
WHOSE LINE IS IT ANYWAY? THE FIRST AMENDMENT AND CABLE OPEN ACCESS

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Cable companies (generally known as “multi-systems operators” or “MSOs”) have begun a lengthy process of upgrading their facilities to support high-speed Internet service, called “broadband.” The cable MSOs have opposed federal and local efforts to open their cable networks to non-affiliated internet service providers (“ISPs”) who wish to provide broadband access independent of the cable MSO that owns the network. Leading the cable resistance has been AT&T Corporation. In 1998, AT&T acquired the largest existing cable MSO, Tele-Communications, Inc. (“TCI”). From the minute AT&T filed with the Federal Communications Commission (“FCC”) for permission to consummate the merger, it has faced demands from competitors, consumer groups, and local franchising authorities to provide “open access” to its cable network on nondiscriminatory terms.

In response, AT&T (and its supporters in the cable industry) have consistently responded that cable MSOs have the right to offer internet services through an exclusive provider. AT&T offers broadband access through an exclusive contract with Excite@Home, Inc. (“@Home”).¹ Although the FCC declined to impose an open access provision on AT&T as a condition of its acquisition of TCI, the City of Portland imposed open access as a condition on the transfer of TCI’s Portland

franchise to AT&T. AT&T brought suit in federal district court, lost before the district court and promptly filed an appeal with the Ninth Circuit Court of Appeals.

The AT&T case is the most advanced case addressing the issue of open access and the question as to whether requiring a cable MSO offering broadband services to provide a choice of ISPs on a nondiscriminatory basis offends a cable MSO’s First Amendment right to offer a unique “repertoire” of programming.² In other words, is the First Amendment a shield against any effort to open the cable network? As discussed below, rather than a shield against an open access requirement, the First Amendment serves as a sword of compelling state interest, justifying an open access requirement.

In its case against the City of Portland, AT&T has argued that its position as an internet access provider subjects any attempt to regulate its internet access to the “strict scrutiny” standard, traditionally reserved for newspapers but recently applied by the Supreme Court to invalidate content restrictions on the internet.³ Alternatively, AT&T argues that the *Turner* decisions⁴ require that all regulation of cable services must survive intermediate scrutiny under the First Amendment. Furthermore, AT&T claims that an open access requirement would burden its rights as a speaker by

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¹ Although @Home is a joint venture among several cable MSOs, AT&T holds a controlling interest. See *How Do*

AT&T, Excite@Home, Fit Together, SAN JOSE MERCURY NEWS, Aug. 11, 1999, at A1.

² Another case is pending in Broward County, Florida at the district court level, involving a number of cable MSOs. See *Open Access Lawsuit Closed*, WIRED NEWS, Feb. 15, 2000 <www.wired.com/news/politics/0,1283,34365,00.html> (report that district court dismissed all but the First Amendment counts of the complaint).

³ See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997).

⁴ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) [hereinafter *Turner I*]; *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) [hereinafter *Turner II*].

forcing it to carry the speech of others and thus, regardless of its status as an internet access/cable provider, such a requirement would trigger strict scrutiny under the First Amendment.

As demonstrated below, an MSO's status as an internet access or cable provider does not award it any special First Amendment protection in this context. AT&T's offering of internet access, whether classified as a "cable service" or a "telecommunications service" under the Communications Act,⁵ should be treated as a common carrier service from a First Amendment point of view. None of the concerns exist here that caused the Supreme Court in *Turner* to treat cable services as members of the "press" engaged in First Amendment activity.⁶

Because an MSO such as AT&T provides subscribers full access to the "public" internet through its service, it cannot claim that an open access requirement amounts to "forced speech." The nature of the internet does not support this assertion. For example, the requirement that a subscriber affirmatively select an alternate ISP guarantees that the subscriber cannot reasonably impute any offensive speech to the MSO.

Conceptually, an open access requirement amounts to a "virtual easement" over the cable plant. It does not interfere with an MSO's general enjoyment of its cable property or its ability to offer its full range of speech and services. Indeed, in this regard, it is similar to state-imposed easements over shopping centers and other areas in which the property owner has invited the public. The Supreme Court has found such state-imposed easements that promote the First Amendment rights of others to speak and hear information from diverse sources Constitutional in physical space.⁷ Given that the cable franchise carries with

it use of the public right of way, there seems no reason to demand a similar easement, and no reason why it should be unconstitutional, in cyberspace. A virtual easement to promote competition and the public's access to choices of information provider seems a reasonable condition for the locality to impose in exchange for the right to lay cable line through the public streets and run cable service to the home.

More fundamentally, rather than violating the First Amendment, an open access requirement effectuates the purpose of the First Amendment: to provide American citizens with access to—and the ability to participate in—the broadest marketplace of ideas possible.⁸ Absent government intervention, this First Amendment purpose does not necessarily imply a general right of access to cable networks under the First Amendment.⁹ The First Amendment does, however, authorize both the federal government and local franchising authorities to impose open access conditions, even under some degree of scrutiny.

I. INTRODUCTION

A. Broadband in the Existing Internet and the "Next Generation Internet"

"Broadband"—high speed internet access capable of delivering video streaming, local telephone service and a host of other wonders—promises to revolutionize the internet.¹⁰ The FCC has defined "broadband" as internet access at speeds of at least 200 kilobits/second (kbps).¹¹ By contrast, conventional dialup or "narrowband" service—usually involving a local phone call to an internet service provider—is limited to speeds of approximately 28.8 or 56 kbps.¹² Speed of connection to

⁵ Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–714)

⁶ This proposition is dependent on the condition that open access requirement would not reduce the number of channels available to an MSO to offer its own choice of cable and internet services. See *infra* Part III.A.

⁷ See *Prune Yard Shopping Center v. Robbins*, 447 U.S. 74 (1980).

⁸ See, e.g., Cass S. Sunstein, *A New Deal For Speech*, 17 HASTINGS COMM. & ENT. L.J. 138 (1994).

⁹ Such an argument is not inconceivable. See *Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir. 1994) (finding that the city's grant of an exclusive cable franchise violated a potential franchisee's First Amendment right unless the city could show that physical limitations made an exclusive franchise necessary). In addition, federal

or state statutes governing antitrust and prohibiting anticompetitive behavior might require cable MSOs to provide open access to their networks to competing ISPs.

¹⁰ See Kevin Werbach, *The Architecture of Internet 2.0*, RELEASE 1.0, Feb. 1999, at 1 [hereinafter WERBACH].

¹¹ See *In re Inquiry Concerning Deployment of Advanced Telecomm. Capability to All Americans in a Reasonable and Timely Fashion, Report*, 14 FCC Rcd. 2398, 2406, para. 20 (1999) [hereinafter *Advanced Services Report*].

¹² See generally FCC, OPP WORKING PAPER 29, DIGITAL TORNADO: THE INTERNET AND TELECOMMUNICATIONS POLICY (authored by Kevin Werbach) (1997) [hereinafter DIGITAL TORNADO]; Barbara Esbin, *Internet Over Cable: Defining the Future In Terms of the Past*, 7 COMMLAW CONSPECTUS 37 (1999); FCC, OPP WORKING PAPER 31, THE FCC AND THE UNREGULATION OF THE INTERNET (authored by Jason Oxman) (1999)

the end-user, or “bandwidth” at the “last mile,” is a critical bottleneck in the delivery of internet services. Imagine the internet as coming through a funnel, with the narrow point at the end-user. The size of the hole determines the speed at which water comes through. The larger the hole (*i.e.*, the greater the bandwidth), the faster the information moves from the internet to the user.¹³

Because dial-up access has evolved over the past 30 years in the context of the telephone network, a substantial body of law exists requiring telephony networks to provide “open access” to internet service providers.¹⁴ The common carrier telephone networks must carry the traffic of any ISP under nondiscriminatory terms, even where the telephone network itself provides internet service. As a result, individuals have a wide choice of ISPs offering a variety of services.¹⁵ More than 6,000 ISPs offer dial up services¹⁶ to the nearly 100 million Americans who are on line.¹⁷ More than ninety-five percent of Americans live within the local calling area of four or more ISPs,¹⁸ with average costs less than \$20 per month for unlimited internet access.¹⁹

This open access regime has permitted the development of an unusually competitive and robust market in which consumer choice prevents even the largest ISPs from dominating the market. As a

result, the content of the internet has become “as diverse as human thought.”²⁰ Individuals enjoy a wide range of services and the ability to interact freely with each other and with purveyors of goods and services online. It is no exaggeration to say that the development of the internet has fundamentally altered the way Americans speak, listen, work, shop and play.²¹

The advent of broadband, primarily deployed to residential users through cable systems with no history of common carrier or open access regulation, threatens to change all of this. Although common carriers have begun to deploy broadband services through open networks, cable companies have taken a commanding lead.²² Unlike telephone companies, cable companies generally do not need to provide access to their networks to competitors.²³ As a result, cable companies that provide two-way communications services and internet access need not provide subscribers with a choice of ISP. Rather, a cable system operator can require any subscriber who wishes to use its cable system for broadband services to subscribe separately to the cable company’s affiliated ISP. Cable operators have generally exercised this privilege and have refused to allow competing ISPs to access their cable networks at any price.²⁴

This difference would not seem important if

[hereinafter UNREGULATION OF THE INTERNET].

¹³ See FCC CABLE SERVICES BUREAU, BROADBAND TODAY: INDUSTRY MONITORING SESSIONS 19 (staff report authored by Deborah A. Lathen) (1999) [hereinafter BROADBAND TODAY].

¹⁴ See UNREGULATION OF THE INTERNET, *supra* note 12, at 18–20.

¹⁵ See *id.* at 5 (crediting open access to the telephone network as the key to the explosive growth of the internet).

¹⁶ See *id.* at 17.

¹⁷ See NUA Ltd., *How Many Online?*, NUA INTERNET SURVEYS (visited Nov. 8, 1999) <www.nua.ie/surveys/how_many_online/index.html>.

¹⁸ See UNREGULATION OF THE INTERNET, *supra* note 12, at 17. Although nothing prevents an individual from using dial-up access outside a local calling area, the economics of the telephone system make such access prohibitively expensive. Consumers pay a flat rate for unlimited local calls, whereas long-distance calls are paid for on a metered per-minute basis. As a practical matter, therefore, an individual’s choice of ISPs is generally limited to those that maintain a point of presence (“POP”) in the local calling area. See *id.* at n.47.

¹⁹ See *id.* at 5.

²⁰ *Reno*, 521 U.S. at 870.

²¹ See, *e.g.*, UNREGULATION OF THE INTERNET, *supra* note 12, at 4; NUA Ltd., *Net Economy Worth U.S. \$507 Billion by 2000*, NUA INTERNET SURVEYS, Oct. 27, 1999 <www.nua.ie/surveys/>.

²² See, *e.g.*, BROADBAND TODAY, *supra* note 10, at 25–29;

Cable Companies Staking Claim In ISP Race, (visited Nov. 9, 1999) <www.statmarket.com/>; *Broadband Media Compare Well*, (visited Oct. 30, 1998) <www.nua.ie/surveys/> (predicting that by 2002 more than one-quarter of American households will use broadband, and 80 percent of these households will use cable rather than DSL). Other technologies, such as internet access via wireless, via satellite provider, or via electric power lines, are still several years away from widespread deployment. See *generally In re Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, Report and Order*, 14 FCC Rcd. 2398 (1999) [hereinafter *Advanced Services Report*] (describing state of broadband deployment). Furthermore, as discussed in Part II.C. *infra*, the arguments in this article in favor of mandating open access to the cable apply equally to these delivery systems as well. As explained below, the First Amendment arguments presented herein apply to all means of internet access, and the presence of competing monopoly access providers does not relieve the need for open access.

²³ Cable system operators must provide access to their networks for those wishing to provide competing video programming under the “leased access” provisions of the 1992 Cable Act. See 47 U.S.C. § 532 (1994). Other provisions of the Act allow a local franchising authority (“LFA”) to demand a set-aside of channels for public, educational and government programming (“PEG channels”). See 47 U.S.C. § 531 (1994).

²⁴ In response to the inability to negotiate a price for access, at least one ISP—Internet Ventures, Inc. (IVI)—has at-

broadband were simply a faster version of narrowband. The difference in speed is not merely one of convenience, however, but of functionality. Services such as movie-quality video or digital telephony simply cannot take place at lower speeds. In addition, web pages have grown increasingly complex and rich in information, a trend likely to continue. As web pages become "fatter," they require more bandwidth to download and take more time to pass through the last mile bottleneck. Over time, narrowband service will become less useful; more of the internet will become accessible only through broadband connections.

B. The AT&T Case

In 1998, AT&T purchased Tele-Communications, Inc. ("TCI"), the largest multiple system owner ("MSO") in the United States.²⁵ AT&T announced that it would use TCI's cable plant to offer broadband internet access and local telephony service in competition with incumbent local exchange carriers ("ILECs").²⁶ AT&T assumed an exclusive arrangement with TCI's affiliate broadband ISP, @Home Corporation, that terminates

in 2002.²⁷ Following its acquisition of TCI, AT&T announced plans to also acquire the cable MSO MediaOne.²⁸ Assuming AT&T is permitted to acquire MediaOne, AT&T will directly or indirectly control approximately sixty percent of the nation's cable networks.²⁹

Alarmed at the potential monopoly in deployment of broadband services, consumer groups, competing ILECs and large internet service providers such as America Online ("AOL") vigorously pressed the FCC to adopt an "open access" requirement either as a general regulation or as a condition of permitting AT&T to acquire TCI and MediaOne.³⁰ In an "open access" regime, cable networks must allow competing ISPs to access their networks at non-discriminatory prices.³¹ However, the FCC has repeatedly refused to impose such a condition.³²

Every cable system operates under a local franchise,³³ every TCI or MediaOne system acquired by AT&T must transfer its local franchise to AT&T. This transfer process allows each local franchise authority ("LFA") to scrutinize the transaction and impose open access conditions. Taking advantage of this structure, consumer

tempted to use the leased access provisions of the Cable Act to secure a channel for broadband internet access. See *In re* Petition of Internet Ventures, Inc., Dkt. No. CSR-5407-L, at 4 (Aug. 11, 1999). The Commission denied this petition on February 18, 2000. See generally *In re* Petition of Internet Ventures, Inc., Dkt. No. CSR-5407-L, *Memorandum Opinion and Order*, FCC 00-37 (Feb. 18, 2000) [hereinafter *IVI Order*]. The Commission relied on the fact that § 532 explicitly sets aside commercial leased access channels for "video programming." See 47 U.S.C. § 532(b)(5) (1994 & Supp. III 1997); see also *IVI Order*, *supra*, at para. 12. The Commission explicitly refused to determine whether internet services provided over cable generally constitute "cable services" or "telecommunications services." *IVI Order*, *supra*, at para. 11.

²⁵ See *In re* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp., *Memorandum Opinion and Order*, 14 FCC Rcd. 3160 (1999) [hereinafter *AT&T/TCI Merger Order*]; *In re* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Fifth Annual Report*, 13 FCC Rcd. 24284, 24374, para. 154 (1998) [hereinafter *Fifth Annual Report*].

²⁶ See *AT&T/TCI Merger Order*, 14 FCC Rcd. at 3166, para. 9.

²⁷ See *How Do AT&T, Excite@Home, Fit Together*, SAN JOSE MERCURY NEWS, Aug. 11, 1999, at A1.

²⁸ This application is pending before the FCC. See AT&T Corp. and MediaOne Group Inc. Seek FCC Consent for a Proposed Transfer of Control, *Public Notice*, 14 FCC Rcd. 11867 (1999). AT&T must also secure permission from the Department of Justice Antitrust division before completing this acquisition. See generally 15 U.S.C. § 1 (1994) (outlawing combinations in restraint of trade). See also generally 15 U.S.C.

§ 2 (1994) (outlawing monopolization or attempts to monopolize); 15 U.S.C. § 18a (1994) (establishing procedures for premerger notification of the Assistant Attorney General and the Federal Trade Commission for certain transfers).

²⁹ See DEBORAH L. MORRIS, CABLE TELEVISION LAW 1999 UPDATE: COMPETITION IN VIDEO, INTERNET AND TELEPHONY, IN PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 578, 147 (Practising Law Institute, Oct. 1999) (stating that "contrary to its assertions, AT&T would gain ownership interests in cable plant infrastructure allowing it to pass more than 56 million homes, or 59 percent of all cable homes passed in the country"). See generally Consumer Federation of America, *Consumers Demand Open Access to the High Speed Internet* (visited Feb. 20, 2000) <www.consumerfed.org/internetaccess>.

³⁰ *AT&T/TCI Merger Order*, 14 FCC Rcd. at 3197, para. 75; *Advanced Services Report*, 14 FCC Rcd. at 2449, para. 101.

³¹ See No GateKeepers FAQ, (visited Jan. 15, 2000) <www.nogatekeepers.org/learnmore/faq.shtml>. Attempts to define "nondiscriminatory" have usually led to requirements that competitors receive the same or better terms as affiliated ISPs. See, e.g., City of Portland Ordinance 1729555 (1998).

³² *AT&T/TCI Merger Order*, 14 FCC Rcd. at 3207, para. 96; *Advanced Services Report*, 14 FCC Rcd. at 2449, para. 101. The FCC has rejected both the invitation to impose such a condition and AT&T's argument that the Commission lacks the authority to impose such a condition. Rather, the Commission has maintained an attitude of "watchful waiting," declining to regulate the market but watching closely for signs of developing monopoly. See generally Esbin, *supra* note 12; *Advanced Service Report*, 14 FCC Rcd. at 2449; BROADBAND TODAY, *supra* note 13.

³³ 47 U.S.C. § 541 (1994).

groups and other open access proponents have petitioned the LFAs to impose open access requirements as a condition of transferring a franchise.³⁴ Several municipalities, led by Portland, Oregon, have responded favorably to these arguments.³⁵

The LFA in Portland required AT&T to provide open access to its cable system to competing ISPs on comparable terms to those offered AT&T's affiliate @Home, as a condition of local service.³⁶ In *AT&T Corp. v. City of Portland*, AT&T appealed this ordinance to the U.S. district court in Oregon but lost at that level.³⁷ AT&T has appealed to the Ninth Circuit Court of Appeals.

II. AT&T'S FIRST AMENDMENT ARGUMENT

AT&T has pressed two species of First Amendment argument with increasing vigor.³⁸ First, AT&T claims a First Amendment right to provide the @Home service exclusively, either as speech or as a protected exercise of editorial discretion.³⁹ Second, AT&T claims that the requirement to provide access constitutes "compelled speech."⁴⁰ Before discussing these claims, however, it is important to understand the relationship between

AT&T and @Home and the underlying technology.

A. The AT&T/@Home Relationship

AT&T and @Home have consistently represented themselves as separate entities, although AT&T now owns a controlling interest in @Home. As a legal matter, however, AT&T and @Home maintain independent existences and contract with each other for services. As explained by the parties, @Home provides two services to cable clients such as AT&T:⁴¹ internet infrastructure, which allows access through standard internet protocols and additional proprietary content. In exchange, AT&T and other cable partners/clients provide @Home exclusive access to their cable subscribers, install any necessary customer premise equipment, and bill the customer as part of the customer's monthly cable bill.⁴²

To clarify this, one must recall that "the internet" is not a single entity or network. Rather, the internet is a "network of networks" that communicate through the use of common protocols.⁴³ ISPs provide access to the internet for subscribers through proprietary networks.⁴⁴ Thus, a

³⁴ See, e.g., No Gatekeepers (visited Feb. 20, 2000) <www.nogatekeepers.org/about> (listing groups who support open access).

³⁵ At the time of this article, LFAs that have required open access as a condition of offering internet access service include Broward County, Florida; Fairfax City, Virginia; Cambridge, Massachusetts, and North Andover, Massachusetts. Several other LFAs have included "Portland clauses," clauses that allow them to reexamine the issue of open access if Portland's open access provision is upheld in court. See Mary Ann Barton, *AT&T Decision to Open Cable Internet to ISP Doesn't Impress County Officials*, NATIONAL ASSOCIATION OF COUNTIES (visited Jan. 18, 2000) <www.naco.org/pubs/cnews/current/at&t.htm>; Patricia Fusco, *Gang of Four Takes on AT&T-MediaOne in Massachusetts*, INTERNETNEWS.COM (visited Jan. 18, 2000) <www.internetnews.com>; Patricia Fusco, *Open Access Debate Comes to Virginia*, INTERNETNEWS.COM (visited Jan. 18, 2000) <www.internetnews.com>; FCC to Fight Open Cable Access, WIRED NEWS, Jul. 21, 1999 <www.wired.com>.

³⁶ *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1150 (D. Or. 1999).

³⁷ See *id.* at 1156. The appeal has been docketed at No. 99-35609 (9th Cir. 1999).

³⁸ Although AT&T's briefs focused primarily on the preemption issue, AT&T attempted to cast this in a First Amendment light in its oral argument before the Ninth Circuit Court of Appeals. See generally Brief of Appellant, *City of Portland*, No. 99-35609 (11th Cir. Aug. 9, 1999) available at <www.techlawjournal.com/courts/portland/19990809.htm> [hereinafter AT&T Brief]. A video record of the oral argument may be found at <media.ci.portland.or.us:2259/

<ramgen/pdxvsattv.rm>. AT&T has also pressed this argument before the FCC as grounds for rejecting an open access requirement. See *Reply Comments of AT&T Corp. and MediaOne* in CS Dkt. No. 99-251, at 121-22 (Sept. 17, 1999).

³⁹ See AT&T Brief, *supra* note 38, at 19. See also, e.g., *Reply Comments of AT&T Corp. and MediaOne*, *supra* note 38.

⁴⁰ AT&T also claims that conditioning open access on providing internet service "punishes" it for providing @Home's speech, in violation of the First Amendment. Courts have routinely rejected such claims, finding that a condition based on offering a service is content-neutral. See, e.g., *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 182-84 (D.C. Cir. 1995).

⁴¹ @Home notes in its brief that it provides these services for other cable companies that choose to use @Home as a means of providing internet access to subscribers. Brief of @Home, at 8, *City of Portland*, No. 99-35609 (11 Cir. Aug. 16, 1999), available at <www.techlawjournal.com/courts/portland/19990816exc.htm> [hereinafter @Home Brief]. AT&T and @Home have an exclusive contract only in that AT&T agrees to use @Home to the exclusion of other ISPs. *Id.* at 4-5 (describing exclusive distribution arrangements with cable operator/clients). See Barton, *supra* note 35. This exclusivity will last until 2002, and AT&T has indicated that it may contemplate opening its network when its existing contract with @Home ends. See *id.*

⁴² @Home Brief, *supra* note 41, at 4-5.

⁴³ See *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996). For a general description of the internet and its operations, see *DIGITAL TORNADO*, *supra* note 12, at 10-22.

⁴⁴ See *DIGITAL TORNADO*, *supra* note 12, at 12.

user subscribing to @Home does not directly access the internet. Rather, the user enters @Home's own proprietary system, described by @Home as a "parallel internet."⁴⁵ The user does so through a cable line provided by AT&T, which connects with the @Home national network, which in turn connects the end-user to both @Home's proprietary content and to the public internet at large.⁴⁶

As described in more detail in Part II *infra*, requiring the subscriber to pass through @Home's proprietary system allows @Home to control how subscribers download or upload information from the internet ("surfing the 'net," in the argot of cyberspace). Requiring the subscriber to use the @Home system also gives @Home the ability to favor its own proprietary content and discriminate against content it disfavors.

B. The Effect on AT&T's First Amendment Claims

As a result of the relationship with @Home, AT&T's First Amendment claim must actually be broken into two parts: AT&T's claims (1) that a requirement to open its wire network to others violates its First Amendment Rights and (2) that it has a First Amendment right to provide the @Home service and @Home proprietary content.⁴⁷

However, this bifurcation creates significant difficulties for AT&T's First Amendment claim. When AT&T merely provides passive transport of another's content, where is the expressive conduct that gives rise to a First Amendment claim?

Recognizing this weakness, AT&T has at-

tempted to cast its decision to carry @Home—to the exclusion of others—as a First Amendment issue. As an initial matter, AT&T argues that its decision to carry one service that provides proprietary content to the exclusion of all others is an exercise of editorial discretion protected by the First Amendment.

AT&T has also attempted to characterize the open access requirement as a "penalty" on protected speech and therefore, prohibited under the First Amendment. AT&T appears to reason as follows: The decision to carry @Home and provide internet access triggers the "open access" provision, and "open access" is punitive.⁴⁸ The decision to carry @Home exclusively is an editorial decision by AT&T, protected under the First Amendment in the same way that its right to carry a traditional cable channel is protected under the First Amendment. Because the decision to carry @Home is expressive, the argument proceeds, penalizing AT&T for deciding to carry @Home by forcing it to open its network to others, punishes AT&T for expressive conduct in violation of the First Amendment.⁴⁹

Despite AT&T's attempt to characterize these arguments as separate, they are in fact flip sides of the same coin: Does AT&T have an editorial right protected by the First Amendment to choose an exclusive internet service provider and require subscribers to access the public internet through its closed network?

In support of its First Amendment claim, AT&T has primarily relied on three cases: *Miami Herald Publishing Company v. Tornillo*,⁵⁰ *Turner Broadcasting System, Inc. v. FCC* ("Turner I")⁵¹ and *Turner Broadcasting System, Inc. v. FCC* ("Turner II").⁵² As

⁴⁵ See @Home Brief, *supra* note 41, at 8; see also DIGITAL TORNADO, *supra* note 12, at 12.

⁴⁶ See @Home Brief, *supra* note 41, at 10–13; DIGITAL TORNADO, *supra* note 12, at 12.

⁴⁷ This First Amendment calculus does not change even where AT&T or another cable MSO is itself the speaker. As explained *infra* in Part III, in the absence of scarcity of channels, nothing prevents the MSO from "speaking" under an open access regime and accordingly, no First Amendment right is implicated. Similarly, the argument in Part IV *infra*, that a compelling state purpose exists that would justify open access even under intermediate First Amendment scrutiny applies with equal force with an MSO is the speaker or whether the MSO is a passive conduit.

⁴⁸ Precisely how the open access mandate is punitive is unclear from AT&T's pleadings, since AT&T is not being asked to subsidize the access from other ISPs, and may charge any non-discriminatory market rate. See *City of Portland*, 43 F.Supp.2d at 1150. Arguably, it is punitive because it

will deprive AT&T of the income it would otherwise obtain from exclusive use of @Home. Courts, however, have consistently rejected such arguments. See, e.g., *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 469–72 (1997); *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 182–84 (D.C. Cir. 1995); see generally *Amsat Cable, Ltd. v. Cablevision of Connecticut, Ltd.*, 6 F.3d 867, 871 (2nd Cir. 1993).

⁴⁹ Alternatively, AT&T at times seems to suggest that the open access provisions penalize it for offering @Home's content. AT&T Brief, *supra* note at 56–58. This assertion has no basis in fact, since none of the open access requirements proposed are conditioned on the nature of @Home's content. See *AT&T Corp. v. City of Portland*, 43 F.Supp. 2d at 1153.

⁵⁰ 418 U.S. 241 (1974).

⁵¹ 512 U.S. 622 (1994).

⁵² 520 U.S. 180 (1997). To some extent, AT&T also relies on *Reno v. ACLU*, 521 U.S. 844 (1997). In *Reno*, the Court held that speech over the internet deserved unqualified First Amendment protection. See *id.* at 870. As explained below,

discussed below, however, *Tornillo* is not relevant to AT&T's claim. Furthermore, while the *Turner* cases are relevant, AT&T has failed to allege sufficient facts in any of its pleadings before the courts or the FCC to sustain a First Amendment objection to open access.

III. THE PROBLEM WITH AT&T'S FIRST AMENDMENT CLAIM: THE MEDIUM IS NOT THE MESSAGE

AT&T's reliance on the *Tornillo* case blurs the medium and the message. In *Tornillo*, the Miami Herald ran an editorial attacking Pat Tornillo, a candidate for local office.⁵³ Tornillo demanded an opportunity to respond to the editorial, invoking a Florida law guaranteeing a "right of reply" for political candidates.⁵⁴ The newspaper refused to print the reply, arguing that doing so would violate its First Amendment right to publish its opinions.⁵⁵

The *Tornillo* court agreed that the right of reply violated the newspaper's First Amendment rights. In doing so, the court relied on two factors: First, the Florida statute was content based; it exacted a "penalty" (in the form of compelled speech) based solely on the contents of the editorial.⁵⁶ Although the financial consequences of publishing a second editorial may be slight, the Court expressed concern that "editors might well conclude that the safe course is to avoid controversy."⁵⁷ Accordingly, the penalty would have a chilling effect on the First Amendment expression of newspapers.

This argument seems inapplicable to AT&T's offering the @Home service. It is not the *content* of @Home that triggers the open access requirement. Rather, the requirement comes into play as a function of offering the internet access service.

Courts have consistently found such requirements content-neutral, not content-based.⁵⁸

More significantly, however, the *Tornillo* Court found that the statute intruded impermissibly into "the function of editors" and thus amounted to an interference with the newspaper's free expression. As the Court explained,

A newspaper is more than a passive . . . conduit for news, comment and advertising. The choice of material to go into a newspaper, and decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.⁵⁹

The difficulty for AT&T in this analysis is that it is quite literally a "passive conduit" for the @Home service. As described by both AT&T and @Home, AT&T simply provides a connection through its cable wire to the subscriber. The proprietary content and internet access is furnished by @Home.

Both scholars and the courts have recognized that the level of First Amendment protection due to a cable system depends upon the nature of its conduct, *i.e.*, whether its conduct is expressive (designed to communicate a particular message to the subscriber) or whether the cable system simply acts as a conduit for the speech of others.⁶⁰ As one author recognized well before the issue of internet access ever arose, "The key to cable's First Amendment regime lies in distinguishing, as reasonably as possible, among the expressive and nonexpressive activities of operators. That regime should provide First Amendment protection when content-related expressive activities are involved, and pull back that protection when such activities are not."⁶¹

this does not help AT&T. *Reno* does not extend blanket First Amendment protection to internet access providers, any more than *Tornillo* extends First Amendment protection to all acts of newspaper vendors. *Reno* protects *content* disseminated over the internet, not the mechanism by which it is disseminated.

⁵³ See *Tornillo*, 418 U.S. at 243.

⁵⁴ See *id.* at 244.

⁵⁵ See *id.*

⁵⁶ See *id.* at 256–57.

⁵⁷ *Id.* at 257.

⁵⁸ See, *e.g.*, *Turner I*, 512 U.S. at 645–52; *Leathers v. Medlock*, 499 U.S. 439, 449–50 (1991) (service tax on provision of cable services content neutral, despite state distinction between cable television and satellite providers).

⁵⁹ *Id.* at 258.

⁶⁰ See, *e.g.*, *Turner I*, 512 U.S. at 645; *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (Blackmun, J. concurring); *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 637 (11th Cir. 1990); Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329, 331 (1988); see also Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619 (1995) (arguing that First Amendment protection for any medium should be based on architecture of the medium and the degree to which it encourages diversity of information and user control).

⁶¹ Brenner, *supra* note 60, at 331.

Thus, to the extent AT&T and other cable MSOs merely provide a passive conduit for @Home's content, they cannot claim a First Amendment right under *Tornillo* to resist an open access requirement.

A. The Exercise of Editorial Discretion

However, AT&T's status as a conduit does not end the matter. Although the Supreme Court found that the generally passive nature of cable operation does not deserve the same level of First Amendment protection awarded to newspapers or other creators of content, it has recognized that cable operators do exercise a First Amendment right in selecting what content to place upon their cable systems.⁶²

The seminal cases on the question on the degree of deference owed to a cable operator's selection of channels are *Turner I and II*. In 1992, Congress imposed a requirement on cable system operators that they carry local broadcast stations.⁶³ In considering under what standard to evaluate Congress' must-carry requirements, the Supreme Court considered the nature of the First Amendment protection awarded cable as compared to other media. The Court rejected the argument that cable operators exercised sufficient control to warrant full First Amendment protection of the sort provided newspapers in *Tornillo*,⁶⁴ but the court also rejected the lesser degree of protection from intrusion given broadcasters.⁶⁵ Instead, the Court determined that a cable operator's editorial activities are sufficiently expressive to warrant an intermediate level of scrutiny.⁶⁶ Under this standard, a content-neutral government regulation that intrudes on a cable operator's editorial discretion must be justified by a "substantial" government interest and must not "burden substantially more speech than is necessary" to further those interests.⁶⁷

At first glance, it would appear that AT&T's de-

cision to carry @Home exclusively should receive the same level of intermediate scrutiny. Such a result, however, is not mandated by the *Turner* decisions. Indeed, the underlying rationale of the *Turner* decisions suggests otherwise.⁶⁸ The court based its decision to apply intermediate scrutiny on the following premise:

There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators seek to communicate messages on a wide variety of topics and in a wide variety of formats. By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: the rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining.⁶⁹

This premise does not apply with equal force when a cable MSO such as AT&T offers an internet access service such as @Home. As an initial matter, although some courts have interpreted *Turner I* as requiring intermediate scrutiny in all cases involving the provision of cable service,⁷⁰ the *Turner* Court clearly limited its decision to the must-carry rules at issue. As the Court noted, the must-carry rules acted to constrain a cable operator's choice of programming, since the scarcity of channels required the cable operator to forgo channels it wished to provide programming.⁷¹ By contrast, the Supreme Court has made it clear that rules of general applicability that do not restrict an operator's editorial choice are not subject to First Amendment scrutiny.⁷² Indeed, even the print media do not enjoy freedom from laws

⁶² See *Turner I*, 512 U.S. at 636; *Leathers*, 499 U.S. at 444; *Preferred Communications*, 476 U.S. at 494-95.

⁶³ Cable Television Consumer Protection and Competition Act of 1992 § 4, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. §§ 534-35) [hereinafter 1992 Cable Act].

⁶⁴ *Turner I*, 512 U.S. at 655.

⁶⁵ See *id.* at 641.

⁶⁶ See *id.* at 645.

⁶⁷ See *id.* at 661.

⁶⁸ Even if *Turner* applies, this does not end the inquiry.

As explained below, the open access requirements survive intermediate scrutiny as a content neutral means of achieving a substantial government interest, while imposing no greater burden on speech than necessary. See generally *Turner I*, 512 U.S. at 636.

⁶⁹ *Id.* at 636-37.

⁷⁰ See, e.g., *Time Warner Entertainment v F.C.C.*, 56 F.3d 151, 181 (D.C. Cir. 1995).

⁷¹ See *Turner I*, 512 U.S. at 636-37.

⁷² See *Leathers*, 499 U.S. at 447-48.

of general applicability, even where such laws impact on editorial discretion.⁷³

It is unclear that providing consumers with a choice of ISP deprives a cable system operator of any channels. Because the Portland case was decided on summary judgment, no evidentiary record exists upon which to make a determination in the AT&T case. Significantly, however, in its filings before the federal courts and before the FCC, AT&T has never invoked this scarcity claim.⁷⁴ Assuming no scarcity problem, nothing prevents an MSO from offering its full complement of services *and* providing consumers with a choice of ISP. The question thus becomes does an MSO's right to editorial expression—as identified in *Turner*—include a right to force users to go through a service such as @Home before reaching the broader internet?

In the AT&T case, AT&T and @Home have repeatedly represented that an @Home subscriber can access the entire content of the internet and can even set his or her browser to open to another website.⁷⁵ Thus, although the default for @Home subscribers is the “parallel internet” of the @Home system, the “real” internet is simply a “click” away. To assert a First Amendment right in the absence of scarcity under these circumstances, AT&T would be asserting a First Amendment right to have the user *default* be the @Home proprietary system and content.⁷⁶

Such a claim seems farfetched indeed. It is a

truism that while the First Amendment guarantees everyone a right to speak—and in a way that make it reasonable for a willing audience to hear—the First Amendment does not compel an unwilling audience to listen.⁷⁷ Thus, while AT&T certainly has an economic interest in requiring such a default and excluding other providers, such an economic interest alone does not support a First Amendment objection.⁷⁸

This leaves only one possible First Amendment “editorial” reason for offering a service such as @Home exclusively: it gives the provider the ability to control how subscribers access the internet. Does AT&T have a right to discriminate against unaffiliated content—a right AT&T claims it will never exercise but apparently wishes to preserve.

Courts have never recognized a right to block access to the speech of others. To the contrary, they have consistently resisted a claim to any such right as antithetical to the First Amendment.⁷⁹ As the Supreme Court observed, “The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.”⁸⁰

B. The Compelled Speech Claim

The First Amendment recognizes not only a right to speak, but a right to keep silent. A law may not require an entity to engage in actual or symbolic speech,⁸¹ to endorse or finance speech

⁷³ See *Associated Press v. United States*, 326 U.S. 1, 20 (1944).

⁷⁴ On June 14, 1999, GTE—a vocal proponent of open access—announced that it had performed tests demonstrating that one could provide subscribers a choice of ISP without depriving the cable operator of any channels. See Patricia Fusco, *GTE Debunks Cable Access Myth*, INTERNET NEWS (visited Feb. 11, 2000) <www.internetnews.com/isp-news/print/0,1089,8_137621,00.html>; *GTE Demonstrates Ease Of Cable Open Access to Multiple ISPs; Clearwater Trial Shows One-Time Investment of Less Than \$1 Per Home Would Provide Consumer Choice* (visited Feb. 11, 2000) <www.gte.com/AboutGTE/NewsCenter/News/Releases/ClearwaterOpenAccess.html>. Although AT&T criticized the study and questioned its validity, it produced no evidence to the contrary. See Opposition Brief of U.S. West, Interprise America, Inc., GTE Internetworking, Inc., and OGC Telecomm, Ltd., at n.35, *City of Portland*, No. 99-35609, available at <www.techlawjournal.com/courts/portland/19990907gte.htm>.

⁷⁵ See *City of Portland*, 43 F. Supp. 2d at 1154; see also AT&T/TCI Merger, 14 FCC Rcd. at 3206-07.

⁷⁶ This takes AT&T at its word that it will not discriminate. As discussed below, AT&T also has incentive to force

subscribers to use the @Home system because this gives AT&T the ability to discriminate in favor of its proprietary content or in favor of partners' or affiliates' content.

⁷⁷ See *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 637-38 (11th Cir. 1990).

⁷⁸ See *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997); *Amsat Cable, Ltd. v. Cablevision of Connecticut, Ltd.*, 6 F.3d 867, 871 (2d Cir. 1993).

⁷⁹ See, e.g., *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 387 (1969); *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638-40 (11th Cir. 1990). *Accord City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (grant of exclusive cable franchise may violate First Amendment of would-be cable providers). See also *Reno v. ACLU*, 521 U.S. at 847 (state may not create “hecklers veto” that would silence others); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel law may not be used to silence the press); Sunstein, *supra* note 8, at 144-45 and *supra* note 22 (government obligation to use reasonable crowd control measures to prevent hostile audience from silencing speaker).

⁸⁰ *Red Lion*, 395 U.S. at 387.

⁸¹ See *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988).

political or ideological speech⁸² or to associate with ideas it finds distasteful.⁸³ AT&T raises the claim that carrying the speech of other ISPs constitutes "compelled speech" and therefore violates the First Amendment.⁸⁴

Any such claim must be analyzed under the Supreme Court's most recent statement on compelled speech, *Glickman v. Wileman Brothers & Elliott, Inc.*⁸⁵ *Glickman* addressed the authority of U.S. Secretary of Agriculture to enforce an assessment against California nectarine growers for generic advertising of California fruit.⁸⁶ Some nectarine growers objected, arguing that they could spend the money more profitably on individual advertising and that generic advertising benefited their business rivals.⁸⁷ The court rejected the growers' First Amendment claims.⁸⁸

The Court found three factors determinative.⁸⁹ First, the assessment for generic advertising and the general regulatory scheme did not impose any restraint on the plaintiffs' abilities to communicate their own message.⁹⁰ The growers remained free to engage in whatever individualized or targeted advertising they wished.⁹¹ The assessment's reduction of the growers' individual advertising budgets did not constitute any sort of impediment or penalty on transmitting their individual messages.⁹² Second, the scheme did not compel any grower to engage in actual or symbolic speech or appear to endorse such speech; the generic advertising was created and attributed to the broader organization of California fruit growers.⁹³

Finally, the statutory scheme did not require the plaintiffs to finance any political or ideological views or abhorrent messages.⁹⁴ The sole message of the generic advertising was "buy California fruit," a message to which the growers could not possibly object.⁹⁵ Although growers might prefer individual advertising to generic ad-

vertising or might resent the fact that generic advertising helped rival fruit growers as well as themselves, these objections did not raise a First Amendment issue. The assessment therefore constituted a straightforward economic regulation, requiring only a rational basis to support its constitutionality.⁹⁶

The same analysis applies to open access in the absence of channel scarcity. To return to the AT&T case, the open access regime does not prevent AT&T from providing to any willing subscriber AT&T's own repertoire of cable services and products. Nor does open access compel AT&T to engage in any speech; it merely requires AT&T to make its cable plant available so that a subscriber to its cable service may affirmatively seek the services of a different ISP.

Finally, because AT&T has stated that a subscription to @Home provides a subscriber with access to the entire content of the internet, AT&T cannot claim that its is "endors[ing] or financ[ing] any political or ideological view" or any message it finds objectionable. As the district court found in the Portland case, AT&T cannot claim a right of editorial discretion because subscribers will not hold it accountable for objectionable content found on the internet.⁹⁷

It is also worth noting that courts have found other "open access" provisions applied to cable constitutional, even where a greater possibility exists that a cable subscriber will mistakenly ascribe the views of the outside speaker to the cable operator. For example, cable operators must provide access to their cable systems to local broadcast signals ("must-carry"),⁹⁸ outside unaffiliated programming ("leased access")⁹⁹ or public, educational and government programming ("PEG channels"),¹⁰⁰ and must provide these services as part of their regular programming package indistinguishable from its own program offerings. By

⁸² See *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1997).

⁸³ See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

⁸⁴ See *id.*

⁸⁵ 521 U.S. 457 (1997).

⁸⁶ See *id.* at 460-61.

⁸⁷ See *id.* at 463, 467-88.

⁸⁸ See *id.* at 469.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *Glickman*, 521 U.S. at 469.

⁹² See *id.* at 470.

⁹³ See *id.* at 470-71.

⁹⁴ See *id.* at 469.

⁹⁵ See *id.* at 472.

⁹⁶ See *id.* at 470.

⁹⁷ See *City of Portland*, 43 F. Supp. 2d at 1154.

⁹⁸ See 47 U.S.C. § 534 (1994) (noting that "[m]ust-carry involves the requirement that cable systems carry local broadcast stations")

⁹⁹ See 47 U.S.C. § 532 (1994) (stating that cable operators must set aside a specific number of channels for leased access by private individuals).

¹⁰⁰ See 47 U.S.C. § 532 (1994) (stating that an LFA may require a cable operator to set aside channels for public, educational or government ("PEG") use).

contrast, the subscriber wishing to use an ISP other than the one provided by the cable operator must affirmatively select the ISP. Furthermore, the interactive nature of the internet and the need for the internet user to affirmatively seek out content¹⁰¹ make it unreasonable to assume that a subscriber using an ISP other than @Home will hold AT&T responsible for any content encountered.

C. Does *Turner* Apply if Broadband is a Telecommunication Service Rather Than a Cable Service?

Even if *Turner* envisions a right to force users to view proprietary content when a cable service operates as a cable service, this does not settle the matter. As the panel for the Ninth Circuit Court of Appeals noted during oral argument in the Portland case, it is unclear how to characterize internet access through cable systems of the sort provided by AT&T and @Home.¹⁰² Both Portland and AT&T agreed to treat the service as a cable service, but the FCC in its amicus brief questioned this assessment. The FCC explained that internet over cable may in fact be a telecommunications service rather than a cable service. During oral argument, the panel indicated that they would not accept the parties' stipulation as to the nature of the service and would instead determine the matter for itself.

Turner cannot be fairly read to mean that every action performed by a cable company is shielded by the First Amendment. Rather, it seems more reasonable to read *Turner* as applying only to traditional cable functions, where cable operators exercise editorial control. However, where a cable service acts as a common carrier and provides a telecommunication service, it should be treated as

a common carrier and subject to open access requirements.

Such an interpretation is consistent with Congress's analysis. As part of the Telecommunications Act of 1996, Congress stated that cable companies providing telecommunications services must secure a franchise from the appropriate franchising authority and that the provisions of the Communications Act applicable to cable services do not apply to telecommunications services.¹⁰³ Clearly Congress, in authorizing cable system operators to provide telecommunications services, intended to encourage cable services to enter the retail telecommunications market and compete with incumbent local exchange telephony providers for residential customers. At the same time, however, section 541(b)(3) of the Act demonstrates that Congress did not wish to insulate cable companies providing telecommunications services from state regulation in the same way that it insulated cable companies in the provision of their cable services.¹⁰⁴

Such an interpretation is also consistent with the general principles of telecommunications law. Traditionally, although speakers using a telecommunication system have a First Amendment right,¹⁰⁵ this right is distinguishable from the rights of the network provider, who merely provides a passive conduit for speech.¹⁰⁶ Indeed, for the last 30 years, open access has been the rule for internet access provided via telecommunications services.¹⁰⁷ Under the Commission's various *Computer* proceedings, the telephone networks have provided open access to any ISP wishing to provide internet service, even where the telephone company offers rival services it might wish to offer without competition.¹⁰⁸ These provisions have withstood judicial scrutiny and First Amendment

¹⁰¹ See *Reno*, 521 U.S. at 852.

¹⁰² See Amicus Curiae Brief of the FCC, at 9–11 of 13, *City of Portland*, No. 99-35609, available at <www.techlawjournal.com/courts/portland/19990816fcc.htm>. But see Esbin, *supra* note 12, at 41 (concluding that cable broadband service is probably a cable service).

¹⁰³ 47 U.S.C. § 541(b)(3) (1994 & Supp. III 1997).

¹⁰⁴ This distinction makes perfect sense. Congress has declared telephony a basic service and mandated universal service of basic telephony to all Americans. See 47 U.S.C. § 254 (1994 & Supp. III 1997). No similar provision exists for cable, which, while serving an important role in the dissemination of information, is simply not regarded in the same way. Arguably, Congress may regard advanced telecommuni-

cations services, of which cable broadband is a subset, as a basic and essential service in the same way it regards voice telephony as an essential service. See Telecommunications Act of 1996, Title VII, § 706, Pub. L. No. 104-104 (codified at 47 U.S.C. § 157 (1994 & Supp. III 1997)) (requiring the FCC and the states to use regulatory forbearance to foster deployment of advanced telecommunications services to "all Americans").

¹⁰⁵ See *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 125 (1989).

¹⁰⁶ See Brenner, *supra* note 60, at 329–30.

¹⁰⁷ See Esbin, *supra* note 12, at 71; UNREGULATION OF THE INTERNET, *supra* note 12, at 15–16.

¹⁰⁸ See ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW §10.5 (West 1999)

challenges.¹⁰⁹ As discussed in more detail below, rather than violating the First Amendment, the open access requirements have *furthered* the aims of the First Amendment by creating the most robust “marketplace of ideas” known to mankind.¹¹⁰

Applying *Turner* intermediate scrutiny if internet over cable is a telecommunications service would raise serious questions regarding the validity of the comprehensive regulation of common carriers, including separation of businesses lines, the prohibition on long-distance competition by the regional Bell operating companies (“RBOCs”) and access to unbundled network elements (“UNEs”) by competitors. Given the well-settled law in this area of telecommunications that such regulation does not raise First Amendment issues, it seems unlikely that the Portland Court would disturb this analysis simply because AT&T is offering a telecommunication service bundled with a cable service, using the same mode of transport as it does for its cable service.

To conclude, it is unclear whether the intermediate scrutiny standard of *Turner* applies. As an initial matter, the scarcity of channels the Court considered significant in *Turner* may not exist in connection with the provision of internet services and open access. If the only effect of open access is to require AT&T to provide a service *in addition* to the services and content already provided, this would not seem to trigger a First Amendment issue under *Turner*. Portland would not interfere with AT&T’s editorial discretion in assembling a package of content and service offerings. Furthermore, it is unclear that offering a passive service, as distinct from the content usually offered, constitutes an expressive act protected by the First Amendment. Even if a First Amendment concern can be raised in the absence of scarcity, it should be subjected to the “forced speech” analysis of *Glickman*.

Furthermore, *Turner* simply should not apply if the court finds internet over cable service to be a telecommunications service rather than a cable service. To find otherwise would be to reverse more than 30 years of consistent application of

open access to telephone networks and to call into question the entire scheme of common carrier regulation.

IV. THE COMPELLING GOVERNMENTAL INTEREST: PROTECTING A CITIZEN’S FIRST AMENDMENT RIGHTS

Even if *Turner* applies and the Portland Court applies an intermediate level of scrutiny, this does not end the matter. Under the *Turner* standard, Portland’s open access provision still stands if “it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”¹¹¹ The City of Portland chose to rest its ordinance on the need to promote competition.¹¹² On appeal, however, both intervenor Oregon ISP Association (“ORISPA”) and a coalition of consumer groups filing as *amici curiae* (“consumer *amici*”) pointed to a much stronger interest: protecting the First Amendment rights of Portland’s citizens to speak and to hear information from a diversity of sources, a government interest of the highest order.¹¹³

As discussed below, Portland’s open access ordinance protects its citizens’ First Amendment right in three different ways. First, simply preserving competition among ISPs “ensur[es] public access to a multiplicity of information sources.”¹¹⁴ Second, cable operators have the technological potential to discriminate against providers of outside information—for example, to discriminate against content critical of the cable provider or of a business partner or subsidiary—and favor their own proprietary content. In addition, cable operators can and do restrict the ability of their subscribers to participate in the internet, setting limits on the amount of content subscribers can upload or download from outside @Home’s network.¹¹⁵ Because the technology permits cable operators to discriminate in subtle ways virtually undetectable by the subscriber—such as slowing down the speed a subscriber downloads informa-

¹⁰⁹ See, e.g., *United States v. Western Electric Co., Inc.*, 673 F. Supp. 525, 586 n.273 (D.D.C. 1987).

¹¹⁰ *ACLU v. Reno*, 929 F. Supp. at 879–83 (Dalzell, J., concurring).

¹¹¹ *Turner II*, 520 U.S. at 180.

¹¹² *City of Portland*, 43 F. Supp. 2d at 1150.

¹¹³ See generally *Turner II*, 520 U.S. 180; Sunstein, *supra*

note 8.

¹¹⁴ *Turner II*, 520 U.S. at 190 (citing *Turner I*, 512 U.S. at 663).

¹¹⁵ See Brock N. Meeks, *Excite@Home Keeps a ‘Video Collar,’* ZDNET, Nov. 1, 1999 <www.zdnet.com>. See also Werbach, *supra* note 10, at 5–6.

tion while enhancing the speed with which a subscriber accesses @Home's content—the only way for Portland to protect its citizens is to provide a choice among access providers using the broadband network.¹¹⁶

Finally, as others have noted, cable will set the standard for the next development in broadband architecture.¹¹⁷ Even if the FCC is correct in concluding that existing broadband access through DSL and emerging competition from new technologies will act to discipline cable, this will not help if the architecture favors a closed model tying access to content.¹¹⁸ At the moment, the internet is the most interactive medium for the dissemination of information ever known precisely because internet users can immediately access all parts equally.¹¹⁹ Without an open access requirement built into broadband networks—beginning with cable—the internet may well lose this interactive quality.¹²⁰

A. Competition¹²¹

As an initial matter, an entity engaging in First Amendment activities is not shielded from fair competition laws. As the Supreme Court stated in *Turner II*:

We have identified a corresponding 'governmental purpose of the highest order' in ensuring public access to 'a multiplicity of information sources[.]' And it is undisputed that the Government has an interest in 'eliminating restraints on

fair competition . . . , even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.'¹²²

Rather than holding application of fair competition laws an unconstitutional burden on speakers under the First Amendment, courts have long recognized that promoting competition in the communications area is crucial to preserving the First Amendment. As the Supreme Court stated over half a century ago:

It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom . . . [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.¹²³

Furthermore, where some limitation renders true competition impossible, courts have long recognized the need—if not the affirmative duty—for government intervention to protect the public's First Amendment right to a diversity of information sources.¹²⁴ "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial."¹²⁵ Courts have applied this logic not merely to newspapers and broadcast media, but to network operation as well.¹²⁶ Where an entity

¹¹⁶ See Werbach, *supra* note 10, at 6 (explaining cable operators' control by stating, "Any ISP faces pressure to keep customers in its own orbit, but users can normally vote with their feet").

¹¹⁷ See *id.* at 10.

¹¹⁸ See *id.*

¹¹⁹ See UNREGULATION OF THE INTERNET, *supra* note 12, at 5.

¹²⁰ Compare Werbach, *supra* note 10, at 5–6, with UNREGULATION OF THE INTERNET, *supra* note 12, at 5.

¹²¹ Although this section focuses on competition in the ISP market, it should be noted that open access provides the valuable function of providing competition in the provision of cable video programming services as well. Through streaming media and other technologies, internet providers can compete directly with the cable MSOs in their primary market—not merely in the market for internet services. See, e.g., Mark Wigfield, *Cyberlaw Expert Lessig Pushes for Open Cable Access*, DOW JONES NEWswire, Feb. 24, 2000, available at <news.excite.com:80/news/dj/000224/20000224-001656>; Larry Lessig, *Cyberspace Prosecutor*, The Standard, Feb. 21, 2000, available at <www.thestandard.com/article/display/0,1151,10885,00.html>. See also David Lieberman, *Media giants' Net change: Major companies establish strong foothold online*,

USA TODAY, Dec. 14, 1999, at 3B (reporting that AT&T CEO Daniel Somers intends to prohibit streaming video from competing with AT&T's video offering, quoting him as saying: "AT&T didn't spend \$56 billion to get into the cable business to have the blood sucked out of our vein"). Indeed, creating effective competition to cable programming was one of the primary goals of the 1992 Cable Act, and on its own would justify open access. See 1992 Cable Act § 2(a)(6), 47 U.S.C. § 521(a)(6) (1994) ("substantial governmental and First Amendment interest in promoting diversity of views through multiple technology media"); *id.* at § 2(b)(1), 47 U.S.C. § 521(b)(1) (the policy of the Act is to "promote the availability to the public of views and information through cable television and other video distribution media").

¹²² *Turner II*, 520 U.S. at 190 (citing *Turner I*, 512 U.S. at 663).

¹²³ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹²⁴ See *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 389–90 (1969).

¹²⁵ *Id.* at 390.

¹²⁶ See, e.g., *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 183–85 (1982), *rev'd*, 797 F.2d 1082, *rev'd*, 894 F.2d 430, and *rev'd in part*, 900 F.2d 283.

both controls the network and creates proprietary information, it "pose[s] a substantial threat to the First Amendment diversity principle."¹²⁷

Congress exhibited the same concerns with respect to cable industry operations. In enacting the 1992 Cable Act, Congress recognized the danger to free speech posed by any entity with monopoly access to the home. The Senate and House Reports both noted the dangers posed to free speech when any one entity develops monopoly power over the flow of information to citizens.¹²⁸ As Congress recognized, federal policy has consistently resisted concentrations of market power in the communications industry previously considered "safe" under traditional antitrust analysis.¹²⁹ As the Senate Report explained,

There are special concerns about concentration of the media in the hands of a few who may control the dissemination of information. The concern is that the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both.¹³⁰

Furthermore, Congress noted the ability and incentive of monopoly media gatekeepers to leverage their monopoly power to favor their own proprietary content over that of others.¹³¹ To counter this danger, "the Government can and should take reasonable steps to promote diversity."¹³² However, because direct regulation of content for this purpose would violate the First Amendment, the government should fulfill its "affirmative role . . . to encourage a diversity of voices" by imposing structural limitations on the industry that encourage competition.¹³³

While this reasoning certainly holds true for video programming offered via cable, it is especially accurate for internet services offered over cable, given the greater interactivity and First

Amendment discourse available through the internet as compared with traditional cable.¹³⁴ As Congress observed in the context of basic cable service, open access to the network advances the First Amendment simply by promoting greater competition among competing ISPs. Open access and the ensuing competition neutralize the ability of MSOs such as AT&T or services such as @Home to act as "media gatekeepers" by preventing them from discriminating against disfavored content or from directing users toward their own proprietary content.¹³⁵ Promotion of competition therefore furthers the interests of the First Amendment rather than hindering them, as AT&T claims.

B. The @Home Technology

In any situation, a party who has monopoly control of the network and also produces proprietary content has incentive to discriminate in favor of its own content. In conventional media, however, users and regulators can observe gross discrimination fairly easily. For example, if a cable system refuses to carry non-proprietary programming, shifts such programming to undesirable channel locations or directly interferes with the quality of the signal received by the subscriber, users and regulators will assign blame to the operator. Subscribers may file complaints with the appropriate authorities and exert pressure to halt the discrimination.¹³⁶

The @Home system architecture, however, permits a subtler form of discrimination. On July 29, 1999, an alliance of consumer groups submitted a letter to FCC Chairman William Kennard detailing how @Home may employ network management techniques to discriminate against outside content and favor its own proprietary content.¹³⁷

¹²⁷ *Western Electric Co.*, 673 F. Supp. at 586 (citing *United States v. AT&T*, 552 F. Supp. at 184-85).

¹²⁸ See S. REP. NO. 102-92, at 32-34 (1992); H.R. REP. NO. 102-628, at 42 (1992).

¹²⁹ S. REP. NO. 102-92, at 32, 50; H.R. REP. NO. 102-628, at 42.

¹³⁰ S. REP. NO. 102-92, at 32.

¹³¹ S. REP. NO. 102-92, at 33, 51; H.R. REP. NO. 102-628, at 42.

¹³² S. REP. NO. 102-92, at 51 (citing *Associated Press*, 326 U.S. at 20); *Federal Communications Comm'n v. National Citizens Comm'n for Broad.*, 436 U.S. 775 (1977)).

¹³³ See S. REP. NO. 102-92, at 50.

¹³⁴ See generally Berman & Weitzner, *supra* note 60.

¹³⁵ It is worth noting in this context that in the early days

of the internet, commercial services were dominated by private networks that charged additional fees for communications with outside networks. Competition from ISPs willing to provide access to the entire internet at a flat rate forced the earlier proprietary networks to change their working models so that flat-rate access to the public internet is now the norm in the United States.

¹³⁶ See, e.g., Cable Act of 1992, Pub. L. No. 102-385, 106 Stat. 1484 (1992) (identifying anticompetitive practices and imposing a remedial statutory scheme).

¹³⁷ See Letter from Jeffrey Chester for Media Education, Mark Cooper, Consumer Federation of America, Gene Kimmelman, Consumers Union, Andrew Jay Schwartzman, Media Access Project, Patrice McDermott, OMB Watch, to William Kennard, Chairman, Federal Communications

These techniques, Quality of Service (QoS) and caching, constitute accepted industry practice and are not in and of themselves discriminatory. As explained below, however, they provide an opportunity to “crimp the hose” to outside content, slowing down information from the public internet and speeding subscriber access to proprietary content.

Given the vagaries of the internet, even sophisticated users would have difficulty noticing—let alone proving—the existence of such discrimination. More likely, a user noticing that content from an outside site takes far longer to download than content from an @Home source will simply use the @Home source without identifying the reason for the delay. Because such discrimination may prove virtually undetectable to the user, the state has a strong First Amendment interest in taking prophylactic measures to prevent such discrimination.

1. QoS and Caching

As the consumer organizations described in their letter to Chairman Kennard,

First, the cable broadband networks can be intentionally manipulated to provide wide bandwidth to the user for commercially affiliated content, but significantly less bandwidth for generic and cable-unaffiliated internet traffic. One might envision the bandwidth offered by the cable modem network as a funnel, with the wide end being last mile bandwidth and the narrow end being the connection to the internet. The cached content of the service provider affiliates is located in the middle of the funnel, while non-affiliated sites have no means to bypass the bottleneck. According to anecdotal accounts, cable modem users typically have access to internet content at speeds below 200 kb/s while their access to cached content is often at speeds exceeding 1 mb/s (5 times as fast).¹³⁸

Furthermore, using Quality of Service controls (QoS), cable providers may discriminate against non-affiliated content in even more distressing ways. For example, non-cached streaming video

could be limited using QoS to 50 kb/s (even though the total internet bandwidth available might allow every user to have 200 kb/s). This effectively limits that streaming video to a small window at a dozen frames per second (low quality, jerky video). At the same time, cached streaming video, unavailable at any price except to cable operator’s chosen affiliates, comes to users at 1 mb/s, allowing full screen, television-quality video. In essence, cable companies have the ability to crimp the hose based on whether content is viewed as competitive in any manner.¹³⁹

In support of these contentions, the consumer groups submitted a document circulated by Cisco Systems—the leading manufacturer of internet networking equipment—at the National Cable Television Association annual convention. The document, titled *Controlling Your Network: A Must for Cable Operators*, advises cable operators that it can use the QoS controls on Cisco’s equipment to

restrict the incoming push broadcasts [from competitors] as well as subscribers’ outgoing access to push information site to discourage its use. At the same time, you could promote and offer your own partner’s services with full-speed features to encourage adoption of your services, while increasing network efficiency.¹⁴⁰

@Home has already used this feature to reduce the ability of subscribers to receive information. Although @Home now claims not to enforce the provision, it requires cable operators to limit video streaming downloads by subscribers to ten minutes or less. Contractual provisions also allow cable operators to ban any other kind of content.¹⁴¹

Another opportunity to discriminate exists through “caching” technology. Caching allows a system manager to store content on its own machine, so that the user need not spend time downloading the content from the internet.¹⁴² This speeds up the downloading time enormously, since the user will not perceive any delays from general network congestion or from problems at the generating site. The only limiting factors are the subscriber’s processor and the connection between the subscriber and the @Home system.

This provides an obvious means of discriminat-

Commission (July 29, 1999), available at <www.cme.org/kennard.html> [hereinafter *Consumer Letter*].

¹³⁸ *Id.*

¹³⁹ See *id.* (footnotes omitted).

¹⁴⁰ CISCO SYSTEMS, CONTROLLING YOUR NETWORK: A MUST FOR CABLE OPERATORS 5 (1999), as cited in Amicus Cu-

riae Brief of Citizens’ Utility Board, *et al.*, AT&T Corp. v. Portland, 43 F. Supp. 2d 1146 (D. Or. 1999).

¹⁴¹ See Meeks, *supra* note 115.

¹⁴² See DIGITAL TORNADO, *supra* note 12, at 17 n.6; *Consumer letter*, *supra* note 137.

ing in favor of one's own content, especially when used in combination with QoS limitations. @Home might, for example, offer cached video services in combination with AT&T's cable systems that would appear to the subscriber at movie quality, while using QoS to limit outside sites to ten minutes of jerky, stop-motion quality. Alternatively, AT&T and @Home could extract concessions from other content providers for such favored treatment. The past history of cable television lends itself easily to such fears.¹⁴³

Finally, forcing subscribers to go through @Home's system directly impacts the ability of subscribers to receive information critical of AT&T or @Home, or of anyone willing to pay for the privilege of blocking a rival or critic. For example, if Ford Motor Company wished to discourage visitors to blueoval.com, a site which has published consumer information critical of Ford, Ford could simply pay AT&T/@Home to use its QoS controls to limit traffic to that particular site. Again, cable's history in this regard shows that, absent requirements that systems carry content it disfavors without interference, cable systems will not hesitate to refuse to carry content it finds undesirable.¹⁴⁴

@Home in turn has denied that it intends to discriminate against outside content. It has insisted to both the FCC and the courts that it provides "one-click" access to the content of the internet without any interference.¹⁴⁵ @Home claims that it does not and will not enforce contract provisions limiting downloads to discriminate in favor of its own content; rather, such controls are necessary to prevent a few customers from using all available bandwidth to the detriment of other subscribers.¹⁴⁶ Similarly, @Home states it will use its caching technology to relieve network congestion, not to give its own or its partners' offerings an anticompetitive advantage.¹⁴⁷

From a First Amendment point of view, however, the potential to discriminate and the incentive to do so warrant prophylactic action.¹⁴⁸ This

is particularly true in a legislative setting, as in *City of Portland*. This deference does not evaporate, even where intermediate scrutiny applies.¹⁴⁹ As the Court stated in *Turner II*:

Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments.¹⁵⁰

Given the potential for abuse, the difficulty of detecting or preventing such abuse and the clear incentive to discriminate in favor of one's own proprietary content, it is difficult to conceive of any other effective solution besides mandating open, non-discriminatory access to competing ISPs. Furthermore, without mandatory open access it is unclear how the market will properly discipline AT&T and @Home. Non-broadband connections, by their very nature, cannot provide equivalent high-speed services, where discrimination would be most effective and most likely to take place.¹⁵¹ Further, DSL has consistently lagged behind cable in deployment to residential customers, and the emergence of non-DSL broadband alternatives is years away.¹⁵²

This lack of choice neutralizes the restraining influences of the market and creates a significant danger to the First Amendment rights of subscribers. As one internet expert explains,

It's important to be clear here. Cable operators aren't filtering URLs to prevent customers from reaching unaffiliated content sites. The problem is that they could—and users would have no alternative. The cable operators wouldn't even have to be so blunt, because their caching architecture allows some sites to receive better treatment than others. Also, customers may not be able to use new services, such as home servers, without @Home's blessing. Any ISP faces pressures to keep customers in its own orbit, but users can normally vote with their feet.¹⁵³

It is no response that @Home and AT&T have a financial incentive to encourage network usage and that this in turn provides the proper incentive

¹⁴³ See S. REP. NO. 102-92 at 32-34 (1991); 138 CONG. REC. S408-09, S428-30 (daily ed. Jan. 27, 1992) (statement of Sen. Ford).

¹⁴⁴ For example, cable operators have refused to carry ads for such rival services as DSL or DirecTV. See *Advertising Ban the Latest Salvo in Fight Over Internet Cable Access*, LA TIMES, Oct. 5, 1999, at C4.

¹⁴⁵ See AT&T/TCI Merger Order 14 FCC Rcd. at 3205, para. 95; *City of Portland*, 43 F. Supp. 2d at 1154.

¹⁴⁶ See generally Meeks, *supra* note 115.

¹⁴⁷ See @Home Brief, *supra* note 41, at 5 of 11.

¹⁴⁸ See *Western Electric*, 673 F. Supp. at 532.

¹⁴⁹ *Turner II*, 520 U.S. at 189.

¹⁵⁰ *Id.* at 195.

¹⁵¹ See *supra* notes 10, 12.

¹⁵² See BROADBAND TODAY, *supra* note 13, at 20-21 (explaining the limitations of DSL).

¹⁵³ WERBACH, *supra* note 10, at 6.

to allow customers the broadest and most unfettered use of the network. As Judge Greene recognized in requiring the RBOCs to observe the FCC's open access requirements and limitations on monopoly network operators in the nascent field of "information services and electronic publishing,"

The Regional Companies argue at some length that they have no incentive to discriminate against competitors in the information service market because to do so would diminish use of the network and hence a reduction in their revenues. But in any market where Regional Companies are in competition with independent information service providers, their economic interest lies in manipulating the system toward their own services, rather than in encouraging maximum use of the network by their information service competitors . . . That the ability for abuse exists as does the incentive, of that there can be no doubt. As stated above, information services are fragile, and because of their fragility, time sensitivity, and their negative reactions to even small degradations in transmission quality and speed, they are most easily subject to destruction by those who control transmission.¹⁵⁴

Cable operators clearly have both the ability and the incentive to discriminate against outside content and favor proprietary content. The danger this potential poses to a citizen's ability to access the free and open "marketplace of ideas" that is the internet triggers the government's "affirmative role to encourage diversity of voices" by imposing structural safeguards upon the industry.¹⁵⁵ Accordingly, even if intermediate scrutiny applies, an open access requirement withstands First Amendment scrutiny.

C. Defining the Internet Architecture

The existing network architecture for the internet is open: It is fully interactive and individuals move through it with ease. This, more than any other factor, has contributed to the explosive growth of the internet. As the FCC has acknowledged,

Every user that accesses the [i]nternet becomes a part of it. The most important technical feature of the internet is its openness, which allows any user to develop new applications and to commu-

nicate with virtually any other user . . . But the internet is more than just a common language. The internet is a community, and users need to move in and out of that community with ease.¹⁵⁶ Similarly, the courts have observed how the open nature of the internet fosters the First Amendment's purpose of creating a true "marketplace of ideas" where all can speak and hear equally regardless of financial resources or position in society.¹⁵⁷

While users take this openness for granted, it is by no means either pre-ordained or assured. The current openness and interoperability of the internet results from using the telephone network as the base.¹⁵⁸ Certain aspects of the telephone network ensure this openness, for example, the widespread penetration of the telephone network and the low cost of use for individuals utilizing the network. Additionally, the FCC mandates that the phone system remain open: Any user of the network may attach devices to the network, such as modems, without approval of the phone company, and anyone may provide service over the network, including independent ISPs.¹⁵⁹

Yet this architecture is not written in stone. As Kevin Werbach has noted, this version of the internet is "release 1.0," the first generally widespread commercial internet.¹⁶⁰ This in itself represented a change from the previous architecture, characterized by Werbach as "release 0.9," in which the government maintained the network.¹⁶¹ This architecture will change again as the internet moves from one geared toward dial-up narrowband use to one geared toward always-on broadband use.¹⁶²

We therefore stand at the cross-roads in the evolution of this next generation of the internet. Not surprisingly, those offering broadband services have sought to shift the model from an open and participatory internet to a closed network system favoring consumption of proprietary information.¹⁶³ Such behavior may not merely set the model for a particular network, but for the future of the internet as a whole.

¹⁵⁴ *Western Electric*, 673 F. Supp. at 565-66.

¹⁵⁵ See S. REP. NO. 102-92 at 50.

¹⁵⁶ UNREGULATING THE INTERNET, *supra* note 12, at 5.

¹⁵⁷ *Reno*, 521 U.S. at 870.

¹⁵⁸ DIGITAL TORNADO, *supra* note 11, at 12 (explaining the interaction of the internet and the public switched telephone network).

¹⁵⁹ See, e.g., *Hush-A-Phone Corp. v. United States*, 238

F.2d 266 (D.C. Cir. 1956); *In re Use of the Carterfone Device in Message Toll Telephone Service*, *Decision*, 13 F.C.C.2d 420 (1968); UNREGULATING THE INTERNET, *supra* note 12, at 5.

¹⁶⁰ See Werbach, *supra* note 10.

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.*

Opponents of open access usually respond with two objections to this scenario. First, they argue that other broadband alternatives, notably DSL alternatives deployed by telephone companies, will properly discipline cable and prevent the evolution of a closed network.¹⁶⁴ Second, they argue that the FCC or other authorities retain the power to intervene should a broadband monopoly does develop.

Even assuming that alternative broadband technologies will emerge that are capable of competing with cable,¹⁶⁵ these objections do not address the key concern that permitting closed networks fundamentally alters the nature of the internet, inhibiting First Amendment discourse and service innovation. The First Amendment is not served by reducing citizens to a choice of two or three closed networks. If cable is permitted to remain closed, it seems probable that other high-speed service offerings, including DSL, will become closed as well.¹⁶⁶

Second, as the consumer coalition noted in their July 29 letter to Kennard, cable operators may design their networks so that open access becomes physically impossible.¹⁶⁷ A recent report by the FCC's Cable Bureau, generally opposed to open access, noted this "troubling prospect."¹⁶⁸ Although observing that "[t]his is a charge the Commission should take seriously," the report concluded that no action was needed at this time, but that "[i]f signs develop that cable is pursuing a closed, proprietary network design, the Commission should take immediate and aggressive steps to prevent this result."¹⁶⁹

¹⁶⁴ See *Advanced Services Report*, 14 FCC Rcd. at 2423-26, paras. 48-52.

¹⁶⁵ The FCC has noted that non-DSL alternatives to cable broadband are, at best, several years away from widespread deployment. See *id.* at 2430-31, para. 61. In addition, although telephone companies and others have increasingly deployed DSL to business customers, they have been slow to offer such services to consumers. See *id.* at 2408, para. 26; see also *DIGITAL TORNADO*, *supra* note 12, at 74 n.154.

¹⁶⁶ Indeed, decisionmakers within the FCC have already indicated that the existing open access requirements should be reexamined and potentially loosened or eliminated should other broadband services remain closed. See *UNREGULATING THE INTERNET*, *supra* note 12, at 25. As Chairman Kennard stated,

I want to create an oasis from regulation in the broadband world, so that any company, using any technology, will have incentives to deploy broadband in an unregulated or significantly deregulated environment. And that does not mean just cable companies. We must have fast and ubiquitous deployment of broadband services and

History does not support such optimism. To the contrary, history demonstrates the wisdom of prophylactic action over remedial action. Consider, for example, the tremendous cost associated with the break up of AT&T's telephone monopoly, which required years of litigation followed by a painful process of restructuring. Similarly, neither Congress nor the FCC has successfully reversed the development of a highly concentrated, vertically integrated cable market.¹⁷⁰ By contrast, the internet, which has heretofore evolved in an open access regime with other protections from anticompetitive behavior in place, has prospered and developed into a highly competitive, interactive and diverse medium of communication and commerce.

Given the enormous First Amendment interest in preserving the interactive quality of the internet, it is both understandable and consistent with First Amendment jurisprudence for localities such as Portland to take more aggressive action. Even if intermediate scrutiny applies, the public's interest in maintaining the continued health and vitality of the internet is at least as strong as its interest in maintaining the broadcast television industry.¹⁷¹

V. CONCLUSION

While the First Amendment protects both the editorial discretion of a cable operator in choosing what package of video services to offer and the proprietary content of an ISP, this does not automatically translate into a First Amendment right

that will only happen if every sector of the industry has incentives to provide it: wireline, wireless and cable. FCC Chairman William E. Kennard, Remarks at the U.S. Telecom Ass'n Annual Convention (Oct. 18, 1999).

¹⁶⁷ See Consumer Letter, *supra* note 137.

¹⁶⁸ *BROADBAND TODAY*, *supra* note 13, at 43.

¹⁶⁹ *Id.*; see also Esbin, *supra* note 12, at 104 ("If, in the future, cable becomes the dominant means of high-speed, broadband access to data networks and the internet, application of the traditional dominant/non-dominant analysis may warrant a different regulatory response.")

¹⁷⁰ In fact, cable markets have become even more concentrated since the attempt by Congress in 1992 to stem the tide. See generally *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, *Fifth Annual Report*, 13 FCC Rcd. 24284, 24374-75 (1998).

¹⁷¹ *Cf. Turner II*, 520 U.S. 180 (applying intermediate scrutiny to cable programming must-carry provision, but finding that the preservation of local broadcast television is an important governmental interest).

to offer internet access through one ISP to the exclusion of all others. As an initial matter, it is unclear if offering internet access is a form of cable service or simply a neutral telecommunications service, where the network provider traditionally has had no right to exclude others.

Even if the internet can be classified as a cable service, it is unclear whether any First Amendment right is implicated. Assuming that permitting a subscriber a choice of access provider does not deprive the cable operator of other channels, it would appear that the rationale of *Turner* simply does not apply. Nothing in open access interferes with the “repertoire of services” that the cable operator wishes to offer, the subscriber will still receive the full range and mix of speech that the cable operator—in the exercise of its editorial discretion—wish to communicate. What the cable operator loses is simply the ability to *deny* access to other’s speech. Nothing in the First Amendment guarantees a speaker the right to drown out others. Indeed, such a right would be antithetical to the purpose of the First Amendment and to

trends in First Amendment case law.¹⁷²

Even assuming that editorial discretion encompasses the right to block access to the speech of others, this right must yield before a compelling governmental purpose. Here, open access provides citizens with access to information and a forum in which they may speak freely to anyone who will listen. Without open access, broadband providers may well become “media gatekeepers,” capable of slanting information for commercial or ideological reasons. Worse, the ability to restrict choice and access to the internet threatens the open and democratic process that has made the internet a “unique and wholly new medium of worldwide human communication.”¹⁷³

Requiring open access, therefore, serves what the Supreme Court has termed a governmental purpose of the highest order—facilitating the public’s First Amendment rights. It would prove ironic indeed if AT&T were correct that a cable company’s right to deny speech could trump the government’s right to have its citizens receive speech.

¹⁷² See Sunstein, *supra* note 8, at 138.

¹⁷³ *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996).

