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David Wolitz
Georgetown University Law Center, diw4@law.georgetown.edu

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David Wolitz
Associate Professor of Law
Legal Research and Writing
Georgetown University Law Center
diw4@law.georgetown.edu

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Abstract:

To what extent does the Free Speech Clause of the First Amendment bar the adoption of "open access" regulations? Open access (or "net neutrality") refers to a policy that would require broadband Internet providers, such as cable and phone companies, to allow competitive Internet Service Providers (ISPs) onto their broadband lines at nondiscriminatory rates. A federal district court in Florida recently held Broward County's open access ordinance unconstitutional on the grounds that it would force speech – in the form of Internet content – on to the local cable company. If the district court's analysis is correct, then open access regulations are foreclosed by the Free Speech Clause. This article argues that open access regulations are, in fact, thoroughly consistent with the First Amendment. Broadband providers maintain the kind of "bottleneck" control over Internet content that justifies regulations aimed at facilitating the free flow of information. Broadband providers are already using their strategic position to interfere in the e-commerce and video-downloading markets, and they have the power to speed up or slow down the delivery of Web-pages and other Internet applications. By breaking the broadband provider's bottleneck control over Internet content and applications, open access regulations serve the important government objectives of facilitating robust public discourse and free markets. The First Amendment does not stand in the way of this important policy proposal.

* Yale Law School, JD candidate 2001.

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I. INTRODUCTION

By striking down major portions of the Communications Decency Act of 1996,[1] the Supreme Court put policymakers on notice that free speech must be respected in the new domain of regulations concerning the Internet. Consequently, one of the most important questions facing legislative and regulatory bodies across the country is the extent to which the First Amendment confines the government's ability to shape the media and communications infrastructure of cyberspace. On November 8, 2000, Judge Donald M. Middlebrooks of the Federal District Court for the Southern District of Florida entered this discussion in dramatic fashion. Invoking the First Amendment and a free speech tradition dating back to John Milton, Judge Middlebrooks voided a Broward County ordinance mandating "open access" on Internet-capable cable lines.[2]

In *Comcast Cablevision of Broward County, Inc. v. Broward County*,[3] Judge Middlebrooks presents an expansive view of the First Amendment and defends its salience in the Internet age. The judge correctly subjected the county ordinance to First Amendment review. However, I believe that current First Amendment doctrine permits the government a wider purview within which to pursue communications regulation than Judge Middlebrooks' opinion allows. Specifically, I aim to show that the First Amendment presents no bar to open access regulations of the kind promulgated by Broward County.

My argument does not depend on a belief in the wisdom of open access as public policy. Rather, I endeavor to demonstrate that the debate over open access should go forward on the merits, without a First Amendment bar. In order to make my case that open access regulations are consistent with the Free Speech Clause, I will provide a short introduction to the open access policy debate before turning a critical eye to the *Broward County* case.

II. THE OPEN ACCESS DEBATE

"Open access" refers to a policy that requires cable operators to allow all Internet Service Providers (ISPs), regardless of corporate affiliation, to lease bandwidth on the cable lines at nondiscriminatory rates.[4] Currently, almost all of the major cable companies are locked

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[1] *Reno v. ACLU*, 521 U.S. 844 (1997).

[2] *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000) [hereinafter *Broward County*].

[3] *Id.*

[4] The Broward County open access ordinance reads, in pertinent part, "'Subject to technical feasibility, [cable] Franchisee shall provide any requesting Internet Service Provider access to its Broadband Internet

into exclusive deals with one of two cable-modem ISPs (Excite@Home or RoadRunner),[5] excluding the nation's 6,000 dial-up ISPs from the most popular residential broadband platform.[6] Broadband connections provide consumers with a substantially faster, richer, and more convenient Internet experience than traditional dial-up "narrowband" service.[7] Broadband vastly speeds up all conventional data flows and makes possible high-quality video and audio transmissions over the Internet. Moreover, since broadband Internet connections are "always-on" and do not interfere with standard telephone service, they are significantly more convenient than today's standard dial-up service.

Predictably, dial-up ISPs that lack access to the cable platform are concerned that they will be unable to compete as consumers switch to superior broadband service. Local telephone companies, now promoting their own broadband Internet service (DSL), also feel that they are unfairly disadvantaged because their common-carrier status prevents them from entering into similar exclusive agreements with preferred ISPs. Therefore, these competitors to cable Internet service have pushed for legislation mandating cable *un*bundling. Cable unbundling (otherwise known as "open access") entails separating, as a matter of policy, the cable lines from the Internet service provided over these lines. The result is a competitive ISP market on the cable platform.

Proponents of cable unbundling-including, at times, such corporate heavyweights as America Online[8] and Bell Atlantic-GTE (now Verizon),[9] as well as public interest groups

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Access Transport Services (unbundled from the provision of content) on rates, terms, and conditions that are at least as favorable as those on which it provides such access to itself, to its affiliate, or to any other person. Such access shall be provided at any technically feasible point selected by the requesting Internet Service Provider."' *Id.* at 686-87 (citation omitted).

[5] *See* Steven van Yoder, *Open Access and AT&T*, BOARDWATCH, Sept. 2000, *available at* http://www.ispworld.com/bw/sep/Open_Access.htm ("[O]f the estimated 2 million consumers who subscribe to high-speed Internet access over cable lines, 97 percent get the service from Excite@Home or Road Runner, heavily owned by AT&T and Time Warner Inc. respectively.").

[6] I derive the figure of 6,000 ISPs from Tom Spring. Tom Spring, *ISPs Share Urge to Merge*, PC World, Feb. 1999, *available at* http:// www.pcworld.com/news/article.asp?aid=9924.

[7] The FCC defines broadband as the provision of Internet service at speeds exceeding 200 kilobits per second (kbps) in the last mile in both provider-to-consumer (downstream) and consumer-to-provider (upstream) directions. *See In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, 14 F.C.C.R. 2398, ¶ 20 (1999) [hereinafter *706 Report*].

[8] AOL was the driving force behind the "open access" (i.e., unbundling) lobbying effort until it announced its intention to acquire Time-Warner, Inc. Among other concerns, Time-Warner operates about 20% of the country's cable systems. *See* Tony Perkins, *Readers Talk Back on AOL/Time Warner*, REDHERRING.com, Jan. 20, 2000, *available at* http:// www.redherring.com/insider/2000/0120/news-redeye012000.html. Consequently, AOL lost much of its incentive to fight for unbundling. AOL has essentially bought its way on to at least 20% of the cable infrastructure and now has a strong bargaining position from which to gain access to the rest of the country's cable systems. AOL's current public position appears to be that cable operators ought to open their lines to unaffiliated ISPs. *See* Jerry Berman & John Morris, *Testimony of the Center for Democracy & Technology before the Senate Committee on Commerce, Science, and*

like the American Civil Liberties Union[10] - have taken their case to Congress, the Federal Communications Commission (FCC), and local cable franchising authorities across the country.[11] They argue that a closed cable platform will negatively impact the growth of the Internet not only by decreasing competition and diversity in Internet service and Internet content, but also by warping the online applications market. On the other side, AT&T, Time-Warner, and other major cable service operators defend the status quo and contend that regulation of the cable Internet service market will slow down investment in this important new communications technology.[12]

So far, AT&T and its cable allies have managed to avoid federal action on cable unbundling.[13] Legislation has been introduced in both the House and Senate that would require open access, and various congressional committees have held extensive hearings on broadband Internet development.[14] Moreover, both the Fair Trade Commission and the FCC have focused on the open access issue in scrutinizing AT&T's proposed acquisition of cable giant MediaOne and the mammoth AOL-Time-Warner merger. No unbundling proposal has made it out of committee, however, and no decisive action is expected soon.[15] The FCC has argued that no action is required at the present time because, in its view, sufficient competition already exists in the nascent broadband Internet access market, and new regulatory action would serve only to increase investor uncertainty.[16] At the same time, the Commission claims that it possesses the authority to enact regulations should it find it appropriate to do so in the future.[17]

At the local level, the pro-unbundling forces have had more success. They achieved their first significant victory in November 1998 when Portland, Oregon became the first jurisdiction in the country to formally impose unbundling requirements on its local cable

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Transportation Subcommittee on Communications, Mar. 2, 2000, *available at* http://www.cdt.org/testimony/000302berman.shtml. This position suggests that AOL believes that there is no need for government legislation or regulation to mandate access.

[9] See Verizon, *Open Access* (visited Mar. 4, 2001), *at* http:// www.gte.com/AboutGTE/publicpolicy/openaccess/index.html.

[10] *See* Press Release, Barry Steinhardt, ACLU, *Internet Must Not Become "Walled Garden"*, Dec. 13, 2000, *available at* http:// www.aclu.org/news/2000/n121300a.html.

[11] *See* Stephen Labaton, *Fight for Internet Access Creates Unusual Alliances*, N.Y. TIMES, Aug. 13, 1999, at A1.

[12] *See* Brief of Amicus Curiae Hands Off the Internet, *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (No. 99-35609), *available at* http:// techlawjournal.com/courts/portland/19990811.htm.

[13] *See* Labaton, *supra* note 11.

[14] For a summary of all relevant bills now being considered in Congress, *see Summary of Bills Affecting Broadband Internet Access in the 106th Congress* (last updated May 28, 2000), *available at* http:// www.techlawjournal.com/cong106/broadband/Default.htm.

[15] *See* Labaton, *supra* note 11.

[16] *See 706 Report*, *supra* note 7, ¶ 91; John Borland, *FCC Gives Cautious Thumbs-Up to Broadband Market*, CNETNEWS.COM, Aug. 3, 2000, *available at* http:// news.cnet.com/news/0-1004-202-2428442.html.

[17] *See 706 Report*, *supra* note 7, ¶ 93.

franchise.[18] AT&T immediately challenged the regulation, arguing that it violated the Cable Act[19] as well as AT&T's First Amendment right to transmit speech solely of its own choosing over the cable lines.[20] While the district court dismissed AT&T's case and upheld the regulation,[21] this outcome was reversed by the Ninth Circuit Court of Appeals.[22] The Ninth Circuit held that broadband Internet service offered over cable lines does not constitute a "cable service" as that term is defined in the relevant provisions of the Cable Act.[23] As a result, the court argued that local franchising authorities, like Portland, have no statutory basis pursuant to the Cable Act to exercise regulatory power over broadband cable Internet service.[24] Though the decision was a local victory for AT&T, the court clearly held that the FCC could enact such mandates at the national level if it so wished.[25]

In the meantime, a number of other localities, most notably San Francisco[26] and Los Angeles[27], have held high-profile debates over unbundling. However, only a few local cable franchising authorities- including those in Richmond, Virginia and Broward County, Florida-have followed Portland's lead in formally adopting open access provisions. Like the Ninth Circuit, district courts in both Richmond and Broward County have struck down open access regulations, though in strikingly different ways. The Richmond Court took an approach similar to that of the Ninth Circuit and found that the statutory division of powers in the Cable Act prevents local franchising authorities from imposing open

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[18] The two cable services operating in Portland and Multnomah County in 1998 were both owned by Tele-Communication, Inc. (TCI). TCI was acquired by AT&T in mid-1998, and pursuant to its franchise agreements with the City of Portland and Multnomah County, TCI was obliged to request approval from the City and County to shift control of its "franchisees" to AT&T. After holding multiple hearings on the issue, the City and County agreed to approve the change of control only on the condition that the new owner (AT&T) "'provide, and cause Franchisees to provide, nondiscriminatory access to Franchisees' cable modem platform for providers of internet and on-line services, whether or nor such providers are affiliated with Transferee [AT&T] or Franchisees ...."' *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1150 (D. Or. 1999). In effect, Portland required unbundling as a condition for AT&T's control over the local cable companies.

[19] The "Cable Act," 47 U.S.C. §§ 521-573, refers to Title VI of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[20] *See AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Or. 1999).

[21] *See id.*

[22] *See AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

[23] *See id.* at 876 ("[W]e begin with the question of whether the @Home [cable Internet] service truly is a 'cable service' as Congress defined it in the Communications Act. We conclude that it is not.").

[24] *See id.* at 877 ("[B]ecause the Internet services AT&T provides through @Home cable modem access are not 'cable services' under the Communications Act, Portland may not directly regulate them through its franchising authority.").

[25] *See id.* at 879-80.

[26] The San Francisco Board of Supervisors voted in July 1999 not to require immediate unbundling of the local cable lines, but to revisit the issue pending the outcome of the legal challenge to Portland's regulations. *See* Labaton, *supra* note 11.

[27] The City of Los Angeles passed a resolution calling on cable operators to respect "open access" principles, but it has not adopted a binding ordinance requiring unbundling. *See* Brian Krebs, *Los Angeles Passes Cable Open Access Resolution*, NEWSBYTES, Nov. 21, 2000, *available at* http:// www.newsbytes.com/news/00/158480.html.

access regulations.[28]

As statutory interpretations, the Ninth Circuit and Richmond opinions allow for future federal action on open access initiatives. However, the November 8, 2000 decision of Judge Middlebrooks struck down Broward County's open access ordinance on constitutional grounds.[29] In a full-length decision dealing exclusively with the free speech issue, Judge Middlebrooks agreed with the cable operators that unbundling violates their First Amendment right to editorial discretion over content transmitted on their lines. If upheld by the Supreme Court, the *Broward County* decision would completely bar open access regulation by all levels of government, including Congress itself.

III. CRITIQUING THE BROWARD COUNTY OPINION

If Judge Middlebrooks' First Amendment jurisprudence is correct, the debate over open access should grind to a halt. No matter how worthwhile unbundling may be as public policy, it would not be worth a fight if it violated the highest law of the land. However, my analysis will show how the *Broward County* opinion is flawed and why open access is constitutional under current First Amendment jurisprudence. As in many controversial First Amendment cases, the two key issues are (1) what level of judicial scrutiny applies to the regulation, and (2) how the court ought to conduct the balancing test required at the applicable level of scrutiny.[30] Judge Middlebrooks found that unbundling should be subject to the usually fatal strict scrutiny or, alternatively, that it would fail the test of intermediate scrutiny. My contention is that open access triggers intermediate, rather than strict scrutiny, and that a proper weighing of evidence illustrates that the government interest in open access regulation justifies a small diminution in the editorial discretion of cable operators.

A. *The Road to Intermediate Scrutiny*

1. *Is Speech At Issue*?

A judge's first burden in striking down an ordinance as inconsistent with the Free Speech Clause is to show that speech is implicated by the regulation.[31] The district court judge in *AT&T Corp. v. City of Portland* argued that speech was simply not at issue in the open access debate: "There is no free speech violation ... because AT&T volunteered to give cable subscribers access to competing ISPs ... It [the open access ordinance] does not

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[28] *See MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 717 (E.D. Va. 2000).
[29] *See* Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685, 698 (S.D. Fla. 2000) ("[T]he ordinance violates the First Amendment.").
[30] *Id.* at 697 ("I believe ... strict scrutiny is required. However, if I am mistaken, the ordinance fails content-neutral scrutiny as well.").
[31] *See* Kathleen M. Sullivan & Gerald Gunther, FIRST AMENDMENT LAW 369 (1999) ("If a law does not compel speech, ... then no First Amendment scrutiny is required.").

force plaintiffs to carry any particular speech."[32] This argument had some resonance in the *Portland* case because AT&T's own rhetoric at the time touted the openness of its system. AT&T claimed that its cable modem subscribers could access all Internet content, including the proprietary content and services of other ISPs, provided that they first purchased @Home's Internet service.[33] AT&T even noted that @Home customers could make a competing ISP's homepage their own default first page.[34] This stance was somewhat deceptive as customers were unlikely to purchase any Internet service on top of the @Home service they were already paying for. But it did mean that a provision allowing competing ISPs to connect directly to customers over the cable platform, i.e. open access, had no particular speech implications. It merely changed the economic regulations under which unaffiliated ISPs could reach cable-modem customers. In other words, open access forced no identifiable speech on AT&T that AT&T had not already agreed to carry. Hence, the *Portland* judge reasoned, AT&T could make no claim that its speech rights were implicated by the regulation.

The weakness of this argument came to light in the *Broward County* case when the cable operators changed their rhetorical stance. Instead of touting the ostensibly open nature of the cable-modem network, the cable operators in Broward County baldly asserted that they did not want to carry certain speech because they objected to its content. According to Judge Middlebrooks, "They [the cable operators] consider some Internet providers unacceptable because of offensive or hateful programming."[35] Thus, the cable operators in Broward County were able to point to a hypothetical domain of speech which, absent open access, they would choose not to carry-namely certain types of offensive or hateful

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[32] *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1154 (D. Or. 1999) (citations omitted).

[33] During the regulatory review of AT&T's proposed merger with cable operator Tele-Communications, Inc. (TCI), AT&T assured the FCC that "subscribers [to @Home Internet service] are provided with browsing and e-mail functionalities similar in nature to those offered by other ISPs, [and it] permit[s} those subscribers to send and receive e-mail and reach any available content on the World Wide Web, including proprietary content and services offered by AOL, Yahoo!, and others." *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, 14 F.C.C.R. 3160, ¶ 72 (1999), *available at* http:// www.fcc.gov/Bureaus/Cable/Orders/1999/fcc99024.txt [hereinafter *Consent to Transfer*].

As the City of Portland put it in one of its trial briefs, "TCI and AT&T have told the FCC that even in the absence of open access conditions, @Home users can obtain *any* content. In fact, TCI and AT&T have asserted that users will be able to obtain service from the very companies that would take advantage of open modem platform conditions-albeit under economically disadvantageous conditions. Thus, the companies have conceded that the same information could flow over the cable system with or without the open access condition, and the same entities could use the platform." Def.'s Mem. in Supp. of Def.'s Cross Mot. in Supp. of Summ. J., *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Or. 1999) (No. CV99-65 PA), *available at* http:// www.techlawjournal.com/courts/portland/19990326.htm.

[34] AT&T and TCI assured the FCC that "TCI customers subscribing to AOL ... can connect directly to AOL by 'double clicking' on the AOL icon on their computer desktop. They do not have to 'go through' @Home or view any @Home-provided content or screens. In fact, if they so desire, customers will be able to remove the @Home icon from their desktop completely." *Consent to Transfer, supra* note 33, 14 F.C.C.R. at ¶ 95.

[35] *Broward County*, 124 F. Supp. 2d at 691.

programming. Whether this represents a genuine, principled opposition to "offensive and hateful programming" is subject to doubt. But it illustrates the fact that ISPs may filter out Internet content and applications that they find objectionable if they so choose. Thus different ISPs may offer significantly different "cuts" of the Internet to their customers. By requiring cable operators to lease their lines indiscriminately to all ISPs, open access prevents the cable operator from choosing ISPs on the basis of their content (i.e., filtering) policies. Thus, open access may force unwanted speech on cable operators and diminish their editorial discretion over content transmitted on their lines.

2. *Is Open Access a Content-Based Regulation*?

Because open access regulations impose "special obligations upon cable operators ..., some measure of heightened First Amendment scrutiny is demanded."[36] Whether it is subject to intermediate or strict scrutiny depends on whether the effect of open access on speech is content-neutral or content-based. As the Court explained in *Turner Broadcasting System v. FCC* [hereinafter *Turner I*],

> Our precedents ... apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.[37]

In *Turner I*, the Supreme Court confronted cable "must carry" regulations, which required cable operators to carry local broadcasting television channels on their cable systems. In a five-to-four decision, the Court held that must carry did not constitute a content-based provision because Congress' aim in passing the legislation was not to suppress or prefer any particular speech.[38] The regulation, according to the Court, was meant to "serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."[39] While the minority felt that the must carry provisions constituted a preference for the content of broadcast programming over cable programming,[40] the majority argued that "[n]one of these interests is related to the 'suppression of free expression,' or to the content of any speakers' messages."[41] Consequently, the Court applied only intermediate scrutiny to the must carry provisions.

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[36] *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) [hereinafter *Turner I*].
[37] *See id.* at 642 (citations omitted).
[38] *Id.* at 661-62.
[39] *Id.* at 662.
[40] *See id.* at 679 (O'Connor, J., dissenting in part).
[41] *Id.* at 662 (citations omitted).

Turner I is the Supreme Court case most relevant to cable unbundling. Like must carry, open access aims to promote competition in an important information medium and seeks to foster "widespread dissemination of information from a multiplicity of sources." Of course, there are a variety of reasons for promoting open access regulations, and the competing ISPs and local telephone companies are clearly motivated primarily by commercial self-interest. However, the public policy rationale for open access is quite strong. Simply put, open access is intended to mitigate the danger of local-monopoly cable operators coming to dominate the Internet access market. While there are competitors to cable in the residential broadband Internet market (most notably, DSL service), cable operators appear to be staking out a dominant position from which they will wield enormous power over the content and future development of the Internet.[42] Cable operators with exclusive ISPs can pick and choose which content and which applications to allow their customers to access; consequently, they serve as gatekeepers determining what content and which new innovations succeed.[43] In addition, compelling economic arguments can be made that a competitive ISP market is worth maintaining for the standard reasons that competitive markets tend to deliver better service at lower prices to consumers than monopolistic or oligopolistic markets.[44]

There is no plausible argument to be made-and none has been offered- that the County open access ordinances adopted in Portland or Broward are actually motivated by those governments' distaste for the content or message of local cable operators, or by a County government preference for the viewpoints expounded by unaffiliated ISPs. Those local governments that have adopted unbundling measures, and those now considering them, are motivated by a legitimate belief that ISP competition on the cable lines would be better for the development of the Internet than cable bundling. If, as the *Turner I* Court wrote, the "principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement

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[42] The FCC estimates that cable operators hold 84% of the residential broadband market. *See* Federal Communications Commission, Graphic, *Shares of Residential Advanced Services by Technology, available at* http:// www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2000/ncc0040b.doc.

[43] According to Professors Mark Lemley and Lawrence Lessig, the current Internet architecture operates on an End-to-End principle such that no central power exists to thwart or disrupt innovation. *See* Mark A. Lemley & Lawrence Lessig, *In the Matter of Application for Consent to the Transfer of Control of Licenses MediaOne Group, Inc., to AT&T Corp.*, CS Docket No. 99-251, *available at* http://cyber.law.harvard.edu/works/lessig/MB.html. This End-to-End principle relies in large measure on the common carrier telephone system over which most people access the Internet today. Local phone companies cannot choose an exclusive ISP or discriminate among Internet content and applications running over their lines. Allowing cable operators to attain a dominant market position in broadband Internet access, without accompanying open access regulation, would effectively grant them a privileged central perch from which they could warp this evolving medium. *See id.*

[44] Gene Kimmelman, Co-Director of Consumers Union's Washington Office, has said explicitly on the topic that "[w]ithout competition, Internet users will face higher prices and fewer service options." Bloomberg News, *Advocates Demand Cable Open Access*, CNET.COM Apr. 9, 1999, *available at* http:// www.canada.cnet.com/news/0-1004-200-340996.html.

with the message it conveys,"[45] then unbundling regulations are clearly content-neutral.

3. *Distinguishing* Turner: *Strike One*

Judge Middlebrooks acknowledged that *Turner I* set the framework for the First Amendment debate over open access, but he argued that "the reasons given by the Court for applying intermediate rather than strict scrutiny do not apply in this case."[46] While the judge offered three reasons for diverging from *Turner I*, none of them is very convincing.

"First," argued the court, "unlike the must carry rules which applied to virtually all cable operators in the country, the Broward County ordinance applies only to the select few that seek to operate broadband Internet."[47] Judge Middlebrooks argues here that the ordinance makes an invidious distinction between cable operators because it "applies" only to those who make an editorial decision to offer Internet service in the first place. However, for the three reasons I lay out below, his observation fails to show either a distinction between must carry and open access or that the ordinance is content-based.

First, the must carry regulations made different demands on different cable systems. For instance, those with twelve channels or less were required to carry only three local broadcast stations, while those with more than twelve channels had to reserve up to one-third of their channel capacity for local broadcast stations.[48] Furthermore, cable systems with less than 300 subscribers, no matter how large their channel capacity, had no must carry obligations at all.[49] According to Judge Middlebrooks' reasoning, then, must carry also "applied" only to those cable operators successful enough to sign up 300 customers or more, and discriminated even more insidiously against those that offered more than twelve channels of video programming. This is no basis on which to rest a distinction between *Turner* and the case at issue.

Second, the idea that must carry "applies" only to those cable operators that provide broadband Internet service is true only if one deliberately misunderstands the normal use of the term "apply." The ordinance at issue clearly applies to all County cable operators, but naturally, the unbundling provisions are triggered only when a cable operator begins to offer Internet access over its lines. After all, it would be nonsense to speak of an unbundling provision that affected a cable operator that had no broadband Internet facility to unbundle.

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[45] *See Turner I*, 512 U.S. at 642 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
[46] *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 696 (S.D. Fla. 2000).
[47] *Id.* This is a surprising assertion because in his description of the ordinance at issue, the judge wrote earlier in the same opinion that the "ordinance ... is applicable to all County granted cable franchisees." *Id.* at 686.
[48] 47 U.S.C. § 534(b)(1) (2000).
[49] Id.

Lastly, the distinction between cable operators that offer Internet service and those that do not is not a distinction based on "'[agreement or] disagreement with the message it conveys."'[50] It is a distinction based on the different transmission capacities of the cable operators, not on the County's view of the merits of the cable ISP's content. A distinction between cable operators that do and do not offer Internet service is simply not a content-based distinction; it is certainly no more than a distinction between cable operators that carry more or less than twelve channels.

4. *Distinguishing* Turner: *Strike Two*

Judge Middlebrooks' second and third arguments distinguishing must carry from open access touch on the controversial area of medium-specific First Amendment standards. In *Red Lion Broadcasting Co. v. FCC*, which justified government regulation of broadcast television, the Supreme Court wrote, "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[51] Ever since, the Court has been decidedly more sympathetic to government regulation of broadcast television than to government regulation of the print media.[52] How cable television fits into this bifurcated First Amendment jurisprudence has been a controversial question since the advent of cable television and has not been definitively answered.[53]

On the one hand, the majority in *Turner I* clearly wrote, "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation."[54] In other words, the Court held that cable regulations are not eligible for the more deferential review granted to broadcast regulations. Nevertheless, Justice Kennedy's majority opinion also cautioned, "[t]his is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech."[55] Writing for the Court, Justice Kennedy went on to elaborate what has come to be known as the "bottleneck" theory of cable regulation:

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[50] *See Turner I*, 512 U.S. at 642 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
[51] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).
[52] *See generally* Lee C. Bollinger, IMAGES OF A FREE PRESS (1991).
[53] In many ways, the sharp divisions among the Justices in the *Turner* cases and in *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996), have heightened the uncertainty over cable's First Amendment status rather than clearing it up. *See* Christopher Kelly, Note, *The Spectre of a Wired Nation: Denver Area Educational Telecommunications Consortium v. FCC and First Amendment Analysis in Cyberspace*, 10 HARV. J.L. & TECH. 559, 566 (1997) ("[I]nstead of boosting and clarifying the First Amendment's signal, a badly fractured Court may have merely amplified preexisting static."). *Denver Area* dealt with three provisions of the Cable Act of 1992 relating to the ability of cable operators to block the transmission of indecent material on leased access and public access channels. The Court produced six opinions, and no single explanation of cable's First Amendment status commanded majority support. *See Denver Area*, 518 U.S. at 727.
[54] *See Turner I*, 512 U.S. at 637.
[55] *Id.* at 639.

> When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled to a subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude .... The potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.[56]

In *Turner I*, the bottleneck theory served as one means of distinguishing must carry from seemingly similar print regulations that had been struck down in *Miami Herald Publishing Co. v. Tornillo* (*Tornillo*)[57] and *Pacific Gas & Electric Co. v. PUC of California* (*PG&E*).[58]

Judge Middlebrooks' assertion in *Broward County* is simply that "[c]able operators control no bottleneck monopoly over access to the Internet."[59] Thus, the bottleneck theory employed in *Turner I* has no bearing on the case, and the strict scrutiny test employed in *Tornillo* and *PG&E* applies instead. Again, Judge Middlebrooks' argument does not hold up under careful analysis. First, even if he were correct that the bottleneck theory does not apply to cable Internet access, that assertion alone would not be a sufficient reason to conclude that *Tornillo* and *PG&E* control. *Tornillo* and *PG&E* were both cases in which the regulation at issue was deemed content-based by the Court, regardless of medium.[60] Judge Middlebrooks bears the burden not just of showing that *Turner I* does not control the open access case, but also of showing independently that open access is a content-based regulation.

More importantly, Judge Middlebrooks misunderstands the bottleneck theory. In support of his contention that cable Internet access does not pose the same bottleneck concerns as cable television, the judge noted, "[l]ocal telephone companies provide dial up Internet access to over 46.5 million customers, whereas all cable companies combined currently

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[56] *Id.* at 656.
[57] 418 U.S. 241 (1974).
[58] 475 U.S. 1 (1986).
[59] *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 696 (S.D. Fla. 2000).
[60] In *Tornillo*, the statute at issue gave candidates for public office a right to publish a reply, free of charge, in any newspaper wherein his or her character was assailed. *See Tornillo*, 418 U.S. at 244. Likewise *PG&E* dealt with a "rule requiring a privately-owned utility ... to include with its monthly bills an editorial newsletter published by a consumer group critical of the utility's ratemaking practices." *Turner I*, 512 U.S. at 654. In both cases, the Court found that the regulations forced speech of a certain kind on the regulated entities because of the government's preference for the content of the forced speech over that which the regulated entity would otherwise carry.

provide Internet services to only about two million customers."[61] He went on to cite an FCC report on broadband access, concluding, "it does not foresee monopoly, or even duopoly in broadband Internet services."[62] For the judge, these facts demonstrate that cable does not impose a bottleneck problem on Internet access. This reasoning is flawed for two reasons.

First, the "bottleneck" that the *Turner* Court found is a bottleneck that occurs in a cable subscriber's home once he or she chooses to subscribe to cable television. It is not, as Judge Middlebrooks appears to believe, a theory that cable television constitutes a monopoly in the provision of all video programming.[63] The *Turner* Court found correctly that, once a home subscribes to cable and attaches the cable wire to the television set, it becomes immensely difficult-if not practically impossible-to receive both cable channels and over-the-air broadcast channels. This difficulty arises from the way in which televisions connect to the cable line.[64] Through the physical connection between the cable line and the television, the cable operator maintains an effective "gatekeeping" position in the provision of video services to a cable-subscribing household.

Likewise, once a household makes a decision to use a cable modem to connect to the Internet, it becomes immensely difficult-though not practically impossible-to receive Internet access via a telephone line. Again, this difficulty arises from the way computers connect to cable Internet modems. Theoretically, one could go through the laborious process of unhooking the cable modem, changing various software settings, setting up a telephone modem, and then connecting to the Internet in this way. However, for all practical purposes once a household sets up cable-modem Internet service, the cable line becomes the bottleneck for all Internet content coming into or going out of the home. This is the same bottleneck of which *Turner* speaks.[65] The relative popularity or market share of cable simply has no bearing on whether it creates a "bottleneck" in the way that term is used in *Turner*. The bottleneck problem of cable Internet access is perfectly analogous to that of cable television; namely, as soon as one subscribes, the cable operator becomes an effective gatekeeper between the subscriber and all of the content or

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[61] *Broward County*, 124 F. Supp. 2d at 697-98.
[62] *Id.* at 696.
[63] The Court has never claimed that cable television is the only way to receive video programming in the home. It would be nonsensical to make such a claim given that broadcast television preceded cable programming and continues to operate in every television market in the country.
[64] Around the same time that Congress adopted must carry, there was a competing proposal to require all television sets to have an "A/B switch" that would allow viewers to switch easily back and forth between cable television and over-the-air channels. The D.C. Court of Appeals discussed this proposal in its (subsequently overruled) opinion in the *Turner* case. *See Turner Broad. Sys. v. FCC*, 819 F. Supp. 32, 47 (D.C. Cir. 1993). Without such a switch, it was a laborious process to go from cable to broadcast, though it could be done by unhooking the cable wire, re-attaching the antenna, and re-setting the television to broadcast mode. Moreover, Congress found that people simply did not use the switches even when they had them. *See id.*
[65] *See Turner I*, 512 U.S. at 656 ("[T]he physical connection between the television set and the cable network gives cable operators bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscribers' homes.").

programming available through that medium.

Second, to compare the type of Internet access available by dial-up telephone modems to the type available by cable modems is to compare apples and oranges. Not only is the cable modem access markedly faster, but it also allows one access to video and audio content, as well as file sharing applications, that are impossible or fatally time-consuming to use with a dial-up modem. To say that cable does not dominate the Internet access market because most people still use dial-up ISPs is analogous to saying that Ford did not dominate the passenger vehicle market at the beginning of the 20th century because most people still used horse-and-buggies. Speaking blithely of an undifferentiated "Internet access market" elides the issue. The clear technological superiority of broadband over narrowband dial-up Internet service renders the switch to broadband technology inevitable. More to the point, cable operators do have a dominant market share-and in many areas an outright monopoly-in the residential broadband Internet service market, which is the real market at issue in the open access debate. According to the latest FCC report-the same report quoted by Judge Middlebrooks-cable operators are estimated to have 84% of the residential broadband Internet access market, compared to only 11% for its closest competitor, DSL.[66] Therefore, even if the judge was correct in thinking that the *Turner* decision relied on the dominant market position of cable versus its competitors, cable Internet access would still present the same problem as cable television.[67]

5. *Distinguishing* Turner: *Strike Three*

Finally, the judge found *Turner I* inapposite because "[t]he Broward County ordinance, unlike the must-carry regulations of the FCC, threaten [sic] to diminish the free flow of information and ideas."[68]
The argument runs as follows:

> [T]he [*Turner*] Court found that the must-carry regulations did not force the cable operators to alter their own message or create a risk that a cable viewer might assume that ideas or messages of the broadcaster were endorsed by the cable operator. The Court pointed out that cable had a long history of serving as a conduit for broadcast signals and that broadcasters were required by FCC regulation to identify themselves at least once every hour .... In contrast, there is no history of cable operators serving as a conduit for Internet service providers.[69]

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[66] *See* Federal Communications Commission, Graphic, *supra* note 42.
[67] This broadband Internet access monopoly argument is contingent on the current market conditions. If DSL managed to capture a larger share of the residential broadband market, then the market dominance concern vis-à-vis cable would diminish accordingly. However, the earlier point-that market dominance and the bottleneck theory point to two distinct harms-remains sound no matter what the market conditions become.
[68] *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 697 (S.D. Fla. 2000).
[69] *Id.* at 696.

Thus, the judge appears to reason that, in a world of open access, subscribers may wrongly associate the ideas and messages of unaffiliated ISPs with those of the cable operator itself. The judge noted in this regard that "white supremacist groups and other purveyors of hate" have set up elaborate sites on the Internet.[70] To dispel the impression that it endorses such messages, the cable operator would have to choose between not offering any Internet service at all-thus impeding the free flow of information and ideas - or altering its own message by serving as a conduit for content with which it does not want to be associated.

This argument fails on its own accord. It is simply not viable to maintain that cable Internet customers would associate offensive Internet content with the cable company. It is not at all clear that consumers associate Internet content with their ISP, much less with the infrastructure over which the Internet service runs. Nobody has ever suggested that dial-up Internet customers associate offensive Internet content with the phone company. The danger that a customer will, for instance, assume that the cable operator endorses a neo-Nazi site that she reaches through the cable Internet service is specious, especially if it is common knowledge that the cable company operates under an open access regime. Additionally, a consumer would be much more likely to associate offensive television programming with the cable operator than Internet content because, apart from must carry and certain other obligations, consumers know that cable operators do maintain the right to actively select the television channels they carry. Cable ISPs, on the other hand, serve in large part as mere conduits for content produced by other, and often rival, content producers.[71] Judge Middlebrooks may be right about the lack of "history of cable operators serving as a conduit for Internet service," but this observation does not suggest in any way that open access would actually "diminish the free flow of information and ideas,"[72] as he concludes. To the extent that it does point to a relevant distinction between must carry and open access, it cuts the other way: customers are much more likely to associate unaffiliated television programming with the cable operator than they are unaffiliated Internet content.

In sum, the reasons given by Judge Middlebrooks to differentiate open access from must carry, and to apply strict rather than intermediate scrutiny, do not hold up under analysis. Like must carry before it, open access is a content-neutral regulation aimed at remedying

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[70] *Id.* at 697 n.4.

[71] For instance, customers of Time-Warner's RoadRunner service can reach *inter alia* Disney's entertainment websites and MSNBC's news site, though the operators of those sites are direct competitors of Time-Warner in almost all media markets. Of course, one of the worries motivating open access proponents is that cable companies will cease to act as "mere conduits" and begin to filter and censor Internet content as they see fit. However, as between cable television and cable Internet service, the cable company has a much closer association with the content it delivers on television than it does with the content it delivers through its Internet service. Due to the limited number of stations a cable operator can offer, the cable operator cannot help but select programming. In contrast, a cable Internet service provider need not limit the number of sites that can be viewed through its service.

[72] *Broward County*, 124 F. Supp. 2d at 696-97.

potentially problematic conditions in an important communications and media market. Consequently, it should face intermediate scrutiny.

B. *Passing Intermediate Scrutiny*

Intermediate scrutiny, as laid down in *United States v. O'Brien*,[73] requires that the government regulation at issue (1) promote an important governmental interest unrelated to the suppression of speech and (2) not burden speech any more than is essential.[74] Interestingly, though Judge Middlebrooks argued for strict scrutiny, he ran the intermediate scrutiny test as well. He found that open access would fail even this less exacting form of scrutiny. Again, however, the opinion evidences a misunderstanding of the purposes behind open access and of the nature of the broadband market.

1. *Does the regulation promote an important governmental objective*?

Judge Middlebrooks argued that unbundling failed intermediate scrutiny because the purported harm that the regulation addresses-the cable company bottleneck on Internet service-simply does not exist. Thus, there could be no excuse for any infringement of the cable company's speech. "[T]he harm the ordinance is purported to address appears to be non-existent. Cable possesses no monopoly power with respect to Internet access."[75] But I have already shown that the opinion confuses the danger of cable bottleneck control over broadband with the danger of cable monopoly. It is principally the former that open access seeks to mitigate. Moreover, the *Broward County* opinion ignores the fact that cable possesses 84% of the national market share in residential broadband service,[76] even though the judge cites numbers to that effect in the text of his opinion.[77] Consequently, Judge Middlebrooks is mistaken when he writes that the "harm the ordinance is purported to address appears to be non-existent.[78]"

Like most legislation, open access is prospective. Much of the impetus behind open access provisions stems from fears about how the broadband Internet market will develop over the next few years. The judge is right to probe whether or not these fears are justified. He correctly states, "When the government defends a regulation on speech it must demonstrate that the harm it seeks to prevent is real, not merely conjectural, and that the regulation will alleviate the harm in a direct and material way."[79] However, one may already point to a number of worrying activities of cable operators that indicate the kind

[73] 391 U.S. 367 (1968).
[74] *Id.* at 377.
[75] *Broward County*, 124 F. Supp. 2d at 697.
[76] *See* Federal Communications Commission, Graphic, *supra* note 42.
[77] *Broward County*, 124 F. Supp. 2d at 698 ("With respect to advanced telecommunications capability or broadband, the FCC estimated that there were approximately one million subscribers as of December 31, 1999. Of these, approximately 875,000 subscribed to cable based services, 115,000 subscribed to asymmetric DSL, with the remaining attributed to other media.").
[78] *Id.* at 697.
[79] *Id.*

of harmful medium-shaping power they have in the absence of unbundling regulations. For instance, cable company ISPs offer their preferred content and e-commerce partners local caching of websites, resulting in much quicker download times than for non-cached material.[80] This is a blatantly anti-competitive policy that disadvantages all Internet actors who do not already have partnership deals with one of the two cable-modem ISPs. It is easy to understand why smaller e-commerce sites and independent content producers are particularly worried about a cable bottleneck on a large percentage of household Internet access. They would almost certainly suffer competitively if their online offerings were consistently presented more slowly and shabbily than the content of e-commerce providers affiliated with the cable operators.

In addition, current cable-based ISPs do not allow streaming Internet videos to exceed ten minutes.[81] Many assume that this rule is in place because cable operators do not want to cannibalize their own cable television operations by encouraging video-over-Internet.[82] Be that as it may, it means that one of the primary advantages of broadband Internet access-the ability to receive full-length high-quality streaming video files- is eliminated as a consequence of the market power of the cable operators. These policies illustrate the power of exclusive cable ISPs to pick winners and losers in online applications.[83] Who, after all, would spend their time developing broadband Internet technologies if they were not sure such applications would be allowed to run on the cable platform?

We have yet to witness the whole parade of horribles that might result from cable's bottleneck control over a vast majority of household Internet connections. Cable ISPs are not clumsily filtering out large swaths of the Internet, or denying customers access to popular applications like e-mail or online chatting. But the examples cited above, coupled with the dominant position that cable continues to enjoy in residential broadband access, provide striking evidence that the harm open access "seeks to prevent is real, not merely conjectural."[84]

Again, the must carry case provides an apt analogy. One of Congress' main rationales for requiring cable operators to carry broadcast television stations was the fear that free broadcast television would die if cable operators were allowed to drop those channels

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[80] *See* Mark Cooper, *Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks*, 71 U. COLO. L. REV. 1011, 1045-46 (2000).

[81] *See* James B. Speta, *The Vertical Dimension of Cable Open Access, 71* U. COLO. L. REV.*975, 1000-05* (2000).

[82] *See id.* (discussing but rejecting this view); *see also* Cooper, *supra* note 80, at 1054 (discussing AT&T's invocation of "the need to manage its network" in response to charges of discrimination and exclusion regarding content).

[83] Even if unaffiliated commercial Internet companies were able to challenge these anticompetitive policies under unfair trade practices or antitrust law- an open question at this point-there does not appear to be any remedy for the immeasurable number of noncommercial Internet content and applications providers also disadvantaged by these policies.

[84] *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 697 (S.D. Fla. 2000).

from their repertoire.[85] While the minority in the *Turner* cases believed that Congress' fear was misplaced and that must carry failed to alleviate an actual harm,[86] the majority explained the proper judicial role as follows:

> The question is not whether Congress, as an objective matter, was correct to determine must-carry is necessary to prevent a substantial number of broadcast stations from losing cable carriage and suffering significant financial hardship. Rather, the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress. In making that determination, we are not to 're-weigh the evidence *de novo*, or to replace Congress' factual predictions with our own.' Rather, we are simply to determine if the standard is satisfied.[87]

Judge Middlebrooks demanded an objectively correct prediction from the County vis-à-vis the future development of broadband Internet access-a standard of scrutiny no legislation could possibly pass. He proceeded to re-weigh the evidence de novo and replace Broward County's predictions with the FCC's.[88] The *Turner Broadcasting System Inc. v. FCC* (*Turner II*) Court declared, "We need not put our imprimatur on Congress' economic theory in order to validate the reasonableness of its judgment."[89] Thus, even if Judge Middlebrooks would find on the available evidence that unbundling was not needed to mitigate the danger of a closed broadband platform, his judicial task is simply to determine whether the legislative body made a reasonable judgment to the contrary. Had he correctly understood the bottleneck problem, acknowledged the dominant position of cable in the broadband market, and noted the cable operators' demonstrated proclivity to exploit their bottleneck control, he would have been compelled to find that the Broward County Commission made a reasonable decision that a closed cable system constitutes a real harm to its citizens.

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[85] *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 208 (1997) ("The harm Congress feared was that stations dropped or denied carriage would be at a 'serious risk of financial difficulty,' and would 'deteriorate to a substantial degree or fail altogether."') (citation omitted) [hereinafter *Turner II*].

[86] *See id.* at 240-49 (O'Connor, J., dissenting).

[87] *Id.* at 211 (citation omitted).

[88] Judge Middlebrooks put great stock in the fact that the FCC has yet to come to the same decision as the Broward County Commission about the necessity for open access regulation. *See Broward County*, 124 F. Supp. 2d at 698. But the FCC's current reluctance to mandate unbundling illustrates simply that it is possible for different regulatory agencies investigating similar phenomena to come to different policy conclusions. It does not show that the policy enacted by the County lacked substantial evidence or support. Analyzing must carry, the *Turner II* Court wrote, "The issue before us is whether, given conflicting views of the probable development of the television industry, Congress had substantial evidence for making the judgment that it did." *Turner II*, 520 U.S. at 208. Today, the issue is whether regulatory bodies- now local governments, tomorrow perhaps Congress or the FCC-have substantial evidence for making the judgments that they do about open access, given conflicting views of the probable development of the broadband Internet industry. There is no reason to expect that every regulatory body will come to the same policy conclusions. What is clear, however, is that the Broward County Commission had substantial evidence for making the judgment that it did.

[89] *Turner II*, 520 U.S. at 208.

As the *Broward County* opinion acknowledged, the County's open access regulation was "designed to ensure 'competition' and 'diversity' in cable broadband Internet services."[90] There is little doubt that this goal, ensuring competition and diversity in the Internet content and online application markets, constitutes an "important ... governmental interest."[91] As the content and applications of the broadband Internet become more and more central to the everyday lives of Americans, the governmental interest in a competitive online environment, "promoting the widespread dissemination of information from a multiplicity of sources,"[92] will only grow. The Court has recognized the Internet as an important national and international medium of communication.[93] Ensuring that the markets for Internet service, content, and applications remain robust and competitive is undoubtedly a government interest of great import.[94]

2. *Does the regulation burden any more speech than is essential*?

Because Judge Middlebrooks concluded that "[i]t has not been demonstrated that the Broward County ordinance furthers a substantial governmental interest,"[95] he found that open access failed the first prong of the intermediate scrutiny test. Thus, he did not address its second prong. Had he done so, as I argue he should have, he would have asked whether the regulation burdens any more speech than is essential to secure the interest at stake. Here, the County's case is straight-forward. Cable operators' bottleneck control over the dominant broadband facility, namely cable lines, endangers competition, diversity, and open network architecture on the broadband Internet. Open access eliminates the cable operator's bottleneck control over cable Internet by requiring cable operators to lease bandwidth to unaffiliated ISPs at non-discriminatory rates. Unbundling does not force cable operators to carry any particular ISP or any particular content; it simply requires them, in the words of the Broward County ordinance, to "provide any requesting Internet Service Provider access to its Broadband Internet Access Transport Services ... on rates, terms, and conditions that are at least as favorable as those on which

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[90] *Broward County*, 124 F. Supp. 2d at 697.
[91] *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).
[92] *Turner II*, 520 U.S. at 189.
[93] *See Reno v. ACLU*, 521 U.S. 844, 850-53 (1997).
[94] One might formalize the argument as follows. The Supreme Court found in *Turner II* that ensuring diversity in the television programming market is an important government interest. *Turner II*, 520 U.S. at 189-90. In *Reno v. ACLU*, it found the Internet to be an important source of information and an important means of communications. *See Reno*, 521 U.S. at 850-53. Consequently, the Supreme Court should-and one can only presume that it would-find that ensuring diversity in Internet service, content, and applications markets constitutes an important government interest

I would even argue, along with Professors Lemley and Lessig, that the preservation of an open architecture Internet-in which all parts of the network are interoperable and thus open to competitive innovation-is also an important government interest. *See* Lemley & Lessig, *supra* note 43. However, this would require a novel finding by a court that the government has an important interest in network architecture.
[95] *Broward County*, 124 F. Supp. 2d at 698.

it provides such access to itself, to its affiliate, or to any other person."[96] As the City of Portland asks in one of its trial briefs, "how else" could the City "have addressed the bottleneck problem effectively without eliminating the bottleneck?"[97]

The burden on the cable operator's speech is as minimal as it could be to achieve this end. That "burden" consists of the possibility that some Internet content which the cable company's preferred ISP would have blocked may run over the cable company's lines. As noted before, because consumers are not at all likely to associate Internet content with a cable company operating under open access, the alleged harm to the speech interest of the cable operator is *de minimis*. Certainly, it is equal to or less than the harm done in requiring cable operators to carry, without charge, local broadcast stations.

To be clear, open access does reduce the editorial discretion of cable operators, and it may lead to some offensive speech being transmitted on their lines that they would otherwise prefer not to transmit. But this discrete harm to the cable operator's speech rights is outweighed even if we restrict our analysis to First Amendment concerns. There are, as Judge Breyer noted in his *Turner II* concurrence, "important First Amendment interests on both sides of the equation."[98] On the one hand is the autonomy of the cable operator to determine the content it carries; on the other, there is the public interest in an "uninhibited, robust, and wide-open"[99] free speech market. The Court has already noted how these two interests conflict on the cable medium: "A cable operator, unlike speakers in other media, can ... silence the voice of competing speakers with a mere flick of the switch. The potential for abuse of this private power over a central avenue of communication cannot be overlooked."[100] The Court concluded that "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[101] Open access, like must carry before it, aims to ensure that cable operators are not allowed to exert their vast power to "silence the voice of competing speakers with a mere flick of the switch."[102] Unbundling serves to promote the free flow of information and ideas, not to threaten it as Judge Middlebrooks contends.

Finally, it may be suggested that there are other means to promote diversity and competition in broadband Internet services and content that would not lead to any burden on the cable operators' editorial discretion. But the Supreme Court has already noted that

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[96] *Id.* at 686-87 (citation omitted).
[97] Def.'s Mem. in Supp. of Def.'s Cross Mot. in Supp. of Summ. J., AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146 (D. Or. 1999) (No. CV 99-65 PA), *available at* http://www.techlawjournal.com/courts/portland/19990326.htm.
[98] *Turner II*, 520 U.S. at 227 (Breyer, J., concurring in part).
[99] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
[100] *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 656-67 (1994) (citation omitted).
[101] *Id.* at 657.
[102] *Id.*

"our cases establish that content-neutral regulations are not 'invalid simply because there is some imaginable alternative that might be less burdensome on speech.'"[103] Consequently, a court reviewing open access is not obligated to determine whether the regulation is the "least restrictive means" possible to achieving the governmental objective.[104] Even so, open access opponents have not yet suggested any less restrictive regulations that would ensure open ISP competition on the dominant broadband platform. Of course, one can think up such alternatives. Instead of requiring open access on the cable lines, perhaps the government could subsidize DSL subscription massively to ensure that at least one open-access broadband platform succeeds in the market. Alternatively, the government could simply buy a sufficient share in the cable companies to impose open access through shareholder control. But one suspects that the cable operators would be opposed to these highly interventionist alternatives.

In sum, the burden imposed by open access is "congruent to the benefits it affords."[105] It aims to mitigate the dangers of a cable bottleneck on the most popular broadband Internet facility, although achieving this goal inevitably diminishes-very marginally-the editorial discretion of the cable operators. Thus open access presents a perfect example of the kind of content-neutral, speech-enhancing regulation that intermediate scrutiny permits the government to enact.

IV. CONCLUSION

Any court that subjects open access to the intermediate scrutiny test, as I argue it must, will find that it passes with flying colors. However, the purpose of this study is not to argue that local franchising authorities, the FCC, or Congress should adopt open access regulations. To the contrary, the thrust of my argument has been that unbundling sustains a direct First Amendment challenge whether or not one agrees with it as a worthwhile policy initiative. Of course, regulatory bodies that pass open access ordinances must show substantial evidence that there is *some* real danger in a closed broadband infrastructure. To this end, open access proponents can bear this burden simply by pointing to the anti-competitive activities of the current cable ISPs.[106]

The resolution of the open access debate could very well determine the basic architecture of the dominant communications medium of the twenty-first century. Judge Middlebrooks' opinion in *Broward County* would, if endorsed by the Supreme Court, effectively short-circuit the debate on constitutional grounds. If open access truly violated the First Amendment, judicial determination of the issue would be entirely appropriate.

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[103] *Turner II*, 520 U.S. at 217 (citation omitted).
[104] *See id.* ("'So long as the means chosen are not substantially broader than necessary to achieve the government's interest, ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."') (citation omitted).
[105] *Id.* at 215 (discussing the burdens and benefits of must carry).
[106] *See supra* text accompanying notes 80-83.

However, Judge Middlebrooks' opinion is severely flawed, and a more careful analysis of First Amendment precedent shows that open access is entirely consistent with the Free Speech Clause.[107] Consequently, the First Amendment should not serve as a bar to open access regulation, and the debate over its policy merits should continue.

[107] Broward County has appealed Judge Middlebrooks' ruling to the Eleventh Circuit Court of Appeals, and the parties will begin filing with the appellate court in March 2001. Interview with Anitra Lanczi, Assistant County Attorney, Broward County Attorney's Office (Feb. 16, 2001).