

COMMENTS

THE FIRST AMENDMENT, THE FCC, AND DIGITAL SUBSCRIBER LINE SERVICE: WILL CONGRESS GET IT RIGHT THIS TIME?

*Adam J. Coates**

INTRODUCTION

This comment explores the First Amendment implications of the present regime for regulating Digital Subscriber Line (“DSL”) service. In particular, it will analyze the sometimes glaring differences in the way the government regulates the high-speed Internet access offerings of the major local telephone providers (the Bell companies), as opposed to the competing services offered by other providers, in particular cable companies. This comment concludes that the current regime is illogical, impractical, and ill-equipped for dealing with the fundamental changes wrought by the ascent of the Internet as a powerful and ubiquitous tool for communications and commerce. It relates these practical weaknesses to the regulatory regime’s constitutional weaknesses.

First, I will outline the basic contours of the telecommunications industry and the antitrust-predicated system of regulation it has spawned. Then, I will discuss the Supreme Court’s First Amendment jurisprudence as it relates to telecommunications carriers in general, and specifically to the provision of broadband Internet access services. Finally, I will analyze the current regulatory scheme for broadband Internet services provided by the Bell companies in terms of the burdens it places on these companies’ speech. I will evaluate this regime by comparing it to the manner in which the government regulates a similar service provided by the cable companies.

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I. BACKGROUND OF THE TELECOMMUNICATIONS INDUSTRY

A. *The Communications Act of 1934*

Before 1934, the telephone industry was a sort of “wild frontier,” with a number of companies duking it out to win customers for their relatively new—and extremely expensive to operate—services. The Bell System, with a head-start granted by its founder Alexander Graham Bell’s patents in telephone technology, was at the fore, winning out in part by refusing to interconnect its network with those of competitors.¹ With the Communications Act of 1934, Congress charged the Federal Communications Commission (hereinafter “FCC”) with protecting Americans’ access to communications services.² Tele-

¹ A communications network is only as valuable as the breadth of its nodes. If a customer has a choice between two competing, exclusive telephone networks, one of which can connect her with a vast array of individuals with whom she can be expected to want to communicate, while the other can only connect her with a limited set of individuals, she will surely choose the former network. See, e.g., Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to High Technology Competition*, 44 WM. & MARY L. REV. 65, 78-80 (2002):

The trend to monopoly in high technology markets is augmented by a set of circumstances that economists call “network externalities.” This phenomenon results from the fact that the benefits to a particular user increase in direct proportion to the number of other users in the network. As a network expands, its users can communicate with a greater number of fellow members. Consumers are naturally attracted to successful networks because of their greater utility. Network externalities thus reinforce the market power of a dominant network. A telephone system is more valuable if it is connected to a larger number of telephones. Stock exchanges gain their utility by bringing together the maximum number of buyers and sellers of public securities. An ATM system is more attractive to consumers if several different charge cards can be used at a single access point. Consumers subscribe to a dominant Internet access provider such as AOL because they want to be able to communicate with the widest range of other users. Computer operating systems, such as Microsoft’s Windows program, become more valuable as additional applications are developed to run on a particular system. In the case of credit card systems, “the more cardholders in the system, the more attractive the system is to merchants [T]he more merchants in the system, the more attractive the card is to cardholders.”

(citing, *inter alia*, David A. Balto, *The Murky World of Network Mergers: Searching for the Opportunities for Network Competition*, 42 ANTITRUST BULL. 793, 846 (1997); see also *Nat’l Bancard Corp. v. VISA U.S.A., Inc.*, 596 F. Supp. 1231, 1260 (S.D. Fla. 1984), *aff’d*, 779 F.2d 592 (11th Cir. 1986)). For a colorful, detailed description of telephony in its infancy, see Chapter One of PETER W. HUBER ET AL., *FEDERAL TELECOMMUNICATIONS LAW* (2d ed. 1999) [hereinafter “FTL”].

² The Communications Act of 1934, ch. 652, Title I, § 1, 48 Stat. 1064 (1934) (current version at 47 U.S.C. § 151 (2003)). See also 47 U.S.C. § 151 (2003), declaring that the Act is

[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges

phone networks, seen as an essential utility for the American public,³ but also seen as a natural monopoly,⁴ were strictly and comprehensively regulated by the FCC.

Under this regime, the Bell System⁵ operated a franchised monopoly.⁶ From the switches at the core of the vast network to the telephone handsets at its outer edges, and everything in between, the Bell System was the sole proprietor: it operated the local exchange networks virtually throughout the country;⁷ it passed this local exchange traffic onto its exclusive long-distance network for transmission across long distances; it controlled the gateways for international telecommunications traffic; and it either owned, manufactured, or invented (and often all three) just about every piece of equipment used to operate and administer this massive network of networks.⁸

In exchange for government sanction of this exclusive franchise, the Bell System was required, as a “common carrier,”⁹ to provide its

³ See 47 U.S.C. § 151 (remarking that the Act was passed “for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication . . .”).

⁴ A natural monopoly is an industry in which the efficient number of participants is only one. Natural monopolies are characterized by extremely high costs to entry, making it a difficult and expensive undertaking to offer the product or service. The extremely high costs of deploying a local telephone network (laying cable to reach every customer in a community, not to mention inventing, building, deploying, operating, and maintaining the switching system necessary to switch calls between customers) makes the telephone industry a prime candidate for the mantle of natural monopoly. Moreover, the telephone industry is one that is characterized by network externalities: the value of a telephone network goes up as the number of people connected to it go up. See, e.g., Piraino, *supra* note 1, at 78-80.

⁵ This is the moniker generally used to collectively refer to AT&T, Bell Laboratories, Inc., and the various local Bell Telephone Companies, which taken as a whole constituted the largest telecommunications provider in the nation at the time the Communications Act was passed. Although there were a handful of smaller integrated telephone networks, and many very small rural telephone carriers, the Bell System was by far the largest and furthest-reaching.

⁶ 47 U.S.C. § 214(a) (2003) (allowing new competitors into the market only if they demonstrated that the “public convenience and necessity” warranted their entry); *id.* at 201(a) (requiring the Bell System to afford competitors access to the Bell network only if the FCC found it “necessary or desirable in the public interest”).

⁷ Smaller local exchange carriers, such as GTE, operated their own regional networks, along with even smaller rural telephone companies. See FTL, *supra* note 1, § 1.3.2 (noting that “Bell might not own everything, but some monopolist or other would dominate each discrete market” of the communications industry). They were all considered common carriers and given monopoly franchises, but none were regulated as extensively as was the Bell System.

⁸ See FTL, *supra* note 1, § 1.3.2 (“The Bell System [was] a colossal corporate empire; although it had agreed not to grow by acquisition, nothing prevented it from building up businesses it already owned. It continued to enjoy almost blanket state and federal government protection against competition within its own businesses.”).

⁹ The concept of a “common carrier” derives from the English common law, with the Crown franchising monopolies in certain endeavors, such as ferries or wharves, to ensure that

telephone service “universally”¹⁰ and on a nondiscriminatory basis to any customer requesting it.¹¹ State regulators set the prices at which the Bell System offered these services and, in the interest of “universal service,” these state regulators and the FCC required the telephone company to charge higher prices to its urban business and long-distance customers in order to help subsidize lower prices for local service and for its more remote residential customers.¹² Under this regime, everybody ostensibly benefited: the Bell System was pro-

they are operated in the public interest. *See, e.g., Missouri ex rel. Baltimore & Ohio Tel. Co. v. Bell Tel. Co.*, 23 F. 539, 541 (E.D. Mo. 1885):

[A telephonic system] is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, “my license is to establish a telephonic system open to the doctors and the merchants, but shutting out you gentlemen of the bar.” The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service.

See also FTL, supra note 1, § 1.3.1 (“The English common law gradually developed rules that both contained monopolists’ excesses and defended their monopolies.”). Telephone companies are quintessentially common carriers, charged with “furnish[ing] . . . communication service upon reasonable request therefore,” at “just and reasonable” charges. 47 U.S.C. § 201 (2003). *See also* Section 202(a), which states:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination . . . or to make or give any undue or unreasonable preference or advantage . . . or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Id. § 202(a).

¹⁰ Or, more accurately, as universally as was feasible, given the difficulty in providing America’s more remote rural customers with access to telephone services. *See* note 12, *infra*. This limitation is analogous to contemporary concerns with the pace at which advanced communication services, such as high-speed Internet access services, are being made available to all consumers.

¹¹ *See, e.g.,* 47 U.S.C. § 151 (2003) (noting that the purpose of the Communications Act, in part, is “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . .”).

¹² 47 U.S.C. § 214(e) (2003) (declaring that universal service support would be provided to those common carriers designated by state public utility commissions to be “eligible” or “best able” to serve unserved, underserved, and/or rural areas). Moreover, Section 254(b) gears the federal universal service regime toward “the preservation and advancement of universal service” using the following principles:

Quality and rates[;] . . . [a]ccess to advanced services[;] . . . [a]ccess in rural and high cost areas[;] . . . equitable and nondiscriminatory contribution to the preservation and advancement of universal service[;] . . . specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service[;] . . . [and] [a]ccess to advanced telecommunications services for schools, health care, and libraries.

Id. § 254.

tected from competition and as many Americans as possible received affordable, reliable access to telephone service.

Almost from the outset, entrepreneurs and lawyers began chipping away at the monopolist's monolithic network.¹³ This began with competitors attempting to add their own, specialized equipment onto the user's side of the network to provide value-added services.¹⁴ It continued with creative attempts by would-be competitors to interconnect with the Bell System's local exchange network and offer its customers long-distance services.¹⁵ At every turn, Bell fought all of these private, entrepreneurially-driven attempts to crack into its monopoly, both in the courts¹⁶ and before the FCC.¹⁷

Largely, the Bell System was successful at warding off these attacks or incrementally allowing bits and pieces of competition here and there, but the Bell system's monopoly began to draw the eye of anti-trust regulators, who began to recognize that certain portions of the Bell System's network were not part of a unitary natural monopoly, but were, in fact, separately viable competitive markets. Hence, in

¹³ Which is ironic, given that the much of Congress' rationale for passing the Communications Act was founded on its view of the entire telecommunications network as a "natural monopoly;" essentially, an industry in which the presence of only one supplier makes the most economic sense.

¹⁴ See, e.g., *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956) (finally reversing FCC's policy allowing the Bell System to prohibit the "foreign attachment" of Customer Premises Equipment; in this case, an attachment to the receiver of the telephone set which allowed the user's conversation to be concealed from surrounding observers); FTL, *supra* note 1, § 5.2.1.1 (recognizing this case as the first instance of the government's allowing competitors to interconnect with the Bell System's network, characterizing it as an epochal shift in the traditional view of the entire telecommunications network as a natural monopoly).

¹⁵ See *MCI Telecomms. Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (rejecting AT&T tariffs and FCC regulations prohibiting MCI from interconnecting with AT&T's long-distance network in order to offer "Execunet," a specialized private-line service which functioned similar to AT&T's long-distance service); FTL, *supra* note 1, § 9.3.5 (discussing *MCI Telecomms. Corp.* and its significance against the backdrop of the emerging trend of competition with the Bell System).

¹⁶ See, e.g., *MCI v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983) (ruling on a private antitrust suit in which the Bell system ultimately paid MCI \$113 million for monopolizing the long-distance market); *Mid-Texas Communications Sys., Inc. v. AT&T*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980) (ruling on a private antitrust suit against AT&T); *MCI Telecomms. Corp. v. FCC*, 580 F.2d 590 (D.C. Cir. 1978); *MCI Telecomms. Corp.*, 561 F.2d 365.

¹⁷ See, e.g., First Report and Order, Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service, 29 F.C.C.2d 870 (1971), *aff'd*, 31 F.C.C.2d 1106 (1971), *aff'd sub nom.* *Washington Util. & Transp. Comm'n. v. FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975) (formulating rules and terms for permitting competition in intercity private line connections in an FCC proceeding).

the 1970s, the Justice Department (hereinafter “DOJ”) brought an antitrust suit against the Bell System in federal court.¹⁸

B. *The Break-Up of the Bell System*

After years of litigation, the government and the Bell System, under the watchful eye of the federal judge before whom the antitrust action had been brought,¹⁹ entered into a complex, sweeping consent decree.²⁰ This decree, known as the Modified Final Judgment (hereinafter “MFJ”), broke the Bell System into component parts, along where it was believed the fault-lines of the natural monopoly existed.²¹

The long-distance and equipment manufacturing divisions of the Bell System became American Telephone and Telegraph (AT&T).²² AT&T was initially treated, for regulatory purposes, as a “dominant carrier” in the long-distance market.²³ As such, it was subject to some pricing regulation and tariff filing requirements to ensure that it was

¹⁸ Complaint, *United States v. W. Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982) (No. 74-1698). This was not the first antitrust suit brought by the DOJ against the Bell System. See Complaint, *United States v. W. Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956) (No. 17-49). In 1956, the DOJ and the Bell System entered into a Consent Decree, but this offered little in the way of a concrete, forward-looking solution to the DOJ’s concerns. *United States v. W. Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956); see generally FTL, *supra* note 1, § 4.4.2 (criticizing the terms of the 1956 consent decree, calling its title (“Final Judgment”) “ambitious[.]”); James B. Speta, *The Vertical Dimension of Cable Open Access*, 71 U. COLO. L. REV. 975, 998 (2000) (“While AT&T could have had the incentive to encourage new uses of its network, it had instead the incentive to impede any innovations that threatened the common carrier business.”); T. Jason White, Case Note, *Tearing Down a Fence that is Hog Tight, Horse High & Bull Strong: The Supreme Court Reshapes Jurisdiction of Local Telephone Markets*, 11 LOY. CONSUMER L. REV. 188, 189 (1999) (“Because AT&T was able to hold onto the most valuable pieces of the monopoly, namely, the local and long-distance telephone markets, its monopoly power was unabated by the 1956 consent decree.”).

¹⁹ Judge Harold T. Greene, of the United States District Court for the District of Columbia.

²⁰ *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

²¹ *Id.*, 552 F. Supp. at 226 [hereinafter “MFJ”].

²² MFJ, 552 F. Supp. at 226.

²³ AT&T had been designated a “dominant” long-distance carrier by the FCC in 1980, and the MFJ did not disrupt this classification. See First Report and Order, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 85 F.C.C.2d 1, 10-11 (1980); FTL, *supra* note 1, § 9.5 (discussing rate regulation of long-distance carriers).

not abusing its dominant position in the market,²⁴ but for the most part AT&T was given free rein to offer whatever services it wished.²⁵

The local exchange divisions of the Bell System were broken up into several "Bell Operating Companies" (hereinafter "Bell companies").²⁶ Since they provided what was believed to be the last remaining naturally monopolistic telecommunications service,²⁷ the Bell companies were subject to the full panoply of the FCC's and states' strict, comprehensive service and pricing regulations, universal service requirements,²⁸ and prohibitions upon entering essentially any other sector of the telecommunications industry, including information services (such as what would become Internet access and content services).²⁹ Most importantly, the Bell companies were required to

²⁴ See FTL, *supra* note 1, § 9.5.2 (describing the regulation to which dominant carriers were subject). AT&T was later designated a "nondominant" carrier in the long-distance market, by virtue of competitive inroads made by Sprint and MCI. Order, Motion of AT&T Corp. to be Reclassified as a Non-dominant Carrier, 11 F.C.C.R. 3271, 3356 (1995).

²⁵ MFJ, 552 F. Supp. at 231 (only prohibiting AT&T from engaging in electronic publishing for seven years). Judge Greene and the Department of Justice recognized that unlike the local telephone network, it was economically feasible for numerous competing long-distance networks to be operating simultaneously.

²⁶ *Id.* at 232 (listing the following Bell companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, Northwestern Bell Telephone Company, Pacific Northwest Bell Telephone Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Mountain States Telephone and Telegraph Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, and Wisconsin Telephone Company). As a matter of corporate structure, the Bell companies actually constituted seven Regional Bell Operating Companies: Bell Atlantic, Bell-South, New York Telephone (also known as NYNEX at the time), Ameritech, Pacific Bell, U S West, and SBC. Each of these Operating Companies served local telephone customers in a discrete territory of the United States. See FTL, *supra* note 1, § 4.4.3.2.

²⁷ See MFJ, 552 F. Supp. at 223 ("This divestiture will sever the relationship between this local monopoly and the other, competitive segments of AT&T, and it will thus ensure—certainly better than could any other type of relief—that the practices which allegedly have lain heavy on the telecommunications industry will not recur.").

²⁸ 47 U.S.C. § 254 (2003) (universal service requirements).

²⁹ See, e.g., *id.* § 254 (universal service requirements); *id.* § 271(a) (prohibition on Bell operating companies' provision of "interLATA" services); *id.* § 273 (prohibition on equipment manufacturing); *id.* § 274 (prohibition on electronic publishing, which includes information services); *id.* § 275 (prohibition on alarm monitoring services); see generally FTL, *supra* note 1, ch. 2 (discussing telephone economics and price regulation of telephone companies).

phase in the provision of nondiscriminatory access to their local exchanges for all long-distance carriers.³⁰

Over the ensuing decade or so, lawyers for the Bell companies deluged Judge Greene—who had become saddled with administering the terms of the consent decree³¹—with litigation, primarily in the form of requests that Judge Greene waive particular prohibitions upon a showing of proof by the Bell company that it could not unfairly leverage its local exchange monopoly in the new market it sought to enter.³² Lawyers representing AT&T and whomever the Bell companies would be competing with in the new market vigorously fought most of these waiver requests.³³

C. *The Telecommunications Act of 1996*

New legislation in 1996,³⁴ passed in part to deal with the changing communications landscape wrought by the advent of new communications technologies such as the Internet, fiber-optics, and wireless telephony,³⁵ did not wholly change the 1934 view of the economics of telephony. It did, however, attempt to reverse its currents by modifying the 1934 Act and requiring the Bell companies to allow competitors to access their monopolistic local markets.

In order to be permitted to offer long-distance services to their local exchange customers, Bell companies were required to allow competitors to offer local service to those customers.³⁶ Part of this would be accomplished through resale: competitors could purchase local phone service from the Bell company at a discount and resell it to the

³⁰ MFJ, 552 F. Supp. at 232-34.

³¹ *Id.* at 231:

Jurisdiction is retained by this Court for the purpose of enabling any of the parties . . . to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

³² *See, e.g., id.* at 231 (“The restrictions imposed upon the separated [Bell companies] . . . shall be removed upon a showing by the petitioning [Bell company] that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.”).

³³ *See generally* FTL, *supra* note 1, § 9.6.1.2 (discussing post-divestiture modifications and waivers granted by Judge Greene).

³⁴ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

³⁵ *Id.*, pmb. (“An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”).

³⁶ 47 U.S.C. § 271 (2003).

local exchange customer.³⁷ However, recognizing that facilities-based competition was the best route towards creating a sustainable competitive environment in the local exchange,³⁸ the Act also required the Bell companies to lease unbundled components of their local exchange service at cost-based rates.³⁹ All of this would be accomplished through negotiated (and sometimes arbitrated) interconnection contracts,⁴⁰ overseen by state regulatory authorities to ensure that they were not one-sided or competitively harmful.⁴¹

With respect to high-speed Internet access, the Telecommunications Act of 1996 required the FCC to regulate access for competitors to those components of the Bell companies' local telephone networks that were necessary for providing high-speed, Digital Subscriber Line ("DSL") Internet access services.⁴² The FCC accomplishes this by affirmatively requiring the Bell companies to unbundle the compo-

³⁷ See *id.* §§ 251(b)(1), 271(c)(2)(B)(xiv) (2003).

³⁸ This is due to the inherent disadvantage faced by any new competitor in each market: the fact that their main competitor, the Bell company, has spent decades (in some places, over a century) and hundreds of billions of dollars building vastly complex local telecommunications networks, bases of faithful customers, and hugely recognizable brand names.

³⁹ See, e.g., 47 U.S.C. §§ 251(b)(2) (2003) (number portability, which allows customers switching from the Bell company to a competitor to retain their original phone number); *id.* § 251(b)(3) (dialing parity, which ensures that customers of competitors don't have to dial any extra digits to reach their calls' recipients); *id.* § 251(b)(4) (access to rights-of-way, such as telephone poles, ducts, and conduits, for placement of competitors' equipment and lines); *id.* § 251(c)(2) (interconnection at nondiscriminatory rates with the Bell company's network); *id.* § 251(c)(3) (access to all "unbundled elements" of the Bell company's network); *id.* § 271(c)(2)(B)(iv) (access to "local loop transmission from the [Bell company's] central office to the customer's premises"); *id.* § 271(v) (transport of the competitor's customers' telephone traffic between the Bell company's central offices); *id.* § 271(vi) (switching of these customers' calls across the Bell company's network); *id.* § 271(vii) (nondiscriminatory access to 911 and other emergency services, directory assistances services, and operator assistance services); *id.* § 271(viii) (white pages listings for the competitor's customers); *id.* § 271(ix) (sufficient telephone numbers to assign to customers not electing for number portability).

⁴⁰ These contracts set forth the terms and conditions under which competitive local exchange carriers would "interconnect" with the Bell companies' networks, so that they could, *inter alia*, connect calls between their customers and the Bell companies' customers. See generally *id.* § 251.

⁴¹ See *id.* § 252.

⁴² *Id.* § 271(c)(2)(B)(iv) (2003) (requiring, *inter alia*, the unbundling of local loops, of which DSL is a component, and leasing to competitors at cost-based rates). Moreover, one of the primary goals of the 1996 Act was to "encourage the rapid deployment of new telecommunications technologies." The Telecommunications Act of 1996, pmb., Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.); to this end, the 1996 Act charged the FCC and state regulators with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," *id.* § 706(a), *codified at* 47 U.S.C. § 157 note.

nents of their DSL service⁴³ (along with the rest of their local telephone services⁴⁴) and lease them to these competitors at government regulated, cost-based rates.⁴⁵ The statutory regime and the FCC provide an incentive for the Bell companies to unbundle by conditioning authorization for the Bell companies to offer long-distance services (high-margin fruit the local telephone companies had heretofore been forbidden) upon a successful showing that the Bell companies have unbundled, and that competitors are leasing these unbundled elements. The rationale for this scheme is that it balances the goal of promoting facilities-based competition⁴⁶ in the local telephony market with the goal of maintaining quality, high-speed Internet access service.

Moreover, the FCC, state utility regulators, and the DOJ have all extracted commitments from the Bell companies far above and beyond their requirements under the 1996 Act by withholding their approval of Bell companies' mergers until they concede the intensified

⁴³ See Third Report and Order in Common Carrier Docket No. 98-147 and Fourth Report and Order in Common Carrier Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 F.C.C.R. 20,912 (1999) (defining the high-frequency portion of local loops, over which DSL service is provided, as an unbundled network element that must be provided to requesting carriers on a nondiscriminatory basis pursuant to 47 U.S.C. § 251(c)(3)).

⁴⁴ This includes the local loop, shared and dedicated transport, and local switching. 47 U.S.C. §§ 271(c)(2)(B)(iv)-(vi) (2003).

⁴⁵ The pricing scheme is based on TELRIC, or Total Long Run Incremental Cost, which admittedly builds in a modest profit for the local telephone company. *Id.* § 252(d).

⁴⁶ The term "facilities-based competition" refers to the presence of competitors in a market who own (or, in this case, lease) the equipment and network elements necessary to provide local telephone service. See *id.* §§ 153(47) (defining the provision of "telephone exchange service"), 271(c)(1)(A) (defining the provision of such service on a "facilities," rather than strictly resale, basis). This is distinct from competition based on the mere "resale" of local telephone service—a competitor's simply purchasing the incumbent provider's service at a discount rate, putting the competitor's name on it, and marketing it to customers. *Id.* § 251(c)(4). It is widely believed that in a market such as that for local telephony, facilities-based competition is preferable to resale. See, e.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act Of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, 12 F.C.C.R. 20,543, 20,550, ¶ 12 (1997) (footnotes omitted):

An incumbent LEC's ubiquitous network, financed over the years by the returns on investment under rate-of-return regulation, enables an incumbent LEC to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own network components. Additionally, the value of a telephone network increases with the number of subscribers on the network. Congress recognized that duplicating the incumbents' local networks on a ubiquitous scale would be enormously expensive. It also recognized that no competitor could provide a viable, broad-based local telecommunications service without interconnecting with the incumbent LEC in order to complete calls to subscribers served by the incumbent LECs' network.

regulatory requirements.⁴⁷ Attempts by regulators to extract similar concessions from the cable companies have thus far been met with judicial resistance.⁴⁸

This extensive regulation of the telephone companies' broadband access services stands in sharp contrast to all the other participants in the broadband access industry. Congress,⁴⁹ the FCC,⁵⁰ and the White House⁵¹ have all trumpeted the need to keep the government's hands off the Internet and allow markets to determine what shape the Internet will take in the future, lest this burgeoning business and communications tool be strangled in its infancy.

For this reason, the cable companies—whose cable modem service is remarkably similar to the Bell companies' DSL service⁵²—are subject to no Congressional requirement of open access to competitors, and precious little FCC oversight at all in this regard.⁵³ This is par-

⁴⁷ See, e.g., Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, 14 F.C.C.R. 14,712 (1999) (an extensive list of conditions to FCC approval of the SBC-Ameritech merger, including divestment of certain cellular telephone licenses, dominant-carrier classification for certain international routes, various extensive and intensive service quality and performance commitments pertaining to its provision of unbundled network elements to competitors, and roll-out of DSL and competitive local telephone service across the country on a staggered schedule). *Id.* at 14,964-15,039. This set of conditions was dissented from in part, by current FCC Chairman Michael Powell. *Id.* at 15,197.

⁴⁸ For example, see the open access provision struck down in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). See also *GTE.Net v. Cox Communications*, 185 F. Supp. 2d 1141 (S.D. Cal. 2002) (granting stay of suit brought by ISP alleging that cable company's exclusive agreement with another ISP for providing cable modem service to its cable TV customers violated the Communications Act's nondiscrimination requirement, pending FCC determination of whether or not cable modem service is a "telecommunications service" subject to the common carrier restrictions).

⁴⁹ See, e.g., 47 U.S.C. § 230(b):

It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.

⁵⁰ For a detailed description of the FCC's "unregulation of the Internet" since the Internet's inception in the 1960s, see JASON OXMAN, THE FCC AND THE UNREGULATION OF THE INTERNET, OFFICE OF PLANS AND POLICY WORKING PAPER NO. 31, Federal Communications Commission (July 1999), available at http://ftp.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf (last visited Apr. 10, 2003).

⁵¹ See, e.g., Nancy Victory, Assistant Secretary of Commerce, Creation of a Broadband Universe: A "Big Bang Theory," Keynote Address delivered at the Alliance for Public Technology Broadband Symposium, Washington, D.C. (Feb. 8, 2002), available at http://www.ntia.doc.gov/ntiahome/speeches/2002/apt_020802.htm (last visited Apr. 10, 2003) ("[T]he market, not government, should drive broadband's roll-out. Government's role is to remove the regulatory roadblocks that impede efficient capital investment. Then, whether carriers choose to deploy networks and services and consumers choose to subscribe to them are marketplace decisions.").

⁵² See *infra* text accompanying notes 86-88.

⁵³ See, e.g., 47 U.S.C. § 153(10) (2003) ("[A] person engaged in . . . broadcasting [such as a cable company] shall not . . . be deemed a common carrier . . ."); see also BARBARA ESBIN,

ticularly noteworthy, because, like the Bell companies, most cable systems are historical monopolies that were entrenched for decades.⁵⁴ Although the Cable Act of 1992 officially prohibited franchising authorities from granting “exclusive franchises,”⁵⁵ the reality has been that the vast majority of localities only have one cable service provider to choose from.⁵⁶ Hence, these closely-guarded exclusive cable franchises have enjoyed much greater government protection from competition in recent years than the Bell companies’ local phone networks.⁵⁷

INTERNET OVER CABLE: DEFINING THE FUTURE IN TERMS OF THE PAST 87, 96-87, (Federal Communications Commission, Office of Plans and Policy, Working Paper No. 30, Aug. 1998), *available at* http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp30.pdf (last visited Apr. 16, 2003) (describing cable modem service in detail) (stating that the FCC generally espouses a stance of “competitive and technological neutrality” towards Internet access provided over cable systems and that only “if evidence indicated that cable high-speed data communications platforms themselves occupied a ‘bottleneck’ or ‘essential facilities’ position vis à vis ISP or on-line service provider access . . . and there was some evidence of market failure warranting regulatory intervention,” would the “policy of competitive neutrality might well counsel a different result”); FTL, *supra* note 1, § 11.9 (“And while the Commission’s Common Carrier Bureau remains preoccupied with LECs, the broadcast and cable bureaus have cheerfully unleashed their charges to offer competitive data services, subject to little regulation of any kind from Washington or state regulators.”).

⁵⁴ See FTL, *supra* note 1, § 13.7.1 (“It was common practice for municipalities to grant exclusive franchises—thereby precluding entry by telcos and others—until Congress in the 1992 Cable Act outlawed this practice.”).

⁵⁵ 47 U.S.C. § 541(a)(1) (2003) (“[A] franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.”).

⁵⁶ See, e.g., Ninth Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 02-145, FCC 02-338, ¶ 113 (F.C.C. rel. Dec. 31, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-338A1.doc (last visited Apr. 10, 2003):

The market for the delivery of video programming to households continues to be highly concentrated. For most consumers the choices are over-the-air broadcast, cable, two DBS providers, and, in limited cases, an overbuilder or other delivery technology . . . [B]arriers to entry include: (a) predatory conduct including “predatory pricing”; (b) strategic behavior by an incumbent to raise its rival’s costs by limiting the availability of certain popular programming as well as equipment; and (c) local and state level regulations, including delay in gaining access to local public rights-of-way as well [as] delay in getting cable franchises.

(footnotes omitted); *id.* ¶ 115:

Relatively small percentages of consumers have a second wireline alternative, such as an overbuild cable system. Of the 33,246 cable community units nationwide, 671, or approximately two percent have been certified by the Commission as having effective competition as a result of consumers having a choice of more than one wireline MVPD.

⁵⁷ Compare Second Report and Order, Deployment of Wireline Services Offering Advanced Telecommunications Capabilities, 13 F.C.C.R. 24,011, 24,017-18 (1998) (“[A]ll incumbent LECs must provide requesting telecommunications carriers with unbundled loops capable of transporting high-speed digital signals, and must offer unbundled access to the equipment used in the provision of advanced services[.]”), with Memorandum Opinion and Order, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-

This regime potentially leaves the Bell companies either unwilling or unable to invest in their DSL services to make them faster, more reliable, more widely available, and less expensive. The cable companies, while given free reign to invest in and offer exciting new services, are under no competitive pressure to do so.⁵⁸ Much like their television businesses, their broadband businesses are essentially monopolies. Satellite and other wireless forms of Internet access simply have not yet caught up enough to be a major factor in this industry,⁵⁹ and the telephone companies will not become a factor until the huge investment needed to do so becomes justified by its returns.⁶⁰

The result is that broadband services are not being made available to customers quickly enough, at high enough quality and bandwidth, and at low enough prices.⁶¹ This bottleneck in the rollout of broadband services has ripple effects across the American economy, especially with respect to the computer and burgeoning "new media" in-

Communications, Inc. to AT&T Corp., Cable Services Docket No. 98-178, FCC 99-24 ¶ 96 (F.C.C. Feb. 18, 1999), available at <http://www.fcc.gov/pub/Bureau/cable/orders/1999/fcc99024> (last visited Apr. 10, 2003), which states:

Based on [the] representation [by the applicants that the ability for their customers to "click through" their home screens to access alternative Internet service and content providers], we conclude nothing about the proposed merger would deny any customer (including AT&T-TCI customers) the ability to access the Internet content or portal of his or her choice.

⁵⁸ See Kenneth Katkin, *Cable Open Access and Direct Access to Intelsat*, 53 CASE W. RES. L. REV. 77, 107 (2002) ("Because very few communities currently enjoy two or more overbuilt HFC cable systems, very few incumbent cable operators face intramodal competition in the provision of cable modem service.").

⁵⁹ See William E. Lee, *Cable Modem Service and the First Amendment: Adventures in a "Doctrinal Wasteland"*, 16 HARV. J.L. & TECH. 125, 130 (2002) ("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."); *id.* at 130 n.29 (citing Eighth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-389, ¶ 62 (Jan. 14, 2002); Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, 15 F.C.C.R. 20,913, ¶¶ 56-59 (2000)) (supplying data on the limited practical alternatives to DSL and market-leading cable modem service).

⁶⁰ It may be too late when they finally do catch up. See Katkin, *supra* note 58, at 110 ("[C]able continues to enjoy a number of advantages over its intermodal competitors, including both the cost savings that cable operators derive from the incumbency of their existing 'last mile' facilities, and the technological capacity of HFC cable to offer substantially higher transmission speeds than competing facilities.").

⁶¹ See, e.g., Robert J. Samuelson, *Broadband's Faded Promise*, WASH. POST, Dec. 12, 2001, at A35 ("[B]roadband hasn't lived up to the hype. In 1996 one well-known consulting firm predicted that broadband would be in 14 million homes by the end of 2000; the actual figure was half that.").

dustries.⁶² An ancillary effect is that a vibrant new medium for free, unregulated expression is not what it should be, certainly is not what it could be, and it may never be.

II. THE FIRST AMENDMENT AND THE REGULATION OF BROADBAND INTERNET ACCESS

Recently, there has been a renewed push from Congress⁶³ for legislation that will specifically address the heretofore limited roll-out of broadband Internet access services and the failures of the 1996 Act to create a proper regulatory environment for these services to flourish.⁶⁴ Newly proposed legislation seeks to give the Bell companies the tools they need to compete with the cable companies on an equal footing in the broadband market by removing the requirement that they unbundle these facilities and lease them to competitors.⁶⁵ This is

⁶² See, e.g., Jonathan Krim, *Does Fast Internet Need a Push?*, WASH. POST, Jan. 15, 2002, at A1 ("Often competitors in the marketplace, tech companies are united in their view that broadband could be a catalyst not just for recovery of their own battered sector but also for the next economic boom."). The availability, price, and quality of broadband Internet access are not the only factors hindering the Internet from realizing its true potential as a social, cultural, and economic force. For example, some observers point to the fact that the most desirable online content for which broadband would be used is "in the hands of copyright holders," such as music and video. Lawrence Lessig, *Who's Holding Back Broadband?*, WASH. POST, Jan. 8, 2002, at A17, available at <http://www.washingtonpost.com/ac2/wp-dyn/A11361-2002Jan7> (last visited Apr. 10, 2002); see also Samuelson, *supra* note 61 ("The larger problem is that once you've got it, broadband isn't much use. Downloading is quicker, but most of those fabulous multimedia services and new Internet appliances essentially don't exist."). This complaint, however, feeds into a "chicken-egg" tautology: broadband Internet access is not good enough (in terms of price, availability, and quality, as well as in terms of the lack of desirable content online) because consumers are not interested in it; consumers are not interested in it because it is not good enough. See, e.g., Samuelson, *supra* note 61 ("Color TV faced the same dilemma in the 1960s. The networks wouldn't produce color programs until people had color sets, and people wouldn't buy color sets unless they could watch color programs.").

⁶³ On February 27, 2002, the House of Representatives passed a bill which would, in part, deregulate the Bell companies' provision of Internet access and transport services. H.R. 1542, 107th Cong. (2002). This bill, however, is likely to face significant opposition in the Senate. See, e.g., Steven Labaton, *Broadband Bill Advances, But Its Survival Is Doubtful*, N.Y. TIMES, Feb. 28, 2002, at C4 ("Senator Ernest F. Hollings of South Carolina, the chairman of the Commerce Committee, summoned reporters to a news conference to denounce the legislation as 'blasphemy.'").

⁶⁴ See, e.g., H.R. 1542 §§ 2(a)(2) ("The imposition of regulations by the Federal Communications Commission and the States has impeded the rapid delivery of high speed Internet access services and Internet backbone services to the public, thereby reducing consumer choice and welfare."); *id.* § 2(a)(6) ("Since the enactment of the Telecommunications Act of 1996, the Federal Communications Commission has construed the prohibition on Bell operating company provision of interLATA services in a manner that has impeded the development of advanced telecommunications services, thereby limiting consumer choice and welfare.").

⁶⁵ *Id.* § 4(a):

a desirable result, from an economic or public policy standpoint. More than this, however, as the following discussion will show, this is a desirable result from a First Amendment perspective.

A. *In General*

As one would suspect, the First Amendment plays an important role in limiting the government's ability to regulate telecommunications. Telephone lines transmit speech; broadband DSL and cable modem lines transmit huge amounts of speech at very high speeds. The First Amendment prohibits Congress from unnecessarily interfering with the free delivery of speech.⁶⁶ The Supreme Court also has found that this prohibition extends to the right *not* to carry speech.⁶⁷ Requiring a telephone carrier to—in the form of unbundling its network and leasing its components—carry the speech of its competitors clearly interferes with that carrier's right not to carry speech. The question then becomes whether this interference is necessary.

B. *The Supreme Court's Interpretation of the First Amendment*

In its First Amendment jurisprudence, the Supreme Court has traditionally based its analysis of putatively speech-inhibiting state action on the identity and functions of the speaker. What has evolved is a three-tiered system of analysis of First Amendment issues. At the top is speech carried by newspapers—the “free press.” Any regula-

[N]either the Commission, nor any State, shall have authority to regulate the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data service, Internet backbone service, or Internet access service; nor shall the Commission impose or require the collection of any fees, taxes, charges, or tariffs upon such service that is not imposed or required on the date of enactment of this section.

(amending Part I of title II of the Communications Act of 1934 by adding § 232(a) (quoted above)). See also *id.* § 4(b) (“[N]either the Commission nor any State shall . . . require an incumbent local exchange carrier to provide unbundled access . . . to any . . . network element.”) (amending Section 251 of the Communications Act of 1934 by adding subsection (j) (E) quoted herein).

⁶⁶ U.S. CONST. amend. I; *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181 (4th Cir. 1994), *vacated as moot*, 516 U.S. 415 (1996) (applying intermediate scrutiny, striking down a statutory ban on Bell company provision of video programming service as a violation of the First Amendment); see also FTL, *supra* note 1, § 14.6.2.2 (“Common carriers may be required to carry freight for others, but that does not mean they may constitutionally be barred from carrying expressive freight for themselves.”).

⁶⁷ See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (in holding that the State of New Hampshire could not constitutionally prohibit citizens from obscuring the words “Live Free or Die” from their license plates, stating that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all”).

tions impairing such speech, including restrictions based on antitrust concerns, are subject to strict judicial scrutiny.⁶⁸ Such limits are generally likely to fall in the face of the overwhelming importance we place on these speakers' abilities to carry any sort of discourse, unfettered by government interference of any sort, even interference furthering important antitrust objectives.⁶⁹

In the middle are the cable companies. While they are like common carriers in that they provide the conduit through which speech gains access to eyeballs and ears, they are considered more like broadcasters, and hence providers of speech, because they exercise editorial control over the content that wends its way through the conduit.⁷⁰ However, cable companies do not suffer from the same technological constraints as airwave-based television broadcasters, whose broadcasting "spectrum" is quite limited.⁷¹ Thus, the Court has found content-neutral regulation of speech carried by cable companies to warrant not the "rational basis" scrutiny afforded to broadcast-targeted regulations,⁷² but "intermediate scrutiny:" the statute will

⁶⁸ See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945). It is important to note that, while the vertical restraints at issue in *Associated Press* survived strict scrutiny, they were relatively mild: while the measures prohibited the Associated Press from discriminating anticompetitively in the access it proffered to its wire service for competing publishers, it did not prevent the Associated Press from gathering news service outright, operating a news wire for profit, or engaging in newspaper publishing; see also *FTL*, *supra* note 1, § 14.6.2.2 ("[U]se of public facilities [does not] suspend First Amendment rights. Newspapers place their boxes on public sidewalks; demonstrators parade on public streets; cable operators and telephone companies run their wires overhead along the same routes.") (footnotes omitted).

⁶⁹ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994) (opinion of Kennedy, J.) ("[T]he mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to non-broadcast media.") (citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657-58 (1990)); *Fed. Election Comm'n v. Mass. Citizens For Life, Inc.*, 479 U.S. 238, 256-59, (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 248-58 (1974).

⁷⁰ See *id.*, 512 U.S. at 636 ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.") (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)).

⁷¹ *Id.* at 636-38. See also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-77 (1969) (footnotes omitted):

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony [sic] of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."

⁷² Compare *Turner Broadcasting*, 512 U.S. at 637 ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.") with *Red Lion*, 395 U.S. at 388

survive if “it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”⁷³

The Supreme Court has traditionally considered common carriers, such as providers of telephony, to be at the bottom of its tripartite taxonomy of speech protection. Because common carriers are already required by law to carry all traffic without discrimination as to its content,⁷⁴ and because there have historically been serious anti-trust concerns due to the economies of the networked nature of the service,⁷⁵ the Court has found government action seeking indirectly or directly to regulate telecommunications providers’ carriage of speech to be deserving of the lowest level of scrutiny—the “rational basis” test.

However, when a common carrier provides its own speech, as with a video programming service, regulations are subject to intermediate scrutiny. This became evident in 1994 with *Chesapeake and Potomac Telephone Company of Virginia v. FCC*, where the Fourth Circuit and the Ninth Circuit struck down a provision of the 1992 Cable Act which prohibited Bell companies from providing video programming services.⁷⁶

In those cases, the government attempted to argue that rational basis review should be employed because the prohibition was not content-based, and it was a mere “market structure regulation, intended to promote competition in the cable industry by preventing

(“Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”).

⁷³ *United States v. O’Brien*, 391 U.S. 367, 377 (1968). See also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. at 640-41 (finding content-neutral must-carry provisions imposed on cable companies worthy of intermediate, not strict, scrutiny from a First Amendment standpoint); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (“Cable television provides to its subscribers news, information, and entertainment. It is engaged in ‘speech’ under the First Amendment, and is, in much of its operation, part of the ‘press.’”); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1444 (D.C. Cir. 1985) (“It is now clearly established . . . that cable operators engage in conduct protected by the First Amendment.”). See also FTL, *supra* note 1, § 14.6.2.2 (describing cable’s position in the traditional taxonomy).

⁷⁴ See *supra* note 10.

⁷⁵ See *supra* text accompanying notes 1-33.

⁷⁶ *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181 (4th Cir. 1994), *vacated as moot*, 516 U.S. 415 (1996); *U S West v. United States*, 48 F.3d 1092 (9th Cir. 1994), *vacated as moot*, 516 U.S. 1115 (1996). The Supreme Court vacated these cases because the Telecommunications Act of 1996 lifted the statutory prohibition on Bell company video programming services, rendering the cases’ holdings moot.

the telephone companies from monopolizing the field.”⁷⁷ Both the Fourth and the Ninth Circuits rejected this argument because it was based on the “scarcity” rationale—that intensive government regulation was necessary in certain areas (such as the management of broadcast airwaves), because without it there would be chaos. Since there was no scarcity concern, the courts reasoned, rational-basis review was inapt.⁷⁸

Thus, regulation of a Bell company’s *transport* of speech is entitled to *minimal* (rational-basis) judicial scrutiny, while regulations concerning the Bell company’s *provision* of speech are subject to *intermediate* judicial scrutiny.

Slightly complicating this framework is the Court’s recognition that “laws that single out” a speech carrier (whether a newspaper, a cable company, or a telephone company) for “special treatment” can be more subject to government abuse than “generally applicable” laws. For this reason, a particular implementation of a generally applicable antitrust law may receive more lenient scrutiny than an industry- (and especially company-) specific system of regulation.⁷⁹

C. *The Impact of Technological Evolution*

Over the decades since its initial foray into regulation of the telecommunications industry, Congress and the FCC have tried hard to

⁷⁷ *US West*, 48 F.3d at 1098. See also *Chesapeake & Potomac*, 42 F.3d at 191.

⁷⁸ See *Chesapeake & Potomac*, 42 F.3d at 191 (“The Supreme Court has repeatedly emphasized that the reason that regulations of broadcast media need pass only minimal scrutiny is the fact, unique to the broadcast media, that the number of broadcast stations (television and radio) usable productively by society is limited by physical considerations.”) (citing *Turner Broadcasting*, 512 U.S. at 636-39; *Red Lion*, 395 U.S. at 397-400); *US West*, 48 F.3d at 1098 (citing *Turner Broadcasting*, 512 U.S. at 639):

[T]he scarcity rationale does not apply to the cable television industry. In *Turner*, the Supreme Court held that the “application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation,” because “cable television does not suffer from the inherent limitations that characterize the broadcast medium [and there is no] danger of physical interference between two cable speakers attempting to share the same channel.” Thus, for example, two competing cable concerns could each run wires to every home in a community, giving consumers greater choices in service, without any risk of interfering with each other’s signals.

(citation omitted).

⁷⁹ See *Associated Press v. United States*, 326 U.S. 1, 20-21 (1945) (detailing the limited nature of restrictions at issue and the fact that they were effected pursuant to the Sherman Antitrust Act); see also *Turner Broadcasting*, 512 U.S. at 640 (explaining *Associated Press*’s lesser scrutiny was due to its “enforcement of a generally applicable law,” and finding such restraints not as constitutionally suspect as “laws that single out the press, or certain elements thereof, for special treatment;” applying this framework to the telecommunications regime); FTL, *supra* note 1, § 14.6.2.2 (analyzing *Associated Press* through the *Turner Broadcasting* lens).

strike a balance between the public-interest goals of the regulation of telecommunications and its impingement into these providers' free speech rights. However, there is a fundamental tension between the way the government regulates communications and the empirical reality that is becoming more and more evident.

The government regulates *carriers*. Historically, this made sense; as early as the 1930s it was clear that only a few (if that many) actors in the telephone, broadcast, and eventually cable industries could muster the resources to operate an economically viable network.⁸⁰ Although it was the *services* that Congress was interested in regulating, the best way to do so was to regulate the *carriers*. However, as the pace of technology rolled onwards, this one-to-one relationship gradually eroded. Massive technological advancements⁸¹ in the past twenty or so years—chiefly the advent of the Internet—have made it possible for each of these carriers to provide each others' services (naturally, in competition with one another) with minimal difficulty. And since the Internet is such a new, global technology, for once the FCC is relatively ill-equipped to interfere in quite the same way.⁸²

The result has been “convergence:” in both a corporate-structure sense⁸³ and an operational sense, companies are seeking to offer

⁸⁰ In the early days of radio, for example, after an initial surge in popularity and explosive growth in the number of radio stations, the costs inherent in broadcasting quality programming to large audiences resulted in vast consolidation: only the huge radio “networks” like ABC, NBC, and CBS profited from general-audience broadcasting, because they could broadcast the same programming to the entire country. See Ward Hanson, *The Original WWW: Web Lessons from the Early Days of Radio*, J. DIRECT MKTG., Summer 1998, at 46.

⁸¹ Including, but certainly not limited to, the advent of the Internet, fiber-optics technology, wireless technology, upsurges in computer processing power coupled with decreases in equipment size and cost, and the ubiquity of computing in the everyday lives of consumers.

⁸² Indeed, the Telecommunications Act of 1996 specifically required the FCC to forbear from regulating intensively those services, including “advanced telecommunications services,” that the Commission, after investigation, determined would best flourish in a deregulatory environment. See Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996).

⁸³ A major trend in the telecommunications landscape over the past decade has been consolidation. Whereas at the breakup of the Bell System there were seven Regional Bell Operating Companies, now there are only four: Bell Atlantic merged with NYNEX, and later GTE (one of the few non-Bell local exchange carriers), to form Verizon; Southwestern Bell merged with Pacific Bell and later Ameritech to form SBC; and U S West and Qwest, an Internet backbone and discount long-distance provider, merged in 2000. See Common Carrier Bureau, Federal Communications Commission, *Mergers of Common Carriers Requiring FCC Approval*, at <http://www.fcc.gov/wcb/cpd/Mergers/> (last visited Apr. 10, 2003). Only BellSouth has not yet merged.

“Merger mania” is not limited solely to the Bell companies either. Since passage of the 1996 Act, AT&T has gobbled up: TCG, a provider of competitive local telephone service to business customers; three of the largest cable companies in the country, Comcast, TCI, and MediaOne; and the IBM Global Network. See Sheldon Hochheiser, *A Brief History: The New AT&T*, at <http://www.att.com/history/history5.html> (last visited Apr. 15, 2003). In that same period,

more and more services to their customers. Anyone with either a huge network with massive sunk investments (the Bell companies and cable companies) or the entrepreneurial drive and financial acumen to cobble together through mergers, acquisitions, and resale a network of the necessary components⁸⁴ could become a “one-stop shop:” the fabled Holy Grail of communications. Thanks to the Internet and its supporting technologies, a customer may now theoretically contract with one company to meet her local, long-distance, and wireless telecommunications, her television viewing needs, and her Internet access requirements, which can potentially be used for text messaging, video telephony, and file transfer.

Gradually, the old scheme of regulating *carriers* as a proxy for regulating *services* has become more difficult, since those services could be provided by a wide variety of carriers. Each carrier that was being regulated in a certain way (or not regulated at all) due to the types of services it offered could now offer all sorts of services—including the types of services previously offered by carriers subject to much less regulation (or none at all).

It makes increasingly less sense for these carriers’ “speech” to be regulated differently simply because of who they are. It will be important for new regulation to concentrate more on regulating (and choosing not to regulate) according to the *type* of speech, with less regard to who is *carrying* that speech.⁸⁵ Otherwise, companies offering

WorldCom, a long-distance carrier, consumed MFS, WiTel, and many other providers of local telecommunications services to business, UUNet, a colossal Internet backbone operator, and MCI, the second-largest long-distance carrier in the United States. See *infra* note 84. It even tried to purchase Sprint, the third-largest long-distance carrier. Common Carrier Bureau, *Mergers of Common Carriers Requiring FCC Approval*, *supra*. Time Warner, a cable company, merged with AOL, an Internet service provider. *Id.*

⁸⁴ Until recently, MCI WorldCom stood as an excellent example of this acquisition strategy. MCI began as a long-distance carrier, but gradually began offering other services and built up its own nationwide, fiber-optic Internet backbone. MCI Group, *Milestones*, at http://www.mci.com/about_mci/milestones.jsp (last visited Apr. 10, 2003). In 1997 MCI merged with WorldCom, a company that spent the 1980s and 1990s acquiring small, extremely modernized companies operating fiber-optic networks and serving hugely profitable urban business markets, as well as huge Internet backbones. WorldCom, *WorldCom Data Firsts*, at <http://www.worldcom.com/global/newscenter/facts/firsts> (last visited Apr. 10, 2003). Even though it filed for bankruptcy protection in July 2002, MCI remains the second-largest long-distance carrier in the United States, continues to operate UUNet, one of the largest Internet backbones in the world, and still maintains extensive local telephone operations, although it has been forced to raise its rates recently. See Andrew Backover, *MCI Boosts Bills for 3rd Time in 6 Months*, USA TODAY, Dec. 4, 2002, at B3.

⁸⁵ See, e.g., FTL, *supra* note 1, § 14.1:

Whether state or federal in origin, the law of . . . free speech has traditionally drawn sharp distinctions between carriers and broadcasters. So long as those industries provided quite separate and distinct services, it was possible to regulate them differently and

an identical service can be subject to vastly differing regulation. In addition to varying the costs of providing these services, differentials in regulation can give certain companies unwarranted advantages in the marketplace over their more heavily regulated competitors.

D. What This Means for Broadband

This is currently the situation in the broadband Internet access market. Admittedly, providing a conduit through which users may access content is not the same thing as actually providing the content. Hence, it would be inapt for regulations inhibiting common carriers' broadband Internet access offerings to receive the same strict level of scrutiny as restrictions on newspapers' publishing activities.

But high-speed Internet access service as provided by a telephone company (via DSL) is virtually indistinguishable, from a practical standpoint, from the access provided by a cable company (via cable modem). Admittedly, there are some differences: DSL is offered over telephone lines which have been modified at either end to accommodate digital signal transfer, whereas cable modem service is offered over coaxial cables which have been modified (again, at both ends) to provide two-way digital communications.⁸⁶ The bandwidth limitations are also somewhat different: in addition to the inherent limitations in the processing capabilities of the transmission equipment involved in both services and the distance the customer's premises is from the telephone company's switching facilities, DSL signal speed is limited by artificial, price-point-based limitations placed on the service by the telephone company, while cable modem service is limited by the number of users in each neighborhood simultaneously accessing the service.⁸⁷

These differences, however, are market-oriented differences which will affect customers' purchasing decisions, rather than differences warranting specialized regulatory treatment. They do not change the reality that both DSL and cable modem service provide

to treat them as quite separate creations for constitutional and other purposes. But the industries are now converging rapidly.

⁸⁶ See generally *ESBIN*, *supra* note 53, at 75-82 (describing cable modem service in detail); KEVIN WERBACH, *DIGITAL TORNADO: THE INTERNET AND TELECOMMUNICATIONS POLICY* 69, 75 fig. 11 (Federal Communications Commission, Office of Plans and Policy, Working Paper No. 29, Mar. 1997), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp29.pdf (last visited Apr. 10, 2003) (describing DSL service and comparing the major types of internet access).

⁸⁷ See generally *ESBIN*, *supra* note 53.

high-speed connections to the same Internet content at approximately the same flat rate.⁸⁸

Because these services are so similar (in much the same way that the Bell companies' video programming services were so similar to cable television programming services), it does not seem appropriate or reasonable for DSL service to be subject to the investment-crippling unbundling requirements of Section 251 of the Communications Act and strict merger approval concessions, while cable modem service is subject to no restrictions at all.

More than simply crippling competition in the broadband Internet access industry, this differential in regulation raises specific concerns that the content these providers are now capable of carrying over their networks will be interfered with by the government on an unequal basis.⁸⁹ The FCC is exercising its regulatory power in a manner that is retarding the growth of one important service for carrying speech, DSL, while allowing purveyors of the dominant service, cable modem, to run amok.

Although common carriers have traditionally been at the bottom rung of the First Amendment protection taxonomy,⁹⁰ there is some

⁸⁸ As of April 2003, residential Verizon Online DSL service sold for \$29.95 per month for the first six months and \$49.95 per month thereafter. Verizon, *Verizon DSL for Your Home*, at <http://www.verizon.net/> (last visited Apr. 10, 2002). Residential Comcast cable modem service sold for \$42.95 for subscribers of Comcast's cable TV. Comcast, *Better Value*, at <http://www.comcast.com/Products/BetterValueDetails.html> (last visited Apr. 11, 2003).

⁸⁹ See, e.g., FTL, *supra* note 1, § 14.1:

Regulators have traditionally overseen what carriers do in microscopic detail, and no one much worried about First Amendment issues because carriers rarely, if ever, raised these matters on their own behalf. Now, high-bandwidth carriers also publish. On the new digital media, personals, commercial ads, mail, editorials, and news all move on the same conduits and are displayed on the same screen, combined at will, bit by bit, pixel by pixel. The upshot is a tangle of irreconcilable rights and duties: obligations to carry, on the one hand, and duties to censor, on the other; rights to publish freely, on the one hand, and across-the-board accountability to regulators, on the other. The law is in a state of enormous flux. None of the old labels and legal pigeonholes work anymore; satisfactory new ones have not yet been invented.

⁹⁰ See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (striking down an FCC regulation on the grounds that it regulated cable television systems as common carriers); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm'n*, 412 U.S. 94, 110 (1973):

Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act . . . Congress[] flat[ly] refus[ed] to impose a "common carrier" right of access for all persons wishing to speak out on public issues.

See also *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984) ("Unlike common carriers, broadcaster and 'entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties].") (quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (alteration in original)); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259

support on the Supreme Court for applying the same First Amendment standards to common carriers as to cable companies. In her separate opinion in *Turner Broadcasting Systems, Inc. v. FCC*, Justice O'Connor, joined in part by Justices Scalia, Thomas, and Ginsburg (!), opined that "if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another."⁹¹ Justice O'Connor made this statement in the context of the tools Congress has at its disposal to ensure that cable operators, especially the monopolistic ones, do not abuse their editorial discretion in choosing what speech to transmit over their channels.⁹² But this view may be more broadly applicable: Congress should be held to the same standard when it regulates common carriers' and cable companies' provision of the same service. While this is currently the minority view, this statement could represent a more forward-looking faction on the Court which recognizes the differences in communications today (and in the future) from communications yesterday.

E. The "Open Access" Debate

The case law to date pertaining to the "open access debate" helps to clarify extending the concept briefly contemplated in Justice O'Connor's *Turner* opinion into the realm of broadband access services. The term "open access" refers to the effort by consumer groups⁹³ and competitive, non-cable based Internet access providers to force monopoly-franchised cable companies to unbundle their infrastructure and lease it to them at low rates—much as the Bell companies are required to—so that these competitors may offer their own

(1974) (White, J., concurring) ("A newspaper magazine is not a public utility subject to reasonable governmental regulation."). See also FTL, *supra* note 1, § 14.6.1:

Wires get more First Amendment protection in some respects because they are (apparently) not scarce, but carriers—until recently, at least—have not been thought of as deserving much First Amendment protection at all. The Supreme Court has never expressly so ruled, but it has made noises to that effect.

See also *id.* at n.340.

⁹¹ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part and dissenting in part). See also FTL, *supra* note 1, § 14.6.1, n.340 (listing further cases which support this position).

⁹² *Turner Broadcasting*, 512 U.S. at 684.

⁹³ See, e.g., *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (open access appeal listing the Center for Public Interest Law, Consumer Action, Consumer Federation of America, The Utility Reform Network, openNET Coalition, and Utility Consumers' Action Network as amici).

cable modem service to the cable company's customers.⁹⁴ Naturally, the cable companies have refused to do this, initially on the grounds that since they are the ones who spent the money to invest in such a valuable network, they should not be forced to share its capabilities and capacity with their competitors.⁹⁵

Recently, some municipal governing bodies⁹⁶ have attempted to force the cable companies they regulate into providing unbundled, Bell DSL-style "open access" to competitive providers of broadband Internet access services.⁹⁷ These efforts by municipal authorities have taken the form of straightforward ordinances requiring open access,⁹⁸ as well as conditions placed upon their permitting the transfer of cable franchise licenses when these cable providers merge with other companies.⁹⁹

⁹⁴ See *id.* at 875 ("A variety of interest groups and competitors argued that allowing AT&T to restrict cable broadband access to the proprietary @Home service would harm competition and reduce consumer choice.").

⁹⁵ See, e.g., *id.* at 871 (listing Internet Service Providers U S West Interprise America, Inc. and GTE Internetworking Inc. as intervenors and OGC Telecomm, Ltd. and Oregon Internet Service Providers Association as amici); *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 686 (S.D. Fla. 2000) (noting that open access provision at issue was adopted "at the prompting of GTE," a competing Internet Service Provider).

⁹⁶ Pursuant to the Communications Act, much of the regulation of cable companies is left to municipal authorities, which franchise the monopoly cable provider and permit it to access public rights-of-way and other public facilities when it builds its network. See 47 U.S.C. § 601 (2003) (establishing minimum requirements and national policy for local municipal franchising authorities to carry out). The logic for permitting monopolies is pretty strong: there was little desire on the part of municipalities to allow their public rights-of-way to become a tangled mess of competing coaxial cable infrastructure.

⁹⁷ The logic here is also clear: allowing many providers to share the bottleneck facilities will foster competition in the broadband access market, resulting in lower prices and better services for customers.

⁹⁸ See, for example, *Broward County, Fl., Ordinance 1999-41, § 1.02* (July 13, 1999), which was vacated by *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 686-87 (S.D. Fla. 2000), and stated:

Subject to technical feasibility, Franchisee shall provide any requesting Internet Service Provider access to its Broadband Internet Access Transport Services (unbundled from the provision of content) on rates, terms, and conditions that are at least as favorable as those on which it provides such access to itself, to its affiliate, or to any other person. Such access shall be provided at any technically feasible point selected by the requesting Internet Service Provider.

⁹⁹ See, e.g., *AT&T v. City of Portland*, 216 F.3d at 875 (invalidating condition in Portland and Multnomah County's approval of the AT&T/TCI merger which required "non-discriminatory access to the Franchisees' cable modem platform for providers of Internet and on-line services, whether or not such providers are affiliated with the Transferee or the Franchisees"). As discussed above in the text accompanying notes 47-48, this has been an effective tool for extensively regulating telephone companies because of the rampant consolidation that is taking place in the cable and telecommunications industries.

When this happened in Florida, Comcast Cablevision, the monopoly cable provider, took the municipality to federal court.¹⁰⁰ Applying strict scrutiny,¹⁰¹ the District Court struck down the county ordinance mandating open access on First Amendment grounds: the open access requirement “unconstitutionally abridges freedom of speech and the press,”¹⁰² the court found, while “the harm the ordinance is purported to address appears to be non-existent.”¹⁰³ The absence of this harm, the Court found, is due to the fact that in the broadband Internet access market, cable competes with DSL.¹⁰⁴ This court struck down the ordinance requiring the unbundling of a network used to provide broadband Internet access on the grounds that such unbundling works an impermissible violation of the network owner’s First Amendment rights. In so doing, the Court referred to the FCC’s own industry report to support the proposition that the purported governmental interest behind the restriction, competitive concerns, was non-existent, because of competition with DSL.¹⁰⁵

This is a strong argument in favor of the proposition that the FCC’s unbundling regime violates the First Amendment when applied to DSL. Just as the courts have found with cable modem service, the governmental interest in the unbundling requirement—a requirement the courts have held restricts free speech—is similarly non-existent, because DSL competes with cable modem service in the broadband market, as the FCC’s own data suggests.¹⁰⁶

Admittedly, this holding applies to cable service, which the courts have been careful to distinguish from common carrier service. How-

¹⁰⁰ See *Comcast Cablevision*, 124 F. Supp. 2d 685.

¹⁰¹ In dictum, the court stated that the ordinance wouldn’t pass constitutional muster under intermediate scrutiny, either. *Id.* at 698 (“It has not been demonstrated that the Broward County ordinance furthers a substantial governmental interest. Therefore, even applying content-neutral intermediate scrutiny, the ordinance violates the First Amendment.”) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994) (“[T]he mere assertion of a dysfunction or failure in a speech market, without more is not sufficient to shield a speech regulation from the First Amendment . . .”).

¹⁰² *Id.* at 686.

¹⁰³ *Id.* at 697. See also *id.* at 697-98 (“Cable possesses no monopoly power with respect to Internet access. Most Americans now obtain Internet access through use of the telephone. Local telephone companies provide dial up Internet access to over 46.5 million customers, whereas all cable companies combined currently provide Internet services to only about two million customers.”).

¹⁰⁴ *Id.* at 698 (citing Report, Inquiry Concerning the Deployment of Advanced Telecommunications Capability To All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 14 F.C.C.R. 2398 (1999)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

ever, the characteristics of the service that are at issue and that the court has determined make it worthy of intermediate, rather than rational-basis, scrutiny—requiring the cable company to parse out the components of its service to *all* comers, even competitors—are the very characteristics that make it much more akin to a common carrier service than to a broadcasting service. Therefore, it makes sense to treat the two services the same: Congress and the FCC must either require unbundling and open access for both cable modem and DSL service, or (more preferably) deregulate both to allow them to better compete with one another.¹⁰⁷

III. THE ROLE OF THE FCC

Congress has given the FCC two discrete sets of regulatory tools: one for telephone companies,¹⁰⁸ and one for cable companies.¹⁰⁹ For cable companies, the statutory regime charges the FCC with issuing rules relating to license transfers, channel carriage, and the like.¹¹⁰ A good deal of discretion is left to municipal franchising authorities, but their regulation of cable companies is subject to broadly applicable FCC rules.¹¹¹ Telephone companies have their own set of FCC rules to follow.¹¹²

Certainly, the FCC is broadly permitted by Congress to forbear from regulating any service or sector if its involvement would hamper the public interest.¹¹³ Moreover, the Commission is required to moni-

¹⁰⁷ Indeed, in rejecting the city of Portland's bid to assert control over a cable company's provision of broadband service within its jurisdiction and forcing it to provide such service to all comers on an open basis, the Ninth Circuit clearly placed the responsibility for regulating (or not regulating) cable broadband services in the FCC's lap. See *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). However, neither the FCC nor Congress have gotten the message: monopoly cable broadband continues to pass beneath the regulatory radar, while cable's only viable competitor, the Bell companies, still are subject to investment-crippling unbundling regulation.

¹⁰⁸ See 47 U.S.C. §§ 201-276 (2003).

¹⁰⁹ See *id.* §§ 601-639 (2003).

¹¹⁰ See *id.* §§ 201-276.

¹¹¹ *Id.*

¹¹² *Id.* §§ 201-276.

¹¹³ See 47 U.S.C. § 160(a) (2003):

[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications services are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the

tor the rollout of advanced telecommunications services, and forbear from regulation of such services if it would serve the public interest.¹¹⁴ And the statutory regime imposed on the FCC by Congress clearly shows a legislative decision to treat cable companies differently from telephone companies.¹¹⁵ However, as the networked world becomes more of a reality, and the lines between what type of company is capable of providing what type of service becomes blurred, this regime makes less and less sense; however, the FCC is currently in charge of changing this regime.

As the Internet becomes more important to our economy and in our daily lives, the question of which of those companies that provide our access to it are subject to strict regulations and which are not—and thus, which companies will and will not be given the latitude to help constrain the excesses of the market leaders—begins to look more like a legislative issue. As this happens, the FCC's authority to determine who is worthy of forbearance and who is not begins to look more like an improper delegation of legislative power to a federal agency by Congress.¹¹⁶

I am not proffering nondelegation doctrine as a reason for overturning the current telecommunications regime.¹¹⁷ However, in con-

protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.

See also FTL, *supra* note 1, §§ 3.15, 9.5 (discussing the FCC's historical application of this provision, primarily with respect to the rate regulation of long-distance carriers).

¹¹⁴ The Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 157 note):

[The Commission] shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in manner consistent with the public interest . . . regulatory forbearance The Commission shall . . . initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans . . . it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

¹¹⁵ Compare *id.* §§ 201-276. (comprehensive, prohibitive, primarily federalized regulation of local telephone companies), with *id.* § 601 (primarily leaving regulation up to municipal authorities, guided by broad federal policies and only a few specific requirements).

¹¹⁶ See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (opinion of Scalia, J.), which states:

[T]he Constitution vests "all legislative Powers herein granted . . . in a Congress of the United States." This text permits no delegation of those powers, and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."

(emphasis and alterations in original) (internal citations omitted) (citing U.S. CONST. art. I, § 1; *Loving v. United States*, 517 U.S. 748, 771 (1996); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

¹¹⁷ The Supreme Court has not struck down a Congressional act as an unconstitutional delegation of legislative power since the New Deal era. See *Loving*, 517 U.S. at 771 ("Though in 1935

templating rehabilitative legislation for the regulation of broadband, Congress and regulators would do well to take this and other potential constitutional infirmities—such as Equal Protection implications,¹¹⁸ jurisdictional issues,¹¹⁹ and Bill of Attainder concerns,¹²⁰—into

we struck down two delegations for lack of an intelligible principle, we have since upheld, without exception, delegations under standards phrased in sweeping terms.”) (internal citations omitted) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)). See also *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216-17, 225-26 (1943) (upholding the Communications Act of 1934’s delegation to the FCC to regulate radio broadcasting in the “public interest, convenience, or necessity”).

¹¹⁸ The current communications regulation regime classifies cable companies and telephone companies differently, subjecting them to differing levels of government intervention and control in their provision of essentially the same services. See *supra* text accompanying notes 49-57. Previously, as discussed above, this classification made sense—there were compelling governmental interests being served in the form of universal service, affordable rates, and competitive markets being protected from unfair leveraging by monopolists. See *infra* text accompanying notes 3-12. However, the new reality of convergence means formerly monopolistic cable and telephone carriers may cross over and compete with each other, if they are given the proper incentives to do so. *Id.* Thus, it can be argued that unbundling regulations not only prevent telephone companies from wanting to compete seriously with cable providers in broadband, they deny them equal protection under the law.

¹¹⁹ The regulatory mechanism by which the government supervises the Bell companies’ unbundling of broadband services may be constitutionally suspect. That mechanism, Section 251 of the Communications Act (as amended by the 1996 Act), requires such unbundling to be effected pursuant to rates and terms set by individual state utility regulatory bodies. 47 U.S.C. § 252(d) (2003). In each instance where a competitor wishes to lease access to these unbundled elements, the *federal* Telecommunications statute requires them to negotiate and execute an interconnection agreement with the Bell company. *Id.* § 252 (procedures for negotiation and arbitration of interconnection agreements under state PUC auspices). However, in order to take effect, the terms of these agreements must be reviewed and approved by *state* public utility commissions. *Id.* Such review is cabined by the requirements of state law. *Id.* § 252(e) (3) (“[N]othing in this section [setting forth federal guidelines for negotiation and arbitration of interconnection agreements] shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.”).

This scheme clearly implicates the Supremacy Clause: the Section 251 unbundling and interconnection regime, as it currently exists, gives *state* courts authority to interpret agreements wrought pursuant to *federal* statutes. However, because the local divisions of the Bell companies have spent virtually all of the last century building favorable, symbiotic relationships with state regulatory bodies (much as AT&T has cultivated a sympathetic relationship with the FCC), it is doubtful that such constitutional concerns would ever come to the fore.

¹²⁰ The 1996 Act’s singling out of the Bell companies’ provision of DSL services for stricter regulation than the cable companies’ provision of virtually the same service may arguably constitute an unlawful Bill of Attainder. U.S. CONST. art. 1, § 9, cl. 3 (prohibiting the Government from passing any legislation which amounts to punishing named individuals or easily ascertainable members of a group without a trial); *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) (endorsing a three-part test to evaluate Bill of Attainder concerns: “(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, ‘viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes’; and (3) whether the legisla-

consideration. As with the First Amendment problems, they indicate that something is seriously wrong with both the substance and procedure of the way the United States Government regulates Internet access services.

CONCLUSION

First Amendment concerns should be foremost in legislators' minds when they draft new broadband legislation. Given the convergence that has taken place in recent years, it would be unconstitutional for any legislation that is passed to require unbundling and other extensive regulation for DSL providers, where none is imposed on cable providers.

tive record 'evinces a congressional intent to punish') (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 473, 475-76, 478 (1977)).

It is clear that the statutory regime at issue singles the Bell companies out "by name." However, Bell company attempts to overturn 47 U.S.C. § 271, which sets forth the hurdles a Bell company must clear before gaining long-distance authorization, and 47 U.S.C. § 274, which prohibits Bell companies from engaging in electronic publishing, as Bills of Attainder have been unsuccessful, with Courts of Appeal finding the particular treatment at issue not to amount to "punitive effect" upon or "an intention to punish" the Bell companies. See *BellSouth Corp. v. FCC*, 162 F.3d 678 (D.C. Cir. 1998); *SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998) (rejecting § 271 attacks); *BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998) (rejecting electronic publishing attack).

The scholarly consensus seems to be in agreement that the Bill of Attainder Clause is not cause for concern with the current telecommunications regulation regime. See, e.g., Allison C. Carrigan, Comment, *The Bill Of Attainder Clause: A New Weapon To Challenge The Oil Pollution Act Of 1990*, 28 B.C. ENVTL. AFF. L. REV. 119, 149 (2000) (citing *BellSouth*, 162 F.3d at 685):

[A] line-of-business restriction keeping the appellant from entering a particular area of the industry without first satisfying certain requirements was not a traditional punishment under the test. Instead, the law's requirements were no different than the numerous regulatory measures aimed at other industries, which have not been held to inflict punishment. . . . The requirement imposed on [BellSouth] was part of an act that was meant to provide a competitive telecommunications market in an area particularly susceptible to monopoly power. There was no punitive or suspicious motive in enacting the legislation. The legislative history and background of the Act was clear in this regard.

(citations omitted). Indeed, the Supreme Court has struck down legislation on such grounds only five times in history. See Grady Jessup, *The Emperor's New Clothes: "But The Emperor Has Nothing On!"* *G.S. 110-90.2's Invisible Protection Of Children And Vexatious Impact On Citizens*, 24 N.C. CENT. L.J. 103, 131 n.154 (2001) ("The Bill of Attainder Clause has been one of the original guarantees of civil liberty, and has existed for over two hundred years. However, the Supreme Court has relied upon it to strike down legislation only five times.") (citing *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Lovett*, 328 U.S. 303 (1946); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866)).