the FCC’s local and state government advisory committee announced a set of principles to be used in contract negotiations between AT&T and unaffiliated ISPs. *See* Letter from David N. Baker, Vice President for Legal and Regulatory Affairs, MindSpring Enterprises, James W. Cicconi, General Counsel, AT&T, and Kenneth S. Fellman, Chairman, FCC Local and State Government Advisory Committee, to William E. Kennard, Chairman, FCC (Dec. 6, 1999) (on file with author). During the FCC’s review of the AT&T-MediaOne merger, AT&T agreed to apply the principles to MediaOne cable systems.

AT&T’s agreement to divest its interest in Road Runner, a cable modem ISP, further supports the FCC’s finding that mandated access was unnecessary. *See* AT&T-MediaOne Merger Order, *supra* note 57, ¶ 122; *see also* Complaint, *United States v. AT&T Corp.*, No. 1:00CV01176, 2000 U.S. Dist. LEXIS 14459 (D.D.C. Sept. 26, 2000) (alleging that AT&T’s combined interests in Excite@Home and Road Runner would lessen competition in the aggregation, promotion, and distribution of broadband content).

59. *See, e.g.*, Comments of America Online, Inc. at 30–31, FCC CS Docket No. 98-178 (1999) (claiming that the AT&T-TCI merger would enable the new company to become an electronic gatekeeper).

60. At the time of the merger announcement, Time Warner’s Gerald Levin “vowed to take the ‘open-access’ issue ‘out of Washington and out of City Hall and put it in the marketplace.” John R. Wilke & Kathy Chen, *Merger Partners Vow Open Access to Cable*

AOL and Time Warner issued a memorandum of understanding (“MoU”), establishing a set of principles for multiple-ISP use of Time Warner’s broadband cable facilities.⁶¹ AOL and Time Warner executives resisted efforts to enact “anti-gatekeeper” legislation, but this issue, which AOL had introduced into policy debates, would shape the government’s review of the AOL-Time Warner merger.

To obtain Federal Trade Commission (“FTC”) approval of the merger, AOL and Time Warner entered into a consent agreement with the FTC designed to protect competition in the residential broadband market.⁶² For example, the agreement stipulates that Earthlink’s ISP service must be available to subscribers on Time Warner’s largest cable systems before AOL’s service is offered. Within ninety days of offering AOL on a large cable system, Time Warner must also have agreements with two other unaffiliated ISPs to provide access on the same system,⁶³ and with at least three unaffiliated ISPs after making AOL’s broadband service available on smaller cable systems.⁶⁴ AOL Time Warner is also not permitted to interfere with content transmitted by unaffiliated ISPs.⁶⁵ Finally, AOL is required to offer and promote its service over DSL in areas served by Time Warner cable systems.⁶⁶

The consent agreement expires after only five years, the shortest period ever imposed by the FTC. Robert Pitofsky, chair of the FTC, said this period was justified by the dynamic and uncertain nature of

Lines, WALL ST. J., Jan. 11, 2000, at B1. AOL’s Steve Case seconded Levin’s aversion to government-mandated access, stating, “We need to take it off the table.” *Id.* (internal quotation marks omitted).

61. Memorandum of Understanding Between Time Warner, Inc. and America Online, Inc. Regarding Open Access Business Practices, at http://media.aoltime Warner.com/media/press_view.cfm?release_num=25100400 (Feb. 29, 2002). For criticism of the MoU, see AOL Time Warner Merger Order, *supra* note 9, ¶¶ 93–95.

62. America Online, Inc., and Time Warner, Inc., FTC No. C-3989 (Dec. 14, 2000) (consent agreement).

63. See America Online, Inc. and Time Warner Inc., FTC No. C-3989, § II(A)(1),(2) (Dec. 14, 2000) (Decision and Order) [hereinafter FTC AOL-Time Warner Merger Order]. The FTC must approve agreements with unaffiliated ISPs. See *id.* For recent approvals, see FTC, Application for Approval of a Non-Affiliated ISP and Alternative Cable Broadband ISP Service Agreement, at <http://www.ftc.gov/opa/2002/02/fyi0213.htm> (Feb. 26, 2002).

64. See FTC AOL-Time Warner Merger Order, *supra* note 63, § II(B)(1). The firm is also required to negotiate and enter into “arms’ length” commercial agreements with any unaffiliated ISP seeking to provide cable ISP service, subject to capacity constraints or legitimate business considerations. *Id.* § II(E). The FCC believes that these agreements are private carrier services and not common carrier services because AOL Time Warner “determines on an individual basis whether to deal with particular ISPs and on what terms to do so.” High-Speed Declaratory Ruling, *supra* note 6, ¶ 54.

65. See FTC AOL-Time Warner Merger Order, *supra* note 63, § III(A) Content is defined as “data packets carrying information including, but not limited to, links, video, audio, text, e-mail, message, interactive signals, and interactive triggers.” *Id.* § I(R).

66. See *id.* § IV.

the broadband market.⁶⁷ Counsel for AOL claimed that the FTC was acting “on almost entirely unsupported theoretical ‘claims’ about AOL Time Warner’s market power. . . [The] company accepted [the consent] decree because its conditions were cheaper and easier than [a] bruising legal fight with [the FTC.]”⁶⁸

The FCC also reviewed the merger and concluded that this case was distinct from the earlier AT&T mergers; the AOL-Time Warner merger created a “unique concentration of assets,” enabling the firm to potentially harm competition in the broadband market.⁶⁹ Ironically, the FCC cited AOL’s comments in the AT&T-TCI merger proceeding as support for the agency’s conclusions that the broadband market is separate from the narrowband market, and that a vertically integrated cable operator offering broadband service has incentives to discriminate against unaffiliated ISPs.⁷⁰ The FTC consent agreement substantially addressed the potential harms identified by the FCC, but the FCC added a number of conditions to prevent AOL Time Warner from indirectly discriminating against unaffiliated ISPs. For example, AOL Time Warner must provide technical performance that does not discriminate against unaffiliated ISPs, while allowing the ISPs to directly bill customers and determine the content of their first screen.⁷¹ The FCC was careful to note that AOL Time Warner may petition for modification of the conditions if the FCC issues new rules related to ISPs or revises its definition of the broadband market.⁷²

Despite its actions in the AOL Time Warner merger, the FCC does not currently appear inclined to pursue a policy of mandated access. In connection with the merger, Commissioner Michael Powell, who subsequently became Chair of the FCC, could see no reason for “gratuitously” piling on the FTC’s “good works.”⁷³ Since the AOL-Time Warner merger, Powell has repeatedly criticized the conditions

67. See Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 BERKELEY TECH. L.J. 535, 555 (2001).

68. *AOL Attorney Attacks FTC’s AOL TW Merger Review*, WARREN’S CABLE REG. MONITOR, Apr. 9, 2001.

69. See AOL-Time Warner Merger Order, *supra* note 9, ¶¶ 53–57. The agency also concluded that this merger was distinct from AT&T’s cable acquisitions because the record showed that “the availability of DSL in Time Warner service areas may not be sufficiently widespread to constrain the merged firm . . . , at least in the short term.” *Id.* ¶ 84.

70. See *id.* ¶¶ 72, 86. See generally Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171 (2002) (exploring economic arguments about vertical integration in the broadband market).

71. See AOL-Time Warner Merger Order, *supra* note 9, ¶¶ 126, 318–24.

72. *Id.* ¶ 127. The FCC also noted that its conditions did not require AOL Time Warner “to offer any ISP connection to its cable systems, but instead to ensure that if and when the merged firm does agree to offer ISPs such connection, it does so in conformity with the requirements we delineate herein.” *Id.* n.365.

73. *Press Statement of Commissioner Michael Powell on the Approval of AOL-Time Warner Merger*, at <http://ftp.fcc.gov/speeches/powell/statements/2001/stmkp101.html> (last visited Oct. 6, 2002).

imposed on the merged firm; it is unlikely that he would support similar conditions for Comcast's acquisition of AT&T's cable systems.⁷⁴ The FCC's recent Declaratory Ruling also does not presage the adoption of mandated access on an industry-wide basis.

C. The Declaratory Ruling

By classifying cable modem service as an "information service," the FCC signaled that local governments would not be allowed to mandate access to cable modem platforms.⁷⁵ Simultaneously, the agency eliminated the possibility of Title II common carrier regulation that would accompany a "telecommunications service" classification.⁷⁶ Although the "information service" designation still allows the FCC to exercise Title I ancillary jurisdiction over cable modem service,⁷⁷ the agency seems committed to a minimal regulatory environment.

There are several indications in the Declaratory Ruling that the FCC is not inclined to impose mandated access upon the cable industry. Instead of viewing the broadband market as mature and subject to monopoly control, the agency described it as "still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing."⁷⁸ Moreover, cable systems are distinct from traditional wireline telephone companies.⁷⁹ Those cable operators offering a common carrier

74. Dreazen, *supra* note 46.

75. See High-Speed Declaratory Ruling, *supra* note 6, ¶¶ 99–108. William Kennard, the previous Chair of the FCC, frequently claimed that different regulatory structures created by 30,000 local governments would deter investment in broadband facilities. See, e.g., William E. Kennard, Remarks Before the National Cable Television Association (June 15, 1999), at <http://ftp.fcc.gov/Speeches/Kennard/spwek921.html>. The FCC has the authority under Title I of the Communications Act of 1934 to preempt non-Federal regulations that conflict with its goals. See, e.g., *California v. FCC*, 39 F.3d 919, 931–33 (9th Cir. 1994). The FCC asked for comments on whether it should preempt certain local regulations, such as access requirements. High-Speed Declaratory Ruling, *supra* note 6, ¶¶ 99–108. The agency, however, prefaced its request for comments by stating that it "would be concerned if a patchwork of State and local regulations beyond matters of purely local concern resulted in inconsistent requirements . . . that discouraged cable modem service deployment across political boundaries." *Id.* ¶ 97. Given the FCC's concern for a uniform national policy, it is likely that local access requirements will be preempted.

76. The FCC may forbear from imposing common carrier regulation on a telecommunications service. 47 U.S.C. § 160 (2000). In its Declaratory Ruling, the FCC tentatively concluded that to the extent that cable modem service is classified as a telecommunications service, forbearance from Title II regulations was in the public interest. High-Speed Declaratory Ruling, *supra* note 6, ¶ 95.

77. See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); High-Speed Declaratory Ruling, *supra* note 6, ¶ 75.

78. High-Speed Declaratory Ruling, *supra* note 6, ¶ 95; see also *id.* ¶ 83 (noting that the marketplace has changed significantly since 2000).

79. See *id.* ¶¶ 43–44.

local telephone service should not be required to open their cable modem platforms to multiple ISPs; such requirements would likely cause cable operators to withdraw from the telephony market, undermining one of the primary goals of the Telecommunications Act of 1996.⁸⁰ And, the FCC expressed the desire “to preserve the vibrant and competitive free market . . . for the Internet[,] . . . unfettered by Federal or State regulation.”⁸¹

Some proponents of mandated access claim that cable modem service consists of two discrete elements: a “pipeline” and the services transmitted through that “pipeline.”⁸² The FCC, however, concluded that cable modem service is an “integrated service” combining “the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.”⁸³ This meant that the FCC would not target the transmission function as a “telecommunications service” subject to Title II regulation, while leaving the other elements unregulated. As will be shown next, viewing cable modem service as an integrated combination of content and “pipeline” strongly supports the First Amendment rights of cable operators.

IV. THE FIRST AMENDMENT

A. *AT&T Corp. v. City of Portland*

In 1998, AOL and other narrowband ISPs began lobbying local governments that were considering the transfer of TCI franchises to AT&T. The exclusive contract with @Home was cited as an example of how AT&T intended to crush local ISPs; without access to AT&T’s high-speed service, ISPs claimed their narrowband service would rapidly become obsolete. In Portland, Oregon, local ISPs “claimed that they would be driven out of business, eliminating several hundred jobs and costing the local economy \$20 million.”⁸⁴ The plea to protect local businesses was especially appealing to the Portland area cable regulatory commission, which recommended that

80. *See id.* ¶ 47.

81. *Id.* ¶ 73 (quoting 47 U.S.C. § 230(b)(2)).

82. *See id.* ¶ 39 & n.154; *see also infra* note 91.

83. *Id.* ¶ 38. The FCC found that cable modem service does not involve a “stand-alone” offering of transmission service to subscribers or to ISPs. *See id.* ¶¶ 40, 48–55; *see also supra* notes 64 & 72.

84. *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). The local ILEC, US West, also claimed that the need for a “level playing field” meant cable modem platforms should be subject to common carrier obligations. *AT&T*, 216 F.3d at 875.

AT&T's cable modem service be treated as an "essential facility."⁸⁵ As one cable commissioner stated, "It's like if I owned all the airports in the world and I owned an airline and said only my airline could land there."⁸⁶

On December 17, 1998, the Portland city and Multnomah county commissioners adopted provisions requiring that AT&T provide non-discriminatory access to its cable modem platform for "providers of internet and on-line services."⁸⁷ AT&T rejected the requirement, and in early January 1999, Portland and Multnomah County denied the transfer of TCI's franchises.⁸⁸ AT&T then initiated a lawsuit challenging the local governments' actions. Michael Armstrong, AT&T's Chairman, stated:

We believe our cable customers should be able to access any portals and content they want to reach But it should be done on the basis of a sound commercial relationship, not through regulation Cable carriage that does not deal with these realities will simply kill broadband investment and chill a competitive alternative to the local Bell companies⁸⁹

Judge Owen Panner, in a June 3, 1999 opinion, ruled that the Portland ordinance was not preempted by federal statutes concerning cable services.⁹⁰ The Court of Appeals for the Ninth Circuit subsequently reversed Judge Panner's ruling because the appellate court did not view @Home as a cable service, and the basis for municipal jurisdiction vanished.⁹¹ Nonetheless, Judge Panner's discussion of

85. See *AT&T*, 43 F. Supp. 2d at 1150. For criticism of the "essential facility" designation for cable modem services, see William E. Lee, *Open Access, Private Interests, and the Emerging Broadband Market*, 379 CATO INST. POL'Y ANALYSIS 1 (2000).

86. Bryan Gruley, *Must AT&T Give Internet Rivals Access to TCI's Network?*, WALL ST. J., Jan. 15, 1999, at A1 (internal quotation marks omitted).

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

88. See *id.* @Home's service was introduced in limited parts of nearby Washington County and Clackamas County before imposition of the open-access requirement. Sun-jin Yim, *Lawsuit Slows the Spread of @Home's Internet Hookups*, OREGONIAN, May 16, 1999, at D1.

89. Leslie Cauley, *AT&T to Shun Exclusive Pacts for Cable TV*, WALL ST. J., June 15, 1999, at B8 (internal quotation marks and paragraph break omitted).

90. See *AT&T*, 43 F. Supp. 2d at 1151-54.

91. See *AT&T*, 216 F.3d at 876-77. The Ninth Circuit described "[a]ccessing Web pages, . . . corresponding via e-mail, and participating in live chat groups" as "two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming." *Id.* at 876. Furthermore, the appellate court divided @Home into two segments: a "pipeline" and the "Internet service transmitted through that pipeline." *Id.* at 878. The Ninth Circuit added, "To the extent @Home is a conventional ISP, its activities are that of an information service. However, to

AT&T's constitutional claims is important because it reflects many of the viewpoints expressed by mandatory access advocates.

Judge Panner regarded AT&T's First Amendment claims as less important than the preemption claims; his analysis of the constitutional issues is remarkably abbreviated. He correctly described the law as content-neutral,⁹² but erred in claiming that the law did not infringe upon AT&T's free speech rights. Judge Panner wrote, "There is no free speech violation . . . because AT&T volunteered to give cable subscribers access to competing ISPs."⁹³ Furthermore, there was no evidence that subscribers would associate AT&T with the speech of unaffiliated ISPs.⁹⁴ This analysis was not dictated by any of the Supreme Court's cable-related cases. Instead, Judge Panner relied upon *PruneYard Shopping Center v. Robbins*,⁹⁵ a shopping center case that is readily distinguished from the cable modem context.

PruneYard upheld a state constitutional right of access to a shopping center for protestors against a challenge based upon the Federal constitutional rights of the property owner. Key to the decision was the fact that the shopping center owner chose to open the property to the public and that the speakers did not impair the value of the property, the owner's use of the property, or the public's ability to distinguish between the views of the owner and those of the protestors.⁹⁶ *PruneYard* is inapplicable to the cable modem context for several reasons. First, AT&T's cable modem platform is not equivalent to a public forum;⁹⁷ only subscribers have access to the Internet through

the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service" *Id.* For criticism of the Ninth Circuit's analysis, see Christopher E. Duffy, Note, *The Statutory Classification of Cable-Delivered Internet Service*, 100 COLUM. L. REV. 1251, 1274-75 (2000). In its recent Declaratory Ruling, the FCC agreed that cable modem service was not a cable service. See High-Speed Declaratory Ruling, *supra* note 6, ¶¶ 60-69. However, the agency found that cable modem service did not involve a telecommunications service. See *id.* ¶¶ 39-58.

92. See *AT&T*, 43 F. Supp. 2d at 1154 (noting that the Portland ordinance does not dictate carriage of any specific message).

93. *Id.* This position closely reflect the views of intervenors such as US West and GTE. See Memorandum in Support of Motion to Dismiss by Applicants for Intervention US West Interprise America, Inc., GTE Internetworking Inc., Oregon Internet Service Provider Association, and OGC Telecom, Ltd. at 20-22, *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Or. 1999) (No. CV 99-65-PA). Mandated access proponents advance a double-edged argument that minimizes AT&T's First Amendment rights. On the one hand, they claim that AT&T's policy allowing its customers access to all Internet content means that AT&T is a passive transmission vehicle, rather than a speaker. On the other hand, if AT&T were to restrict access to certain Internet sites, this would lead to claims that it was operating impermissibly as a "gatekeeper."

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

95. 447 U.S. 74 (1980).

96. See *id.* at 83, 87.

97. The rights of speakers to use the shopping center in *PruneYard* were state constitutional rights, not First Amendment rights. See *id.* at 79. California appellate courts applying *PruneYard* consider whether or not the property owner has so opened his property for public

private “Intranet” facilities.⁹⁸ Second, multiple ISP access can impair the owner’s use of the property. Judge Panner erred in thinking that “click through” access had the same impact on AT&T’s cable system as allowing unaffiliated ISPs to install equipment at the headend. Such installation involves network management issues and technical modifications that are distinct from a single ISP environment.⁹⁹ Multiple ISP installations can degrade the operation of the cable network and any additional bandwidth allocated for multiple ISP use reduces AT&T’s ability to use that bandwidth for its own speech or other purposes. Third, and most importantly, the Supreme Court in *Turner Broadcasting System v. FCC* (“*Turner Broadcasting I*”)¹⁰⁰ held that cable systems are entitled to substantial First Amendment protection, even though cable’s “conduit” function meant that viewers would not identify the views carried on broadcast stations with those of the cable system.¹⁰¹ In short, the fact that Portland did not compel AT&T to disseminate any particular message is an insufficient answer to the constitutional questions raised by the mandated access ordinance.¹⁰²

use that it becomes equivalent to a public forum. *See, e.g.*, *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 87 Cal. Rptr. 2d 22, 26 (Cal. Ct. App. 1999).

98. *See* High-Speed Declaratory Ruling, *supra* note 6, ¶ 10 & n.41 (“An ‘Intranet’ is a private network that is the equivalent of a ‘private Internet’ reserved for those users who have the authority and passwords to access the network.”).

99. As the FCC found in its Declaratory Ruling, “the multiple-ISP environment requires a re-thinking of many technical, operational, and financial issues, including implementation of routing techniques to accommodate multiple ISPs.” *Id.*, ¶ 29; *see also id.* ¶ 15 (describing technical challenges, such as bandwidth management, network security, and subscriber IP address assignment management, that may arise in a multiple-ISP environment).

GTE, one of the primary proponents of mandated access, conducted a 1999 demonstration project involving three ISPs on a cable system and claimed that the technological changes to give customers a choice of ISPs cost less than \$1 per home. This project was criticized by Excite@Home because of the small number of customers and ISPs involved. *See Lee, supra* note 85, at 16; *see also* Pankaj Chowdhry, *At Home Should Tell It Like It Is*, PC WEEK, July 12, 1999, at 76 (GTE’s proposal “looked like the work of fiendish elves who’ve been drinking lots of Jolt cola”). For a discussion of the multiple-ISP trials of Time Warner and AT&T, *see* Leslie Ellis, *A Tale of Two Trials*, CED, May 1, 2001, at 80; Angela Langowski, *More Than Meets the Eye*, CED, May 1, 2001, at 18.

100. *See* 512 U.S. 622 (1994).

101. *Id.* at 661–62, 655. The must-carry rules addressed in *Turner Broadcasting I* were content neutral; cable operators did not have ideological objections to the programs of broadcast stations receiving must-carry status. Nonetheless, the Court regarded the burden on cable operators as sufficient to trigger intermediate scrutiny.

102. The absence of compelled dissemination of a particular message removes the Portland ordinance from the context of cases such as *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that compulsory recitation of the Pledge of Allegiance is unconstitutional). Similarly, cases involving compelled subsidies of objectionable messages are inapplicable. *See, e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that union members may be required to contribute dues for collective bargaining activities, but may not be required to finance political messages to which they object). *See generally* Leora Harpaz, *Justice Jackson’s Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817 (1986) (distinguishing among types of compelled speech cases).

The central First Amendment question raised in *AT&T* is whether government may require a private property owner to open its facilities to unaffiliated speakers. Setting aside the unique position of broadcasting,¹⁰³ mandated access based on content will generally be unconstitutional, regardless of the nature of the property.¹⁰⁴ If the regulation is content-neutral, the nature of the property and the expressive activities of the property owner are critical. Quite simply, cable systems make editorial choices about the use of their facilities;¹⁰⁵ cable modem service is not a “dumb pipe” to the Internet.¹⁰⁶ Cable operators — on their own or in partnership with cable modem ISPs — develop distinctive content such as local news, weather, and sports on their services’ home pages.¹⁰⁷ Similarly, operators have commercial relationships in which their home pages feature links to certain websites.¹⁰⁸ By likening AT&T’s cable modem platform to a shopping center, Judge Panner minimized the extent to which the Portland ordi-

Proponents claim that mandated access does not raise First Amendment issues because cable operators lack political or ideological objections to the speech provided by unaffiliated ISPs. *See, e.g.*, Reply Comments of WorldCom, Inc. at 35–36, FCC GN Docket No. 00-185 (Jan. 10, 2001). As shown above, *supra* note 101, the absence of such objections in *Turner Broadcasting I* did not eliminate the need for heightened First Amendment scrutiny.

103. *See, e.g.*, *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (upholding statute granting broadcast access to federal candidates but not to other speakers); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (sustaining aspects of the FCC’s fairness doctrine under which television broadcasters must provide fair coverage of discussions of public issues).

104. *See, e.g.*, *Pacific Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1 (1986) (utility billing envelopes); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (newspapers); *cf. Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group*, 515 U.S. 557 (1995) (holding that a privately-organized parade cannot be required to include groups whose message is contrary to the organizer’s values).

105. *See, e.g.*, *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (stating that cable television is engaged in “speech” under the First Amendment); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1988) (“[T]hrough original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent [cable operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats.”).

106. Tom Jermoluk, then CEO of Excite@Home, stated, “We don’t want to be a dumb pipe for others to take advantage of.” Blumenstein et. al., *supra* note 48, at B1 (internal quotation marks omitted). Cable operators kept 65% of the monthly fee charged for @Home. Thus, @Home’s profit had to come from the sale of advertising placed on Excite, the start page for @Home users unless they configured their computers to go to a different Web portal. Hansell, *supra* note 48, at C1. The start page was tailored to particular communities, with local and regional information provided by the cable operator and national information provided by Excite. Road Runner affiliates also provide local content for their users’ start pages. For an example, see http://rrcorp.central.rr.com/hso/explore_demo4.asp (last visited Oct. 11, 2002).

107. Cox’s cable modem service features a start pages with information tailored to local communities. *See, e.g.*, <http://middlegeorgia.simplylocal.com> (start page for Macon, Georgia area) (last visited Oct. 11, 2002).

108. *See, e.g.*, http://rrcorp.central.rr.com/hso/explore_features.asp (last visited Oct. 11, 2002) (showing the websites, such as CNN, featured on Road Runner).

nance burdened AT&T's expressive rights.¹⁰⁹ He also overlooked the most relevant precedent: *Turner Broadcasting I*.

Turner Broadcasting I involved a content-neutral requirement that cable systems carry certain local television broadcasters.¹¹⁰ The Court rejected the relaxed standard applied to broadcasting.¹¹¹ In addition, the Court did not apply strict scrutiny because there was no compelled dissemination of a particular message.¹¹² The differential treatment of cable was also justified by the "special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."¹¹³ The appropriate standard was a form of intermediate scrutiny known as the *O'Brien* test, which asks whether a content-neutral regulation furthers a substantial governmental interest through narrowly tailored means.¹¹⁴ *Turner Broadcasting I* explicitly requires that courts applying the *O'Brien* test must closely examine the legislative record to determine whether "the recited harms are real, not merely conjectural, and. . . [whether] the regulation will in fact alleviate these harms in a direct and material way."¹¹⁵

Judge Panner, while not citing *Turner Broadcasting I*, nonetheless offered a highly abridged *O'Brien* analysis:

The open access provision is within constitutional power of the City and County, it furthers the substantial governmental interest in preserving competition, the governmental interest is unrelated to the suppression of free speech, and the incidental restriction on free speech is no greater than necessary.¹¹⁶

109. Similarly, Judge Panner's reliance on *AMSAT Cable Ltd. v. Cablevision*, 6 F.3d 867 (2d Cir. 1993) is misplaced. *AMSAT* involved a content-neutral Connecticut law granting cable operators access to apartment complexes. The property owner challenged this law because it would result in compelled expression. The Second Circuit distinguished this law from content-based laws in cases such as *Miami Herald* and *PG&E*, and concluded that tenants would not identify the property owner with the programming of the cable operator. The Second Circuit's analysis stopped there. The court of appeals, almost as an aside, assumed that the property owner was a speaker under the First Amendment. A more thorough analysis would have examined the nature of the property owner's activities to determine if the law burdened "speech" and, if so, whether the law passed content-neutral scrutiny. Judge Panner's citation of *AMSAT* and *PruneYard* reveal that he regarded AT&T's cable modem platform not as an important speech or press outlet, but as property similar to an apartment complex or shopping mall.

110. Discussed at length in William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261, 1306-19 (1998).

111. 512 U.S. 622, 637-39 (1994).

112. *Id.* at 661.

113. *Id.*

114. *Id.* at 662 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

115. *Id.* at 664.

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

Despite this brief reference to the *O'Brien* test, Judge Panner was actually applying rational basis scrutiny. Judge Panner conducted no analysis of the record to determine if Portland had substantial evidence for its finding that AT&T's cable modem platform was an essential facility, or that AT&T's exclusive relationship with @Home would be harmful to competition.¹¹⁷

His posture on judicial review of the factual basis of the law is succinctly captured by the following: "It is not my role to second-guess the findings supporting the decision to impose open access. So long as the City and County act within their jurisdiction, their findings are entitled to deference."¹¹⁸ Interestingly, he cited two rational basis equal protection cases for this posture,¹¹⁹ while completely ignoring the requirements of *Turner Broadcasting I*.

The *AT&T* opinion is entirely bereft of analysis of whether harm to unaffiliated ISPs was "real" and not "conjectural." Also, the assumption that the law would actually achieve its intended purpose is highly questionable; to regulate "nondiscriminatory access," the local cable commission would have to develop elaborate rules governing pricing arrangements and then supervise AT&T's relations with unaffiliated ISPs. These tasks would be far beyond the agency's resources and expertise. Nor was Judge Panner's conclusion that the law did not burden more speech than necessary supported by any analysis. He did not ask whether the need to protect competition justified a requirement that AT&T accommodate *every* ISP, or whether a less extensive measure would be effective. Any serious application of *O'Brien* involves examination of whether the burden on speech is greater than necessary, but Judge Panner was uninterested in this line of inquiry.

117. See Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment at 30, *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Ore. 1999) (arguing that the ordinance contains only abbreviated and conclusory support for the need for the mandatory access condition; there is by no means the extensive factual background the Supreme Court requires to sustain the constitutionality of laws burdening a cable operator's First Amendment rights).

118. *AT&T*, 43 F. Supp. 2d at 1152.

119. *Id.* (citing *New Orleans v. Dukes*, 427 U.S. 297 (1976), *Williamson v. Lee Optical*, 348 U.S. 483 (1955)). The rational basis scrutiny of both *Dukes* and *Lee Optical* is appropriate where fundamental rights are not at issue. See, e.g., *Dukes*, 427 U.S. at 303 (the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations in areas that neither affect fundamental rights nor proceed along suspect lines). Judge Panner's citation of these cases reveals how little he regarded AT&T's First Amendment claims. As the Supreme Court stated in *City of Los Angeles v. Preferred Communications, Inc.*, "Where a law is subject to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force." 476 U.S. at 488.

In brief, Judge Panner's opinion slights the relevant Supreme Court precedent and offers a cursory analysis of the issues. A more thoughtful approach is offered in the *Comcast* opinion.

B. Comcast v. Broward County

On July 13, 1999, the Commissioners of Broward County, Florida enacted an ordinance requiring cable operators with broadband facilities to provide nondiscriminatory access to any ISP.¹²⁰ The ordinance was drafted by a lawyer for GTE, a telephone company with competing ISP services; GTE also agreed to indemnify the county for any costs related to a legal challenge of the ordinance.¹²¹ Although the ordinance was designed to promote competition, AT&T responded by halting plans to offer cable modem service.¹²²

In response to suits brought by cable operators serving Broward County, Judge Donald Middlebrooks found the statute to be an unconstitutional abridgment of the First Amendment.

Unlike Judge Panner, who was indifferent to AT&T's First Amendment claims in the Portland case, Judge Middlebrooks ascribed such importance to the speech activities of the cable operators that he surprised even the cable companies' attorneys.¹²³ He regarded the decisions affecting cable modem service as no different than other programming decisions recognized as "speech" by the Supreme Court.¹²⁴ Judge Middlebrooks wrote:

Along with movies, weather, sports, news and entertainment programming, such as the Weather Channel, HBO, VH1 and CNN, the Plaintiffs have selected an Internet service—Advanced Communications has selected ISP Channel; MediaOne has selected Road Runner; and TCI, along with others, has

120. Broward County Ordinance No. 1999-41 (effective July 13, 1999) at <http://www.broward.org/records1.htm> (last visited Oct. 4, 2002). The ordinance is distinct from the Portland ordinance in that it specifies that access is subject to technical feasibility.

121. *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 686 n.1 (S.D. Fla. 2000).

122. *Id.* at 690. The county suspected that the cable companies halted plans to offer cable modem services because this would enhance their lobbying posture elsewhere. Defendant Broward County's Response to Plaintiff's Motions for Summary Judgment and Supporting Memorandum of Law, at 11–14, *Comcast Cablevision of Broward County, Inc., v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000). See generally Kathy Chen, *AT&T Used Carrot-and-Stick Lobbying Efforts in Local Debates over Access to Cable-TV Lines*, WALL ST. J., Nov. 24, 1999, at A20 (explaining AT&T's successful lobbying efforts used in garnering support of local officials).

123. *U.S. District Court Overturns Florida Cable Open Access Statute*, WARREN'S CABLE REG. MONITOR, Nov. 20, 2000.

124. *Comcast*, 124 F. Supp. 2d at 691; see also *supra* note 105.

founded @Home. Each selection offers distinctive programming and format. According to the Plaintiffs, their choices were made from an array of opportunities and reflected a choice based upon content. Their choice required them to forego other programming because of the physical limitations of their system. They plan to market their Internet provider as an integral part of their overall programming.¹²⁵

In addition to the distinctive content provided by each ISP, Judge Middlebrooks noted that cable operators also acquire or produce news, information, and advertising content and “publish” it on the “first page” of the cable modem service offered to subscribers.¹²⁶ The county ordinance intruded upon the ability of cable operators to select the content offered on their systems.¹²⁷

The county claimed that the First Amendment protected a cable operator’s own content, but that the “transmission mechanism . . . enjoys no First Amendment protection and may be separated out for regulation.”¹²⁸ In other words, regulation of the delivery mechanism or conduit is economic regulation that does not trigger First Amendment scrutiny. Judge Middlebrooks was unimpressed, claiming that “content and technology are intertwined in ways which make analytical separability difficult and perhaps unwise.”¹²⁹ Drawing upon newspaper and pamphlet cases which have emphasized the importance of the “liberty of circulating,” he concluded that the First Amendment protects “not only the words which appear on a newspa-

125. 124 F. Supp. 2d at 691.

126. *Id.* at 690. For example, TCI arranged with, among others, the *Chicago Tribune* to provide local news and content for TCI’s cable modem service. *Id.*

127. *Id.* at 694.

128. *Id.* at 691.

129. *Id.* at 692. He described the relationship between content and technology in the following manner:

Although all would agree that the First Amendment protects freedom of thought and expression, it is equally true that thought is nonverbal and necessarily requires speech to be communicated. Moreover, technology extends the senses, permitting faster communication beyond reach of the human voice. The printed word brought uniformity and repeatability and permitted widespread circulation through books and then newspapers. The increasing speed of information gathering and publication also has created new forms of arranging and circulating information affecting not only the physical appearance of the press but also the prose of those contributing to it. For example, movies, by speeding up the mechanical, moved us from sequence to configuration and structure while the immediacy of radio and television has eliminated distance and time.

Id.

per's pages, but its printing and circulation as well."¹³⁰ The "liberty of circulating," he determined, applied not only to newspapers, but also to new technologies such as fiber optics and cable.¹³¹

Significantly, Judge Middlebrooks' opinion lacks any discussion of statutory classification of cable modem service. The absence of any discussion of statutory classification is especially striking because the Ninth Circuit's opinion in *AT&T*, dividing cable modem service into a "pipeline" and the services distributed through that "pipeline,"¹³² had been issued only a few months earlier. Nonetheless, Judge Middlebrooks rejected any effort to divide cable modem service, insisting that content and transmission technology are intertwined.¹³³ He also stated that a cable system, "unlike a telephone service, does not sell transmission but instead offers a collection of content."¹³⁴ Judge Middlebrooks maintained that freedom of the press included the owner's ability to define how communications facilities are utilized by third parties.¹³⁵

1. Strict Scrutiny

Judge Middlebrooks erroneously believed the Broward County ordinance was similar to the right of reply statute found unconstitutional in *Miami Herald Publishing Co. v. Tornillo*,¹³⁶ and was thus subject to strict scrutiny.¹³⁷ The reply obligation was triggered by a

130. *Id.* at 693.

131. *See id.* History showed that governments "have been quick to exercise control over new technology for expression, from the printing press to broadcast television, to cable. Regulation has been directed not only at the content of the message, but at the method of its delivery." *Id.* at 695.

132. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).

133. *Comcast*, 124 F. Supp. 2d at 692.

134. *Id.* at 693. *See also supra* note 83 and accompanying text.

135. The County offered the following hypothetical to explain its approach:

Suppose to reduce noise and pollution, the County granted one delivery company a public franchise to deliver newspapers each morning. That company then "ties" the delivery franchise to its own newspaper-- it adopts a rule that the consumer must purchase its newspaper in order to receive delivery of any other newspaper.

Comcast, 124 F. Supp. 2d at 691. Judge Middlebrooks, believing that freedom of the press encompassed "liberty of circulating," offered his own hypothetical:

Suppose the Broward County Commission, concerned about the ability of consumers to gain access to classified advertising and other sources of information, adopted an ordinance requiring *The Ft. Lauderdale News and Sun Sentinel* to deliver *The Miami Herald*, *The New York Times*, and the printed material of anyone who made a request on the same terms as it delivered its own newspaper. Could such an ordinance withstand scrutiny under the First Amendment?

Id. at 693.

136. 418 U.S. 241 (1974).

137. 124 F. Supp. 2d at 697.

newspaper's attack on a candidate and the Supreme Court feared that the statute would chill criticism of candidates.¹³⁸ While the Broward County ordinance was triggered by a cable operator's decision to establish cable modem service, the access obligations were not tied to any specific message disseminated by a cable operator.¹³⁹ Similarly, since access was not granted to ISPs for the dissemination of particular viewpoints, the ordinance did not present the content-based problems of *Pacific Gas and Electric Co. v. Public Utilities Commission*.¹⁴⁰

The Court in *Turner Broadcasting I* distinguished the must-carry requirements from the content-based laws at issue in *Miami Herald* and *PG&E*. Judge Middlebrooks was well familiar with *Turner Broadcasting I*¹⁴¹ and it seems odd that he did not acknowledge this aspect of the opinion. The Court in *Turner Broadcasting I* also concluded that because of cable's long history as a conduit for broadcast signals, must-carry requirements would not cause operators to "alter their own messages to respond to the broadcast programming they are required to carry."¹⁴² Although Judge Middlebrooks concluded that there was no history of cable operators serving as a conduit for ISPs, this does not mean that cable modem subscribers necessarily identify the views of unaffiliated ISPs or websites with those of their cable operators. Indeed, a common feature of cable modem service agreements is a warning to subscribers that there may be some content on the Internet which is offensive and that the cable operator does not assume responsibility for "the content contained on the Internet or made available by others."¹⁴³ Thus, while subscribers may find the messages contained on the website of a white supremacist group to be offensive,¹⁴⁴ it seems unlikely that a cable operator would be forced

138. *Miami Herald*, 418 U.S. at 257.

139. *Cf. Turner Broadcasting I*, 512 U.S. at 655 (describing must-carry rules as content-neutral because they are not activated by "any particular message spoken by cable operators").

140. 475 U.S. 1 (1986) (unconstitutional viewpoint-based access requirement); *cf. Turner Broadcasting I*, 512 U.S. at 655 (noting that must-carry status is not granted to broadcasters to counterbalance the messages of cable operators).

141. *See, e.g.*, 124 F. Supp. 2d at 696–97. In *Turner Broadcasting I*, the Court distinguished *Miami Herald* from the must-carry rules because *Miami Herald* involved a content-based restriction, posed a chilling effect, and newspaper publishers did not control a "bottleneck." 512 U.S. at 655–56. Judge Middlebrooks misread *Turner Broadcasting I*; in his view, the only reason the Court did not apply *Miami Herald* to the must-carry case was because cable operators controlled a "bottleneck" for video programming. 124 F. Supp. 2d at 696.

142. 512 U.S. at 655.

143. Comcast@Home Subscriber Agreement §8 (a), at <http://www.comcastonline.com/subscriber-v3-clr.asp> (last visited February 27, 2002).

144. *See* 124 F. Supp. 2d at 697 n.4.

to affirmatively respond to avoid the appearance of agreement with the supremacists.

Judge Middlebrooks was correct in concluding that the ordinance harmed the free flow of ideas by discouraging the implementation of cable modem platforms. To comply with the ordinance, a cable operator would have to design or redesign its cable modem platform to accommodate multiple ISPs, including an allocation of sufficient bandwidth for multiple ISP use. Although the ordinance conditioned access upon “technical feasibility,”¹⁴⁵ this term was not defined; Judge Middlebrooks noted that an unlimited number of ISPs might demand access.¹⁴⁶ Despite the ordinance’s content neutrality, it nevertheless imposed a significant burden on expression through its financial and technical constraints¹⁴⁷ and its intrusion upon the cable operators’ ability to define how bandwidth is utilized.

Content-neutral regulations that significantly burden expression may be subject to strict scrutiny, as illustrated by *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*.¹⁴⁸ That case presented the Court with a Minnesota law exempting newspapers from sales tax but not from taxes on the use of paper and ink to produce publications. Because the first \$100,000 worth of ink and paper used by a newspaper was exempt, the use tax fell hardest on large

145. Broward County Ordinance No. 1999-41 §1.02, *supra* note 120.

146. *See* 124 F. Supp. 2d at 697 (noting that there may be around 5,000 ISPs and there is no limit on the number that might demand access). And, as the district court noted, the must-carry rules had a limit on the number of broadcasters that a cable system was required to carry.

One of the factual disputes among the parties was whether or not there were technical constraints limiting a cable operator’s ability to accommodate multiple ISPs. *See Comcast Cablevision v. Broward County*, 104 F. Supp. 2d 1365, 1366 (S.D. Fla. 2000). Because of factual disputes on this and other matters, Judge Middlebrooks initially denied the plaintiffs’ motion for summary judgment and allowed discovery to continue. *See id.* at 1368. In his subsequent opinion granting the plaintiffs’ summary judgment, Judge Middlebrooks acknowledged the technical constraints of cable systems. To accommodate multiple ISPs, a cable operator would have to “adopt technology which would allow its system to identify each subscriber’s choice of Internet service provider . . .” 124 F. Supp. 2d at 697. Also, he noted that the cable operators’ decision to offer cable modem service “required them to forego other programming because of the physical limitations of their system.” *Id.* at 691. Although these are not explicit findings that multiple ISPs cannot be accommodated, they are an acknowledgment that bandwidth is finite and allocation of bandwidth and equipment for one type of service affects other services. For example, upstream bandwidth is in extremely short supply and technical choices to accommodate multiple ISPs affect the cable operator’s local telephone service and may require replacing modems and amplifiers. *See* Mark Laubach, *Technical Considerations for CATV Open Access* (May 1999) at http://www.isp-planet.com/politics/wh_index.html (last visited Mar. 13, 2002); Comments of Charter Communications, Inc. at 9–20, FCC GN Docket No. 00-185 (Dec. 1, 2000); Comments of Excite@Home at 11–13, FCC GN Docket No. 00-185, (Dec. 1, 2000).

147. *See* 124 F. Supp. 2d at 694; *see also Miami Herald*, 418 U.S. at 256 (right of reply statute imposes a penalty in terms of “the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print”).

148. 460 U.S. 575 (1983).

newspapers. In finding the law unconstitutional, the Court advocated a prophylactic rule requiring that the press be treated like other businesses. The Court presumed that, given that the differential treatment in this case was not justified by some special characteristic, the goal of the law was related to suppression of expression.¹⁴⁹ An alternative reason for the invalidation of the law was its “singling out” of a few newspapers. This presented such “potential for abuse” that no interest advanced by the state could justify the law.¹⁵⁰

Judge Middlebrooks regarded the Broward County ordinance as “singling out” those cable operators who provide Internet service; he observed that the ordinance “has no application to wireless, satellite, or telephone transmission or to other providers of Internet service.”¹⁵¹ He did not mention the fact that media such as wireless, satellite, and telephone-based Internet services are outside the jurisdiction of local governments. Each of the Supreme Court’s differential treatment cases involves a government body that could have applied a regulation more broadly but instead targeted a few members of a medium¹⁵² or distinguished all members of a medium from other media.¹⁵³ Differential treatment analysis is misplaced in cases where local governments lack jurisdiction over federally-regulated media. This type of First Amendment analysis would be appropriate if the federal government mandated access to cable modem platforms but did not mandate access to other federally-regulated broadband facilities.¹⁵⁴ Judge Middlebrooks was on a stronger footing when he questioned whether the ordinance was justified by a special characteristic of the cable medium. Recall that the Court in *Turner Broadcasting I* concluded that

149. See *id.* at 585, 588. For a discussion of *Minneapolis Star*, see William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L.Q. 637, 665–68 (1993).

150. 460 U.S. at 591–92.

151. *Comcast*, 124 F. Supp. 2d at 692.

152. See *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (holding unconstitutional a sales tax applicable to general interest magazines but not applicable to religious, professional, trade, and sports magazines); *Minneapolis Star & Tribune Publ’g Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575 (1983) (holding unconstitutional a use tax singling out only large newspapers); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (holding unconstitutional a sales tax singling out newspapers with weekly circulations above 20,000). *But see Turner Broadcasting I*, 512 U.S. at 661 (rejecting the differential treatment argument because Congress had a legitimate reason to impose must-carry obligations on cable systems but not on analogous video delivery methods such as satellite or wireless cable systems).

153. See *Leathers v. Medlock*, 499 U.S. 439 (1991) (holding constitutional a sales tax that is applicable to cable television but not applicable to print media).

154. Constitutional claims about differential treatment are distinct from policy arguments about differential treatment. One of the primary policy arguments raised by ILECs for elimination of the access requirement to their DSL facilities is that cable does not face equivalent obligations. See, e.g., JOHN THORNE, *THE 1996 TELECOM ACT: WHAT WENT WRONG AND PROTECTING THE BROADBAND BUILDOUT* at 32–38 (2001) (claiming that the regulation of ILECs puts them at considerable disadvantage to cable, wireless, and satellite broadband systems), available at http://newscenter.verizon.com/policy/broadband/primer_c.pdf?PROACTIVE (last visited Oct. 6, 2002).

the must-carry law was justified by the danger cable operators posed to the viability of broadcast television.¹⁵⁵ Must-carry was premised on Congressional findings that cable served over 60% of television households, and since few cable subscribers maintained antennas, most subscribers had no way to gain access to those television stations that were not available on cable. By refusing carriage to certain television stations, cable operators could reduce the audience and revenue of those stations.¹⁵⁶ But cable's ability to harm broadcast television does not mean that cable also has the ability to harm unaffiliated ISPs or restrict consumer access to Internet content. Unlike the video programming market, where the majority of households are served by cable, the vast majority of Internet households do not use cable as their means of Internet connection.¹⁵⁷ Moreover, cable modem subscribers are able to access any content on the Internet.¹⁵⁸ Therefore, Judge Middlebrooks appropriately distinguished the video programming market from the Internet access market.

In summary, Judge Middlebrooks' effort to fit the Broward County ordinance into the *Miami Herald-PG&E* framework is inappropriate. His concern for differential treatment is also troublesome because the county lacked jurisdiction over other forms of Internet access. Finally, Judge Middlebrooks' questions about the county's assessment of the Internet access market can be addressed without strict scrutiny — these questions fit neatly within the framework of intermediate scrutiny.

155. See *Turner Broadcasting I*, 512 U.S. at 661.

156. Justice Kennedy, writing for the Court, described cable in the following terms:

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.

Id. at 656. In contrast, Justice Kennedy said that a daily newspaper, "no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications—whether they be weekly local newspapers, or daily newspapers published in other cities." *Id.* I have previously noted that this passage collapses under close analysis. See Lee, *supra* note 110, at 1311 & n.361.

157. See *Comcast*, 124 F. Supp. 2d at 696 (cable operators have no bottleneck monopoly over access to the Internet). Judge Middlebrooks was writing before the FCC concluded in the AOL-Time Warner merger proceedings that the broadband market is distinct from the narrowband market. Although cable is the dominant broadband form of access, cable's power in this nascent market is quite distinct from its power in the video programming market.

158. See *id.* at 690 (@Home and Road Runner allow subscribers access to all publicly available content on the Internet); see also High-Speed Declaratory Ruling, *supra* note 6, at n.45 (FCC is unaware of any cable operator that prevents subscribers from reaching any Internet content).

2. Intermediate Scrutiny

Although he believed strict scrutiny applied, Judge Middlebrooks did not subject the ordinance to this level of review. Instead, he concluded that the law failed intermediate scrutiny. This was a keen strategy that largely immunized his opinion from reversal by an appellate court.¹⁵⁹ Unlike the toothless version of intermediate scrutiny applied by Judge Panner, Judge Middlebrooks applied intermediate scrutiny with bite.

Judge Middlebrooks understood the requirements of intermediate scrutiny: the government must prove that the harm it seeks to prevent is “real, not merely conjectural” and that the regulation will directly alleviate the harm.¹⁶⁰ Broward County had conducted no studies of the broadband market,¹⁶¹ and offered no substantial evidence in support of its “bottleneck” claim.¹⁶² Consequently, “the harm the ordinance is purported to address appears to be non-existent.”¹⁶³

Judge Middlebrooks was applying one of the most important principles from *Turner Broadcasting I*: the mere assertion of a dysfunction in a speech market is insufficient to justify a cable regulation. This means that even though the government may have the authority

159. In a settlement agreement with AT&T and Comcast, Broward County agreed to repeal the ordinance, rather than appeal Judge Middlebrooks’ opinion. See *Broward County Settles Open Access Lawsuit with AT&T, Comcast*, WARREN’S CABLE REGULATION MONITOR, Apr. 23, 2001.

160. *Comcast*, 124 F. Supp. 2d at 697.

161. Judge Middlebrooks noted that, in contrast, the FCC had undertaken such a study, citing the First Broadband Report, *supra* note 52, and commenting that “the agency charged by Congress with the responsibility of monitoring the deployment of broadband technology, has concluded that the preconditions for monopoly in the consumer market for broadband appear absent.” 124 F. Supp. 2d at 698. Elsewhere in the opinion, Judge Middlebrooks quoted a report from the Cable Services Bureau of the FCC, in which the Bureau concluded that it “is not persuaded that consumers are at risk of cable establishing a bottleneck monopoly in broadband services” *Id.* at 689 (quoting Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman of the Federal Communications Commission, on Industry Monitoring Sessions Convened by Cable Services Bureau 42* (1999), available at <http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf>).

162. Although not mentioned in the *Comcast* opinion, the nature of the record before the district court sheds light on this claim. In support of an earlier motion for summary judgment, the plaintiffs argued that the county commissioners “enacted the ordinance with little evidentiary support.” 104 F. Supp. 2d at 1366. The plaintiffs further claimed that the only relevant evidence was the evidence before the commissioners at the time of enactment, and that, as such, additional potential evidentiary support would be inconsequential. *Id.* at 1367. In denying this motion, Judge Middlebrooks observed that the record developed on remand in *Turner Broadcasting II* contained a variety of materials that were not before Congress when it enacted the must-carry requirements. *Id.* at 1368 (citing *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 187 (1997)). Judge Middlebrooks concluded that he could also consider evidence that was outside of the legislative record. *Id.* at 1368 n.2. Therefore, Broward County was given the chance to supplement the sparse legislative record with additional evidence. Even with this opportunity to enhance the record, the county’s evidentiary support was inadequate.

163. *Comcast*, 124 F. Supp. 2d at 697.

to impose a regulation, it may not do so based solely upon conjecture.¹⁶⁴ It is unlikely that local governments will be able to satisfy this requirement. The broadband market is so new that legislative findings are best described as predictions.¹⁶⁵ Additionally, local government predictions about emerging communication markets are probably entitled to less judicial deference than Congressional predictions.¹⁶⁶

The *Comcast* opinion does not address whether the regulation would actually achieve its intended goal. Assuming that Broward County had a substantial factual basis for concluding that cable modem exclusivity was harmful to competition, the county would still have to prove that the method it selected was properly tailored to advance that interest. In other words, why was it necessary for the county to mandate access for *all* unaffiliated ISPs, rather than some smaller number? Along this line of inquiry, consider the difficulty the FCC recently experienced in defending its rule that cable operators could only devote 40% of their channel capacity to affiliated video programmers.¹⁶⁷ Time Warner challenged the regulation as a restric-

164. See, e.g., *Time Warner Entm't. Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (“The FCC must show a record that validates the *regulations*, not just the abstract statutory authority.”); *Charter Communications, Inc. v. County of Santa Cruz*, 133 F. Supp. 2d 1184, 1216 (N.D. Cal. 2001) (“Whether the County *could have* legitimate interests in regulating the cable industry and whether the County *has shown* such interests in this case are different questions.”).

165. See Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 296–99 (2000) (arguing that the harms feared by “open access” advocates are predictive rather than actual). Benjamin cautions against proactive government regulation of communications, preferring “a principle of humility in the face of uncertainty.” *Id.* at 363.

166. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 311 n.1 (2000) (Souter, J., concurring in part and dissenting in part) (stating that the calculus for determining the level of factual justification needed to satisfy intermediate scrutiny can include the “nature of the legislating institution” as a factor, and observing, “We might. . . defer less to a city council than we would to Congress”). The Court’s willingness to allow cities to base regulations of sexually-oriented businesses on studies conducted by other cities, see, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), does not translate to the regulation of cable. In *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), the city claimed that it did not need to generate a legislative record in enacting ordinances restricting the number of cable operators. *Id.* at 495. The Court rejected this position, noting that such laws need more than just a rational basis. *Id.* at 496. Further, the Court concluded that the factual basis of such laws would be subject to judicial examination. *Id.* (stating that the Court may not assume that laws restricting expression will advance the asserted state interests). This portion of *Preferred Communications* was cited in *Turner Broadcasting I* as support for the proposition that the government must demonstrate that the harms it seeks to alleviate are “real, not merely conjectural” and that the regulation will alleviate these harms in a direct and material way. 512 U.S. at 664.

167. Congress found that cable operators and programmers often have common ownership and that operators therefore have “the incentive and ability to favor their affiliated programmers. This *could* make it more difficult for noncable-affiliated programmers to secure carriage on cable systems.” 47 U.S.C. § 521(a)(5) (2002) (emphasis added). Time Warner, with interests in both cable systems and video programming, facially challenged the statute, which directed the FCC to limit the number of channels a cable operator devoted to affiliated programming. *Time Warner Entm’t Co. v. United States*, 211 F.3d 1313 (D.C.

tion on its ability to exercise editorial control over a portion of the channels on its cable systems. The Court of Appeals for the District of Columbia Circuit found that “the FCC seems to have plucked the 40% limit out of thin air.”¹⁶⁸ The court of appeals added, “What are the conditions that make 50% too high and 30% too low? How great is the risk presented by current market conditions? These questions are left unanswered by the Commission’s discussion.”¹⁶⁹ The appellate court concluded, “Constitutional authority to impose some limit is not authority to impose any limit imaginable.”¹⁷⁰

In summary, the significance of Judge Middlebrooks’ categorization of cable modem service as part of the press cannot be overemphasized.¹⁷¹ If he had not regarded the law as burdening the First Amendment rights of cable operators, rational basis scrutiny would have been appropriate, or the focus would have shifted to whether the federal government had preempted local authority. But by treating content and transmission as inseparable, he rejected the local government’s argument that only content was protected by the First Amendment. This means that “unbundling,” which may be appropriate for electric power grid operators¹⁷² or “telecommunications service” providers,¹⁷³ is presumptively inappropriate for cable operators.

Cir. 2000). The District of Columbia Court of Appeals found nothing demonstrating “that the Congress’s legislative conclusion was either unreasonable or unsupported by substantial evidence.” *Id.* at 1322. Since this was a facial challenge, the court of appeals did not have to consider whether any particular regulation would actually serve the asserted interest. *See id.* at 1315.

168. *Time Warner Entm’t Co. v. United States*, 240 F.3d 1126, 1137 (D.C. Cir. 2001). The court of appeals also found the FCC lacked adequate support for its 30% limit on the number of subscribers that could be served by a cable MSO. *Id.* at 1130–36. *Cf.* *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) (arguing that FCC decisions to retain limits on national television station ownership and television station/cable system ownership are arbitrary and capricious in violation of the Administrative Procedure Act); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (arguing that an FCC rule allowing ownership of two local television stations in certain markets is arbitrary and capricious).

169. *Time Warner*, 240 F.3d at 1137.

170. *Id.* at 1129–30.

171. Judge Middlebrooks stated, “The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.” 124 F. Supp. 2d at 692 (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)).

172. *See, e.g.*, *New York v. Fed. Energy Regulatory Comm’n*, 122 S. Ct. 1012 (2002) (holding that FERC has statutory authority to require electric utilities that unbundle the cost of transmission from the cost of energy to transmit competitors’ electricity on the same terms that these utilities apply to their own energy transmissions). This is not to suggest that power companies lack First Amendment protection. *See, e.g.*, *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530 (1980) (holding that restriction on monthly bill inserts discussing controversial issues infringes the freedom of speech protected by the First Amendment).

173. The extent to which the First Amendment applies to telephone companies is outside the scope of this Article. Some “open access” advocates fear that application of First Amendment standards to cable modem service would raise questions about a variety of regulations aimed at telephone companies. *See, e.g.*, Harold Feld, *Whose Line Is It Anyway? The First Amendment and Cable Open Access*, 8 *COMMLAW CONSPPECTUS* 23, 34 (2000).

V. CONCLUSION

The starting place for any discussion of cable modem regulation should be a recognition of the First Amendment's limits on governmental power to regulate this service. But the proponents of regulation have sought to justify government intervention in the cable modem market by claiming that cable poses a threat as a "gatekeeper." This is not a useful tool of First Amendment analysis.¹⁷⁴ "Gatekeeper" is just an epithet reflecting the fact that cable companies control something that ISPs want.

Nor is "gatekeeper" synonymous with the "essential facilities" doctrine of antitrust law. Instead of proving that exclusive relationships between cable operators and affiliated ISPs violate the antitrust laws, cable's competitors and unaffiliated ISPs have elected to lobby local governments and the FCC for prophylactic regulations. These regulations, based on hypothetical claims, posit a cure for a market that is unpredictable. Mastering this market is difficult, as AOL Time Warner's recent experiences have shown. AOL's broadband results to date have been so meager that some Wall Street analysts are now advocating the breakup of AOL Time Warner.¹⁷⁵ AOL is rethinking its broadband strategy.¹⁷⁶ Cable companies are also rethinking their

Recognition of cable's First Amendment status does not necessarily jeopardize the regulation of "telecommunications services" on telephone networks. Courts have only recently begun to treat certain activities of telephone companies as speech protected by the First Amendment, *see, e.g.*, *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994) (holding a ban on video programming by telephone companies to be unconstitutional), *vacated as moot*, 516 U.S. 415 (1996), and this has not lead to invalidation of common carrier regulations on First Amendment grounds.

174. "Gatekeeper" raises the specter of private censorship, a term I have previously described as a First Amendment oxymoron. William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303, 331-35. Claims that cable operators or ISPs "snuff out" the free speech of others are difficult to take seriously. For example, AOL's "Rules of User Conduct" prohibit users from distributing certain types of content, such as advertising not authorized by AOL. *AOL Rules of User Conduct*, at <http://www.aol.com/copyright/rules.html> (last visited Oct. 3, 2002). When AOL blocked an e-mail advertising firm from using its facilities to send unsolicited advertisements to AOL's subscribers, a federal district court found that there were numerous other ways for advertisers to reach AOL subscribers. *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996). The term "gatekeeper," like "diversity," is amorphous. "Gatekeeper" is a rhetorical device rather than an analytical tool.

175. Julia Angwin & Martin Peers, *AOL Time Warner Gets Advice on Internet Unit from All Sides*, WALL ST. J., July 22, 2002, at A6; Julia Angwin & Martin Peers, *AOL Breakup? Parlor Game for Wall Street*, WALL ST. J., Apr. 22, 2002, at C1; Schiesel, *supra* note 50. In addition to AOL's ISP service, AOL Time Warner owns the Road Runner cable modem service; under the terms of the consent agreement, AOL Time Warner must operate Road Runner independently of AOL. *America Online, Inc. and Time Warner, Inc.*, FTC Docket No. C-3989, § II(A)-(B), (Dec. 14, 2000) (Order to Hold Separate). Road Runner has been far more successful than AOL in the broadband market. Hansell, *supra* note 22.

176. Saul Hansell, *New Approach for AOL Broadband Unit*, N.Y. TIMES, Sept. 16, 2002, at C3; Julia Angwin & Martin Peers, *AOL Rethinks Its Game Plan on Internet Access*,

broadband offerings, with several gearing up to compete more directly with dial-up service by offering different prices for different connection speeds.¹⁷⁷ In short, this is not a market that has fixed contours.

The FCC recently admitted that it needed a more detailed record on matters such as cable system channel capacity before requiring that cable systems carry both the analog and digital signals of television stations.¹⁷⁸ Similarly, there are many unanswered questions about the need for broadband regulation and the impact of regulation on the speech of cable operators. Surely the First Amendment requirement that the government prove the need for a regulation means that the government must not regulate in such uncertain conditions.

WALL ST. J., Apr. 19, 2002, at A3; Hansell, *supra* note 50; *see also* Martin Peers, *In Shift, AOL Time Warner to De-Emphasize "Convergence,"* WALL ST. J., May 13, 2002, at B1 (describing recent changes in strategy at AOL Time Warner). AOL Time Warner's difficulties in merging old and new media are not unique. *See* Martin Peers et al., *At Bertlesmann, Another Blow to Futuristic Media Visions,* WALL ST. J., July 29, 2002, at A1; Bruce Orwall & Martin Peers, *The Message of Media Mergers: So Far, They Haven't Been Hits,* WALL ST. J., May 10, 2002, at A1.

177. Thomas E. Weber, *More Trouble for AOL: Cable Rivals May Push Net Prices Even Lower,* WALL ST. J., Apr. 22, 2002, at B1.

178. Carriage of Digital Television Broadcast Signals, FCC CS Docket No. 98-120, ¶¶ 112-116 (Jan. 23, 2001) (First Report and Order and Further Notice of Proposed Rulemaking).