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## FIRST AMENDMENT COMMON SENSE

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### INTRODUCTION

In *Verizon v. FCC*,<sup>1</sup> high-speed Internet access provider Verizon asserted that the December 2010 Federal Communications Commission (FCC) Open Internet Rules were subject to heightened scrutiny under the First Amendment.<sup>2</sup> Verizon's claim was that because it reserves the right to edit what users access across its high-speed Internet connections, any regulation (and thus, necessarily, any statute) limiting that discretion amounts to compelled speech.<sup>3</sup> (Verizon also claimed that it did not in fact carry out such editing.<sup>4</sup>) The cable industry, for its part, has long maintained that when it is selling high-speed Internet access its activities are shielded by the First Amendment, and that any nondiscrimination obligation aimed at cable Internet access providers "would not only encroach upon but would obliterate the boundaries established by the First Amendment and would surely be subject to at least 'heightened scrutiny' by the courts."<sup>5</sup> Commentators working with think tanks such as the Free State Foundation have said that

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<sup>1</sup> 740 F.3d 623 (D.C. Cir. 2014).

<sup>2</sup> Joint Brief for Verizon and MetroPCS at 42-49, *Verizon*, 740 F.3d 623 (No. 11-1355).

<sup>3</sup> *Id.* at 44 ("The Order's broad 'prophylactic rules' infringe broadband providers' protected speech rights. They strip providers of control over which speech they transmit and how they transmit it, and they compel the carriage of others' speech." (italics omitted)). I participated in an amicus brief challenging the First Amendment assertions made by Verizon. See Brief of Amici Curiae Reed Hundt, Tyrone Brown, Michael Copps, Nicholas Johnson, Susan Crawford, and the National Association of Telecommunications Officers and Advisors in Support of Appellee, *Verizon*, 740 F.3d 623 (No. 11-1355) [hereinafter Brief of Amici Curiae Reed Hundt et al. in Support of Appellee].

<sup>4</sup> See Joint Brief for Verizon and Metro PCS, *supra* note 2, at 43; Press Release, Verizon, Verizon Reiterates Its Commitment to the Open Internet (Jan. 14, 2014), *archived at* <http://perma.cc/KY2B-WQDK>.

<sup>5</sup> Comments of the National Cable & Telecommunications Ass'n at 32, Framework for Broadband Internet Service, GN Docket No. 10-127 (Fed. Commc'ns Comm'n July 15, 2010); see also Comments of the National Cable & Telecommunications Ass'n at 53, Preserving the Open Internet Broadband Industry Practices, GN Docket No. 09-191 (Fed. Commc'ns Comm'n Jan. 14, 2010) [hereinafter Jan. 14, 2010 Comments of the National Cable & Telecommunications Ass'n] ("[B]ecause the Commission is singling out particular speech businesses for specific regulation . . . it bears a high burden of justification.").

they agree with the idea that private providers of Internet access services should enjoy the same First Amendment protection from government oversight as do newspapers.<sup>6</sup>

This commentary is surprising. Congress has for more than a hundred years had unquestioned authority to impose on private providers of general-purpose two-way communications lines a traditional, comprehensive, economic regulatory regime that protects innovation, speech, and national competitiveness by overseeing the activities of these providers, subject only to rational basis review by courts. When the FCC acts pursuant to this congressional authority, it must comply with the Administrative Procedure Act<sup>7</sup> (APA) and applicable statutory language. But its regulatory activities in this arena have not in the past been thought to raise serious constitutional concerns under the First Amendment that would trigger heightened scrutiny.

This Article views the providers' First Amendment arguments in a broad framework of political power.<sup>8</sup> Verizon, speaking (effectively) for the entire high-speed Internet access sector, is seeking to grant greater influence to courts than legislators or regulators by raising constitutional questions about steps that Congress or the FCC may seek to take. From this perspective, aggressive First Amendment arguments that trigger judicial concern are useful to Verizon and its brethren in

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<sup>6</sup> Paul Barbagallo, *Verizon First Amendment Challenge of Net Neutrality Tests Century of Regulation*, BLOOMBERG BNA (Jan. 24, 2013), <http://www.bna.com/verizon-first-amendment-n17179872014>, archived at <http://perma.cc/4HW5-RC7S> ("FCC *Open Internet* rules are really 'compelled access' mandates, similar to the Florida right-of-reply statute overturned in *Tornillo*," (quoting Randolph May, President of Free State Foundation)). The Free State Foundation, TechFreedom, the Competitive Enterprise Institute, and the Cato Institute jointly filed an amicus brief in *Verizon* outlining the claim that the Order "compels speech by forcing Internet service providers to post, send, and allow access to nearly all types of content, even if a broadband provider prefers not to transmit such content." Brief *Amici Curiae* of TechFreedom, the Competitive Enterprise Institute, the Free State Foundation, and the Cato Institute in Support of Appellant at 11, *Verizon*, 740 F.3d 623 (No. 11-1355).

<sup>7</sup> Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>8</sup> As I explain later in this Article, the cable companies (in particular, Comcast and Time Warner Cable) dominate the wired market for high-capacity, high-speed Internet access in America through a series of local monopoly providers. Verizon and AT&T focus their efforts on the wireless market, where their profits are greater than they are in the wired marketplace for Internet access. "Providers," in this sentence, refers collectively to Comcast, Time Warner Cable, Verizon, and AT&T. The Internet access services of all of these entities are covered by the Open Internet Rule. Although Verizon is the nominal litigant in the D.C. Circuit case examined here, its arguments have been echoed by the cable industry, and I have no reason to believe that AT&T disagrees with Verizon's claims. Indeed, in January 2014, AT&T launched a controversial new Sponsored Data plan, requiring content providers to pay to avoid usage of their applications counting against the caps imposed by AT&T on subscribers, raising the economic issues discussed in this Article. See Press Release, AT&T, AT&T Introduces Sponsored Data for Mobile Data Subscribers and Businesses (Jan. 6, 2014), archived at <http://perma.cc/U42X-CJ6W>.

undermining traditional deference to regulators and legislators. But to apply a heightened First Amendment standard when a court is reviewing an ordinary economic regulatory program, merely because there may be some indirect effect on private speech caused by the challenged regulations, would return us to the *Lochner* era and sharply undermine congressional authority.

The risk is that a court will someday take the providers' First Amendment position seriously. Today, the providers' arguments would likely fail given the Court's carefully reasoned (and unanimous) opinion in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*<sup>9</sup> (*FAIR*). But the providers' assertions have an interesting temporal dimension: although it seems almost unthinkable that a general-purpose high-speed Internet access provider — selling services that are the modern-day substitute for a telephone connection — would be considered to be “the same as” the *New York Times* for speech purposes, the network providers have the incentive to change the facts on the ground. As providers of high-speed Internet access have gained market power in the absence of either competition or oversight, their abilities to selectively present digital communications to users and close their gates to content (or “edge”) providers unwilling to pay tribute to them have increased. In the future, their exercise of these powers may arguably make them more like newspapers or the cable pay-television operators found to trigger heightened scrutiny in *Turner Broadcasting System, Inc. v. FCC*<sup>10</sup> (*Turner I*) and less like a communications transport network subject to economic regulation.

Because the consequences of the adoption of the providers' arguments would be to make every congressional enactment in this area subject to a presumption of unconstitutionality, and to strip the FCC of the deference to which it is normally entitled, this is a critical time for courts and others to carefully and deliberately explain why the carriers are wrong. For though the D.C. Circuit declined to address

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<sup>9</sup> 547 U.S. 47 (2006). At issue in *FAIR* was the constitutionality of the Solomon Amendment, 10 U.S.C. § 983 (2012), which required the Secretary of Defense to withhold funding from institutions of higher learning if they refused to provide military recruiters with the same access to students and campus facilities as other prospective employers. *Id.* § 983(b). The Supreme Court unanimously held that the requirements of the Amendment did not amount to compelled speech. *FAIR*, 547 U.S. at 65, 70.

<sup>10</sup> 512 U.S. 622 (1994) (upholding the must-carry requirements in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.), (1992 Cable Act), which obligated cable companies to carry the signals of certain local broadcast stations). In *Turner I*, the Supreme Court applied heightened First Amendment scrutiny to the must-carry provisions of the 1992 Cable Act. 512 U.S. at 641. *Turner Broadcasting System, Inc.* had argued that the must-carry provisions amounted to compelled speech. *Id.* at 646.

Verizon's First Amendment claims in *Verizon*,<sup>11</sup> the providers of high-speed Internet access in America will continue to make these assertions in every possible case and before Congress, repeating their claimed entitlement to heightened scrutiny until it becomes a mainstream argument. On this battlefield, and given that legislators are now suggesting that a rewrite of the Telecommunications Act of 1996<sup>12</sup> is needed,<sup>13</sup> the particular administrative classification the FCC has applied to the providers of high-speed Internet access is irrelevant, both now and in the future. The sole question is whether the providers' constitutional claims should be taken seriously. This Article endeavors to provide a roadmap for the needed explanation as to why they should not be, by engaging with the doctrinal, policy, and normative dimensions of the providers' assertions.

Part I examines the providers' First Amendment arguments in light of the oral argument held on September 9, 2013, in *Verizon*. Part II places the providers' claims in historical perspective. It addresses (1) the current state of high-speed Internet access in America; (2) the history of common carriage regulation and why it applies to all high-speed Internet access providers in the United States; and (3) the providers' economic motivations for evading regulation as common carriers. Applicable precedents dictate that these entities be understood as common carriers in performing this function, however they have been currently labeled as a policy matter by the FCC. Accordingly, economic regulation of their activities is entirely appropriate.

Part III argues that *FAIR* should govern the providers' overreaching First Amendment arguments. Moreover, the risk of *Lochner*-izing the regulatory state is real and forces explicit attention to the normative issues involved in assessing the providers' claims. The Part maps *FAIR* to the providers' claims and assesses the likelihood that the providers are attempting through their First Amendment arguments to undermine congressional authority to oversee their activities. Verizon in this particular case seeks to invoke "constitutional avoidance" and asserts that that canon trumps any *Chevron* deference.<sup>14</sup> In making these arguments loudly and repetitively, the providers are joining tobacco companies, pharmaceutical concerns, energy companies, and

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<sup>11</sup> *Verizon*, 730 F.3d at 634.

<sup>12</sup> Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

<sup>13</sup> See Joe Flint, *Reps. Walden and Upton Pushing for New Communications Act*, L.A. TIMES (Dec. 3, 2013), <http://articles.latimes.com/2013/dec/03/entertainment/la-et-ct-reps-walden-and-upton-pushing-for-new-communications-act-20131203>, archived at <http://perma.cc/M4KC-MEL5>.

<sup>14</sup> Joint Brief for Verizon and MetroPCS, *supra* note 2, at 14 (quoting *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002)).

others in seeking to constitutionalize any regulatory oversight of their activities.<sup>15</sup> The providers' claim is not only legally untenable but also dangerous to the economic competitiveness of the United States.

### I. THE PROVIDERS' FIRST AMENDMENT CLAIMS

*Verizon* was a facial challenge to an FCC order released on December 23, 2010 adopting rules that govern the high-speed Internet access services offered by wireless and wireline providers.<sup>16</sup> Among other things, the order required providers (a) not to block any lawful content, applications, services, or non-harmful devices and (b) not to charge "edge providers . . . for delivering traffic to or carrying traffic from the broadband provider's end-user customers."<sup>17</sup> Alongside its challenge to the FCC's statutory authority (arguments on which this Article does not focus), Verizon included the surprising claim that the order was unconstitutional because "[b]roadband networks are the modern-day microphone by which their owners engage in First Amendment speech."<sup>18</sup> The cable industry has also forcefully made this argument in its filings before the Commission in connection with the order, saying that "the government is not free [under the First Amendment] to impose restrictions on speech out of a fear that, if the speech is left in private hands, some speakers will prevail at the expense of others."<sup>19</sup>

#### A. High-Speed Internet Access in America

To understand the providers' First Amendment claims, one must know something about the legal history of high-speed Internet access

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<sup>15</sup> See generally TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT (2012).

<sup>16</sup> Preserving the Open Internet, 76 Fed. Reg. 59,192 (Sept. 23, 2011).

<sup>17</sup> *Id.* at 59,205. The rules required providers of both fixed and mobile Internet access to publicly disclose information about the nature of the services they provide, *id.* at 59,203; obliged fixed (but not mobile) providers not to "unreasonably discriminate" in transmitting traffic, *id.* at 59,205, and stated that "it is unlikely" that any "pay for priority" arrangements, *id.* at 59,207, (a "commercial arrangement between a broadband provider and a third party to directly or indirectly favor some traffic over other traffic," *id.* at 59,206) "would satisfy the 'no unreasonable discrimination' standard," *id.* at 59,207; and included "no blocking" provisions for both fixed and mobile providers, *id.* at 59,205 ("Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful Web sites, or block applications that compete with their voice or video telephony services . . ."). *Id.* at 59,192.). For fixed providers, the rules stated that charging "edge providers . . . for delivering traffic to or carrying traffic from the broadband provider's end-user customers" would violate the no-blocking rule to the extent the content or application provider could avoid being blocked only by paying. *Id.* at 59,205. Verizon's lawsuit challenged the FCC's legal authority to adopt all of these rules.

<sup>18</sup> Joint Brief for Verizon and MetroPCS, *supra* note 2, at 12.

<sup>19</sup> Jan. 14, 2010 Comments of the National Cable & Telecommunications Ass'n, *supra* note 5, at 64.

in America.<sup>20</sup> Many Americans may assume that the providers are treated just like phone companies were in the past: overseen, regulated, and obliged to provide first-class services to everyone at reasonable prices. After all, high-speed Internet access is the modern-day version of the two-way, general-purpose communications function historically provided by phone companies. But that assumption is incorrect. This section briefly describes the legal legerdemain that has been employed over the last few decades by the providers to limit current oversight of their activities. Their First Amendment claims are designed to limit the risk of any future serious oversight.

Under (a) a 1956 consent decree with AT&T, (b) a series of FCC proceedings begun in 1966 known as the “Computer Inquiries,”<sup>21</sup> (c) the 1982 “Modification of Final Judgment”<sup>22</sup> under which AT&T agreed to divestiture of its Bell operating companies, and (d) the Telecommunications Act of 1996, telephone companies providing the physical facilities for basic two-way communications transport were obliged not to discriminate with respect to that transport and to sell it separately from other services.<sup>23</sup>

As a result, when the first high-speed (greater than dial-up speed) Internet access was supplied by the phone companies across their copper lines, the companies were required to sell this basic service to competitors who wanted to resell it, to allow end-user customers to connect to any Internet service provider (ISP) they wanted (which meant sharing their lines with unaffiliated ISPs), to charge reasonable rates,<sup>24</sup> to allow third-party devices such as computer modems to connect to their networks,<sup>25</sup> and to allow any other network to connect on fair terms.<sup>26</sup> The commercial Internet took off because computers able to “speak” the Internet Protocol were connected to each other by regulated phone lines. By the summer of 1998, there were nearly five

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<sup>20</sup> Verizon and the other providers (and the FCC) routinely use the term “broadband.” I will use the term “high-speed Internet access.” This is not just a semantic quibble; the providers’ goal is to have the discretion to offer a managed service that uses the Internet Protocol but is not the same as nondiscriminatory Internet access. To accept the use of the term “broadband” is to decide the question asked by this Article: should general-purpose U.S. network providers be considered to be the same as newspaper editors or pay television providers, choosing and editing the digital communications viewed by Americans?

<sup>21</sup> Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 891 (2009).

<sup>22</sup> *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 226 (D.D.C. 1982).

<sup>23</sup> I describe this history in detail in Crawford, *supra* note 21.

<sup>24</sup> The Act includes a general mandate to provide service under prices, terms, and conditions that are not “unjust or unreasonable.” 47 U.S.C. §§ 201(b), 202(a) (2006).

<sup>25</sup> See 47 C.F.R. § 68 (1998).

<sup>26</sup> 47 U.S.C. § 251(c)(2) (2006).

thousand ISPs operating in the United States to which the phone companies were obliged to allow consumers to connect.<sup>27</sup>

In the late 1990s, the cable television industry got into the business of using part of its television-by-wire infrastructure to sell high-speed Internet access. Traditionally, cable companies had operated a series of networks providing one-way transmission of television programming from the cable operator to its subscribers. In essence, the industry in the late 1990s added an additional hat: each system operator repurposed a couple of the dozens (later, hundreds) of television transport channels flowing through its wires for use in two-way communications.

The Ninth Circuit ruled that when wearing that high-speed Internet access hat, cable infrastructure operators, like the phone companies, were selling basic communications transport (as defined by the Telecommunications Act of 1996) and should be understood to be covered by obligations not to discriminate in their carriage of information, to allow end-user customers to connect to any ISP, and to permit other networks to connect to theirs on fair and reasonable terms.<sup>28</sup> In other words, the two-way distribution of data by the cable industry would be understood as a “common carriage” service.<sup>29</sup>

The cable television industry was understandably irked by this categorization. Historically, the industry (wearing its original television hat) had been lightly regulated. In its early years, beginning in the 1950s, it was not covered by specific federal regulation, and cities and states had trouble constraining its activities. After the FCC in 1966 adopted rules regulating cable television in order to protect the idea of a national broadcasting system, the Supreme Court retroactively found that the FCC had the “ancillary” authority to do so even though the FCC’s enabling statute said nothing about cable.<sup>30</sup> Finally, the Cable Communications Policy Act of 1984<sup>31</sup> (1984 Cable Act) clearly granted the FCC authority over the cable television industry.<sup>32</sup> The 1984 Cable Act itself, however, was deregulatory in substance, remov-

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<sup>27</sup> Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past* 18 & n.88 (Fed. Comm’n Comm’n Office of Plans and Policy, Working Paper No. 30, 1998).

<sup>28</sup> *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000) (defining cable operators providing high-speed Internet access as “telecommunications” providers under the Telecommunications Act of 1996). The Ninth Circuit was reacting to rules imposed by localities requiring providers to permit “open access” to ISPs — basic transport to which the ISPs could connect — as a condition of holding a municipal cable franchise. *Id.* at 874–75.

<sup>29</sup> See *infra* Part II, pp. 2365–78.

<sup>30</sup> See *United States v. Sw. Cable Co.*, 392 U.S. 157, 165–68, 178 (1968).

<sup>31</sup> Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

<sup>32</sup> See generally *id.*

ing most of the power that local franchising authorities had over cable operators.<sup>33</sup>

After a few years of leaving the cable television industry to its own devices, Congress, concerned about consumer complaints of high prices and poor service,<sup>34</sup> brokered the Cable Television Consumer Protection and Competition Act of 1992<sup>35</sup> (1992 Cable Act). The 1992 Cable Act re-regulated the industry (lightly) by including provisions designed to encourage satellite competition to cable television and regulating rates.<sup>36</sup> At the time the 1992 Cable Act was adopted, the cable television industry had just one hat to wear — selling one-way pay television services — because the commercial Internet had not yet been launched.<sup>37</sup> Naturally, the 1992 Cable Act said nothing about high-speed Internet access. It also didn't include the basic nondiscrimination and interconnection obligations to which phone companies were subject. Cable television operators were accustomed to this treatment.

The Telecommunications Act of 1996, a decade in the drafting, then attempted to introduce competition into all parts of the communications industry while simultaneously deregulating it.<sup>38</sup> It left the traditional obligations of a general-purpose two-way communications network in place (including nondiscrimination vis-à-vis communications and customers, and interconnection vis-à-vis other networks).<sup>39</sup> The Act deliberately did not say that only telephone companies would be subject to those obligations; its language is technology neutral.

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<sup>33</sup> See Thomas W. Hazlett, *Duopolistic Competition in Cable Television: Implications for Public Policy*, 7 YALE J. ON REG. 65, 89 (1990).

<sup>34</sup> See *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 179 (D.C. Cir. 1995) (opinion of Randolph, J.).

<sup>35</sup> Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.). The statutory framework for cable regulation was first established by the 1984 Cable Act. See Cable Communications Policy Act of 1984 § 2, 98 Stat. at 2780 (adding Title VI to the Communications Act of 1934, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.)). Title VI was further amended by the 1992 Cable Act. See, e.g., Cable Television Consumer Protection and Competition Act of 1992 § 4, 106 Stat. at 1471.

<sup>36</sup> See *Time Warner*, 56 F.3d at 179 (opinion of Randolph, J.).

<sup>37</sup> In April 1995, the National Science Foundation (NSF) policy dictating that the National Science Foundation Network backbone not be used for purposes “not in support of Research and Education,” Esbin, *supra* note 27, at 9 (internal quotation marks omitted), was terminated with the end of NSF funding. See *id.* at 10. The money recovered was redistributed to regional networks to buy connectivity from private nationwide Internet backbones. *Id.* This event, together with the Netscape IPO on August 9, 1995, is commonly understood to mark the advent of the commercial Internet in the United States. Adam Lashinsky, *Remembering Netscape: The Birth of the Web*, CNN MONEY (July 25, 2005), [http://money.cnn.com/magazines/fortune/fortune\\_archive/2005/07/25/8266639/](http://money.cnn.com/magazines/fortune/fortune_archive/2005/07/25/8266639/), archived at <http://perma.cc/HC7K-Z6C5>.

<sup>38</sup> See SUSAN P. CRAWFORD, CAPTIVE AUDIENCE 49 (2013).

<sup>39</sup> See generally Telecommunications Act of 1996, tit. II, 110 Stat. at 107-14 (codified as amended in scattered sections of 47 U.S.C.).



So what was to be done when both cable television providers and telephone providers were also wearing second hats as high-speed Internet access providers? This was a regulatory puzzle: the functions seemed to be exactly the same, but they also seemed to be falling within two different categories of regulatory treatment. Phone companies were treated as common carriers, obliged not to discriminate,<sup>40</sup> but cable companies were not. The President Clinton-era FCC did not decide the question of the classification of basic two-way data transmission by cable companies but hinted strongly that it preferred deregulation.<sup>41</sup> While the FCC was trying to make up its mind, the Ninth Circuit ruling came down in 2000: cable systems, when they sold high-speed Internet access, should be treated like traditional communications transport companies (common carriers) for regulatory purposes.<sup>42</sup>

The President George W. Bush-era FCC, under the leadership of then-Chairman (and now cable industry trade association president) Michael Powell, also took its time, finally acting in 2002 by saying it disagreed with the Ninth Circuit.<sup>43</sup> It declared that cable systems were selling an unregulated “information service” when they offered high-speed Internet access.<sup>44</sup> Following a challenge by opponents, the cable industry appealed to the Supreme Court.<sup>45</sup> Over a stinging dissent by Justice Scalia,<sup>46</sup> the Supreme Court deferred to the FCC categorization during the summer of 2005.<sup>47</sup> To keep a level regulatory playing field in place, the FCC then deregulated phone company provision of high-speed Internet access across copper wires, wireless transmission, and fiber.<sup>48</sup> No longer would any provider of basic two-

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<sup>40</sup> See Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, 13 FCC Rcd. 24,011, 24,016–17 (1998) (discussing the classification of DSL services under the Telecommunications Act of 1996).

<sup>41</sup> In 1999, the then-Chairman of the FCC, William E. Kennard, came out strongly against the regulation of high-speed Internet access, saying that regulation might stunt investment, research, and development. William E. Kennard, Chairman, Fed. Commc’ns Comm’n, *The Road Not Taken: Building a Broadband Future for America*, Remarks Before the National Cable Television Association (June 15, 1999), *archived at* <http://perma.cc/L4S2-T57M>.

<sup>42</sup> AT&T Corp. v. City of Portland, 216 F.3d 871, 876–77 (9th Cir. 2000).

<sup>43</sup> Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities, 17 FCC Rcd. 4798, 4802, 4819 (2002).

<sup>44</sup> *Id.* at 4819.

<sup>45</sup> Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 979 (2005).

<sup>46</sup> See *id.* at 1005–20 (Scalia, J., dissenting).

<sup>47</sup> *Id.* at 1002–03 (majority opinion).

<sup>48</sup> See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14,853, 14,899–900 (2005); Press Release, Fed. Commc’ns Comm’n, FCC Eliminates Mandated Sharing Requirement on Incumbents’ Wireline Broadband Internet Access Services (Aug. 5, 2005), *archived at* <http://perma.cc/D2WV-FH6W>.

way communications be required to share its facilities with a competing ISP.<sup>49</sup>

Since 2005, therefore, the FCC has taken the position that competition among various forms of high-speed Internet access (cable access, DSL access across copper wires, wireless access, and fiber) will be better than regulation at protecting users and businesses from any possible abuses by the companies selling high-speed Internet access. The FCC has defined “broadband” (or high-speed) access as anything over 4 megabits per second (Mbps) download and 1 Mbps upload, which allows it to view all of these modalities as competing with one another.<sup>50</sup>

It turns out that this belief in competition is not well founded, as the following section describes: for between 77 and 82% of Americans, their local cable monopoly is their only choice for high-capacity, high-speed connections,<sup>51</sup> and dominant members of the cable industry never enter each others’ territories;<sup>52</sup> the phone companies have retreated almost entirely to wireless where their profits are still secure, and have mostly ceded the wired marketplace to the cable companies<sup>53</sup> (with the narrow exception of Verizon’s FiOS service, available in just 14% of the country);<sup>54</sup> and Verizon and the cable companies are collaborating.<sup>55</sup> Where consolidation is possible, competition is impossible.

Leaving aside the problems of market power in the U.S. high-speed Internet access marketplace for the moment, the policy decision to administratively deregulate general-purpose modern two-way communications networks (whoever provides them) has emboldened both Verizon in the *Verizon* litigation and the cable distributors more generally to claim that their economic decisions about those networks — to create “pay to play” regimes and to overcharge for interconnection arrangements with networks seeking to send traffic to the providers’ subscribers — are protected by the First Amendment. After all, if

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<sup>49</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. at 14,879–80, 14,887.

<sup>50</sup> INDUS. ANALYSIS AND TECH. DIV., FED. COMM’NS COMM’N, INTERNET ACCESS SERVICES: STATUS AS OF DECEMBER 31, 2012, at 4 n.5 (2013), archived at <http://perma.cc/J3SY-W33N> [hereinafter INTERNET ACCESS SERVICES AS OF DEC. 2012] (“The Commission [has] benchmarked broadband as a transmission service that enables an end user actually to download Internet content at 4 Mbps and to upload Internet content at 1 Mbps over the service provider’s network.”).

<sup>51</sup> See CRAIG MOFFETT, NICHOLAS DEL DEO & AMELIA CHAN, BERNSTEINRESEARCH, U.S. TELECOM, CABLE & SATELLITE 1 (2013).

<sup>52</sup> CRAWFORD, *supra* note 38, at 46.

<sup>53</sup> See *infra* pp. 2356–57.

<sup>54</sup> MOFFETT/NATHANSON RESEARCH, TAKEAWAYS FROM THE MOFFETT/NATHANSON BROADBAND POLICY SUMMIT 5 (2013).

<sup>55</sup> See CRAWFORD, *supra* note 38, at 157.

these lines and transmissions are not required by regulation to be passive neutral conduits, then, so the argument goes, they must be free to have the discretion to edit. If the providers are successful, heightened judicial scrutiny of any future regulatory or legislative attempt to constrain transport providers' editing powers or other economic activities will be the inevitable result.

Since 2005, the FCC has simultaneously classified high-speed Internet access as an unregulated service while purporting to (lightly) regulate it.<sup>56</sup> The legal game of Twister that the FCC has played is outlined in the footnote that followed that previous sentence; it has been prolonged and painful. And these legal gymnastics have created the context — now, the Open Internet Rules, and soon, the promised rewrite of the Telecommunications Act of 1996 — for the providers to remove Congress and the FCC from the business of economic regulation of American communications, even as the global economy becomes ever more dependent on information-based services.

### B. Market Structure

Cable has won: the marketplace for high-capacity (200 gigabytes (GB) of data per month), high-download-speed (100 Mbps) wired connections is dominated by a series of local cable monopolies that can

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<sup>56</sup> Beginning in August 2005, the FCC classified high-speed Internet access as an “information service” covered by its assertion of ancillary authority under Title I of the Telecommunications Act of 1996. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14,853, 14,862–65 (2005); *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd. 5901, 5909–11 (2007); *see also* *Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities*, 17 FCC Rcd. 4798, 4822–23 (2002). Also in August 2005, the FCC adopted a policy statement (but not a formal binding rule) regarding high-speed Internet access service. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14,986 (2005); *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1314 & n.7 (1992) (explaining that “policy statements” do not have force of law absent notice and comment process mandated by Congress in the APA). The FCC then ordered Comcast to cease activities that “r[an] afoul of” its policy statement. *Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13,028, 13,050 (2008). The D.C. Circuit vacated the order because the FCC had failed to demonstrate that it had “ancillary” authority under Title I of the Telecommunications Act of 1996 to adopt it. *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010). The FCC then launched a proceeding aimed at reclassifying high-speed Internet access as a “telecommunications service” subject to Title II of the Telecommunications Act of 1996. *Framework for Broadband Internet Service*, 25 FCC Rcd. 7866, 7866–67 (2010). Following the lobbying frenzy that ensued, the FCC adopted the Order challenged by Verizon under, again, an assertion of ancillary authority under Title I of the Telecommunications Act of 1996. *Preserving the Open Internet*, 25 FCC Rcd. 17,905 (2010), 76 Fed. Reg. 59,192 (Sept. 23, 2011) (the Order). On September 9, 2013, the D.C. Circuit heard argument in *Verizon*, Verizon’s challenge to the Order.

charge whatever they want.<sup>57</sup> This dominance is continuing to grow at an ever-increasing rate of speed.<sup>58</sup> Already, for high-capacity download speeds that are at least 6 Mbps and, more likely, above 25 Mbps, the vast majority of Americans have just one choice — their local cable incumbent.<sup>59</sup> Deep confusion has been injected into policy discus-

<sup>57</sup> From 1997 to 1999, the major cable operators executed a series of subscriber swaps and buyouts aimed at “clustering” (regionally concentrating) their operations. Somewhere between 40 and 50% of subscribers changed hands, with the result that by 2000 about 60% of cable subscribers were located in regional clusters controlled by a single operator. Brian J.M. Quinn, *Asset Specificity and Transaction Structures: A Case Study of @Home Corporation*, 15 HARV. NEGOT. L. REV. 77, 109 & n.112 (2010). Today, Comcast subscribers are “clustered in the mid-Atlantic, Chicago, Denver, and Northern California,” while Time Warner Cable’s subscribers are “clustered in . . . New York State (including New York City), the Carolinas, Ohio, Southern California (including Los Angeles), and Texas.” Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 28 FCC Rcd. 10,496, 10,540 (2013) (the FCC redacts specifics of this clustering). Where a cable operator has clustered its operations, it dominates the pay television market (and, thus, the market for bundled cable modem and pay television services). For example, as of mid-2010, Comcast maintained at least a 40% share in 13 of the 20 largest multi-channel video programming distributor markets in the United States, ranging from as low as 43% in Houston to as high as 62% in Chicago and 67% in Philadelphia. See Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc. for Consent to Assign Licenses & Transfer Control of Licensees, 26 FCC Rcd. 4238, 4285 & n.275 (2011). Comcast, with about 22 million subscribers, and Time Warner Cable, with about 12 million, collectively control the pay television market in 20 of the nation’s 25 largest metro areas. See Andrew Hart, *Comcast to Buy Time Warner Cable*, HUFFINGTON POST (Feb. 13, 2014, 7:46 AM), [http://www.huffingtonpost.com/2014/02/13/comcast-time-warner\\_n\\_4778175.html](http://www.huffingtonpost.com/2014/02/13/comcast-time-warner_n_4778175.html), archived at <http://perma.cc/3M74-AT6C>; Henry Mance, *Time Warner Cable Deal Extends Comcast’s Geographic Reach*, FIN. TIMES (Feb. 13, 2014), <http://www.ft.com/cms/s/0/6f747f4a-94a1-11e3-9146-001444feab7de.html>, archived at <http://perma.cc/T7FX-Z2KN>.

<sup>58</sup> Cable accounts for most net additions in high-speed Internet access subscriptions, as subscribers flee DSL. In the third quarter of 2013, 84% of the net high-speed Internet access additions for the quarter came from leading cable companies. Press Release, Leichtman Research Grp., About 520,000 Add Broadband in the Third Quarter of 2013 (Nov. 19, 2013), archived at <http://perma.cc/M3MK-UZNC>. For all of 2012, 88% of net additions went to the cable industry. *Cable Leads Growth in US Broadband Market in 2012*, TELECOMPAPER (Mar. 19, 2013, 5:05 PM), <http://www.telecompaper.com/news/cable-leads-growth-in-us-broadband-market-in-2012--932159>, archived at <http://perma.cc/9YAK-H297>.

<sup>59</sup> See MOFFETT, DEL DEO & CHAN, *supra* note 51, at 1–2 (noting that between 78% and 82% of the country has only one provider (cable) that can provide download speeds greater than 25 Mbps). About 9% of the United States is unserved by any fixed connection. See MOFFETTRESEARCH LLC, CABLE & SATELLITE BROADCASTING: THE NEXT TEN YEARS 42 (2013). In 42% of the country, cable, which is capable of being upgraded to 3 gigabytes per second (Gbps), has no competition other than legacy DSL services (1–10 Mbps) that are at least 100 times slower than cable. *Id.* In 35% of the country, cable has no competition other than fiber-to-the-node services (FTTN), *id.*, whose last portion is made up of copper wires; with technical squeezes (“pair bonding” and “vectoring”), these connections may be able to reach just 45 Mbps downloads that will then be shared between data and television. With a choice between FTTN and cable at 1–3 Gbps, consumers choose cable about 60% of the time. See *id.* In just 14% of America, cable companies face real competition from telco fiber to the home (FTTH) sold by Verizon. See MOFFETT/NATHANSON RESEARCH, *supra* note 54, at 5. In short, cable has a monopoly in the 42% of the country covered by legacy DSL and has a large advantage in the 35% covered by FTTN. See *id.* at 4–5; see also FED. COMM’NS COMM’N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 33–52 (2010), archived at <http://perma.cc>

sions in this area by the FCC's assertion that any connection of at least 4 Mbps for downloads and 1 Mbps for uploads is fast enough to be counted as "broadband" or "high-speed" access. This allows both the existing companies and the FCC to claim that everything is fine with "high-speed" access because above that modest threshold, there is plenty of competition (wireless, satellite, DSL over copper lines, cable modem, a little fiber) and if Americans are not subscribing at home it is because they are not interested. The reality is far different: mobile wireless and satellite services do not substitute for fixed wired services, Americans are fleeing DSL for cable, and the sole national provider of fiber-to-the-home access — which is a true competitor for cable — has elected to serve just 14% of the nation.<sup>60</sup>

First, wireless. Mobile wireless and satellite Internet access are both saddled with low data caps that make sustained uses at high capacity extraordinarily expensive; these uses, for that reason and because of the laws of physics, do not compete on the same field as wired access to the Internet.<sup>61</sup> To see why this is so, consider that the median wire access customer today uses about 30 GB of data per month.<sup>62</sup> Mean users of wired access are now using more than 50 GB of data per month.<sup>63</sup> Wireless plans from Verizon Wireless and AT&T, who lead this market, typically start at \$40 per month for 2 GB and then charge \$15 per gigabyte of data access (overage charges) thereafter.<sup>64</sup> This means that substitution of a wireless connection for a wired connection for the median customer would cost almost \$500 per month.<sup>65</sup> For the mean customer it would cost more than \$800.<sup>66</sup> Phil

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/Q8MB-gXGW. The FCC's latest numbers state that 83.8% of fixed connections of at least 10 Mbps download are cable connections; 14.8% are FTTH. INTERNET ACCESS SERVICES AS OF DEC. 2012, *supra* note 50, at 28.

<sup>60</sup> See MOFFETT/NATHANSON RESEARCH, *supra* note 54, at 5.

<sup>61</sup> I explain the physics of this in Susan P. Crawford, *The Looming Cable Monopoly*, YALE L. & POL'Y REV. INTER ALIA (June 1, 2010, 2:30 PM), [http://ylpr.yale.edu/inter\\_alia/looming-cable-monopoly](http://ylpr.yale.edu/inter_alia/looming-cable-monopoly). Craig Moffett, an industry analyst, asserts that cable capacity is 150,000 times that of wireless capacity; both depend on spectrum, but cable has many more frequencies inside its wires and those transmissions are not threatened by interference. MOFFETT/NATHANSON RESEARCH, *supra* note 54, at 7. We have just about exhausted the capacity of wireless transmissions to carry data; we have not yet approached the limits of fiber optic systems, which can carry infinitely more data than a wireless transmission. *See id.* at 6–7. Satellite systems continue to be burdened by the fact that they are 22,500 miles away from Earth. *Id.* at 23. Latency is a significant issue for satellite access, as is expense, and satellite connections often top out at 12 Mbps download speeds. *Id.* at 23–24.

<sup>62</sup> MOFFETT/NATHANSON RESEARCH, *supra* note 54, at 6.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

McKinney, the President of CableLabs (the research arm of the cable industry), recently said that he called AT&T and convinced the company that he wanted a 50 GB-per-month wireless data plan. AT&T quoted McKinney a service plan cost of \$500 per month, excluding voice services.<sup>67</sup> From a capacity perspective, as well as from a speed perspective, wireless is a complementary rather than competitive product.<sup>68</sup> It is telling that at least 83% of people with smartphones also have a high-speed Internet access connection at home — again, these technologies complement one another.<sup>69</sup>

Wireless, like wired, is a highly concentrated market, although arguably less so at this point than the wired side. On the wireless side, AT&T and Verizon are the dominant players; Sprint and T-Mobile lag far behind. AT&T and Verizon together account for about two-thirds of mobile wireless subscriptions,<sup>70</sup> and Verizon in the fourth quarter of 2012 added a record number of subscribers (2.1 million new postpaid accounts).<sup>71</sup> As of the fourth quarter of 2012, Verizon had almost 116 million subscribers (37.2%), and AT&T had 107 million (27.9%); Sprint had 55 million (about 12% of the market) and T-Mobile had 33 million (less than 10%).<sup>72</sup> AT&T and Verizon Wireless often act in lockstep, and their pricing is not constrained by that of Sprint or T-Mobile.<sup>73</sup>

Further demonstrating the complementarity of these two separate markets, the two sides, wired and wireless, cooperate with one another. Far from competing with Verizon Wireless, Comcast and Time Warner Cable offer bundles that include Verizon Wireless services.<sup>74</sup> Verizon

<sup>67</sup> *Id.* at 22.

<sup>68</sup> As of December 2012, nearly 60% of mobile connections in the United States “were slower than 3 Mbps in the downstream direction” (meaning data flowing to, rather than from, a user’s device). INTERNET ACCESS SERVICES AS OF DEC. 2012, *supra* note 50, at 7.

<sup>69</sup> JOHN B. HERRIGAN, TECHNET, BROADBAND ADOPTION IN 2012, at 4 (2012), *archived at* <http://perma.cc/RAC3-A5W6>.

<sup>70</sup> As of the end of the first quarter of 2013, Verizon’s share was 37.2%, AT&T’s was 27.9%, and the two combined to total 65.1% of the smartphone market. Robert Nazarian, *T-Mobile Loses Market Share While Verizon and AT&T Continue to Dominate*, TALK ANDROID (Apr. 30, 2013, 9:00 AM), <http://www.talkandroid.com/159929-t-mobile-loses-market-share-while-verizon-and-att-continue-to-dominate/>, *archived at* <http://perma.cc/W5EN-B79M>.

<sup>71</sup> Press Release, Verizon, Verizon Reports Strong Revenue and Customer Growth for Verizon Wireless and FiOS Services in 4Q 2012 (Jan. 22, 2013), *archived at* <http://perma.cc/UEX4-FZ6L>.

<sup>72</sup> Nazarian, *supra* note 70; *Grading the Top 10 U.S. Carriers in the Fourth Quarter of 2012*, FIERCEWIRELESS (Mar. 15, 2013), <http://www.fiercewireless.com/special-reports/grading-top-10-us-carriers-fourth-quarter-2012>, *archived at* <http://perma.cc/4XJ2-YPCB>.

<sup>73</sup> See Tero Kuitinen, *Are AT&T and Verizon Finally Going Too Far?*, FORBES (Aug. 24, 2012, 2:07 PM), <http://www.forbes.com/sites/terokuitinen/2012/08/24/are-att-and-verizon-finally-going-too-far/>, *archived at* <http://perma.cc/RMN9-6KJH>.

<sup>74</sup> See *Verizon Wireless with XFINITY Triple Play from Comcast*, COMCAST, <http://www.comcast.com/verizon-wireless.html> (last visited May 10, 2014), *archived at* <http://perma.cc/TG48-P826>; see also Karl Bode, *Cox, Time Warner Cable Expand Verizon Wireless Partnership*, DSLREPORTS (Oct. 23, 2012, 7:55 AM), <http://www.dslreports.com/shownews/Cox>

has made common cause with Time Warner Cable and Comcast to jointly market its wireless product with the wires sold by the cable guys, signaling that it will not be competing fiercely on the wired side of its business.<sup>75</sup>

Next, consider the wired side of high-speed Internet access services. Just five high-speed Internet access services providers — Comcast (20 million subscribers), AT&T (16 million), Time Warner Cable (12 million), Verizon (9 million), and Century Link (6 million) — account for 76% of U.S. wired high-speed Internet access subscriptions.<sup>76</sup> Each of these access providers also has an affiliated cable or telco video business, giving them a built-in conflict of interest when it comes to online services that might compete with their video revenue streams.

It matters what kind of wire these providers are selling. DSL is the high-speed Internet access product sold by telephone companies using their copper wires. Traditional DSL, which is present in 42% of the country,<sup>77</sup> is not truly high speed these days. If we take Netflix, the largest source of online traffic in the United States, as a proxy for future applications that will require high-capacity connections into homes and businesses, it suggests that consumers today require a 5 Mbps download service to watch HD-quality (high-definition) picture.<sup>78</sup>

According to the FCC's most recent numbers, the vast majority of current DSL subscribers' connections cannot handle this usage: although DSL does fine in serving very slow uses (say, checking email or Facebook), DSL's share of fixed connection subscriptions falls to just 26.2% for download speeds of at least 3 Mbps (the minimum recommended speed to stream just a single DVD-quality Netflix movie), and to just 7% of fixed connection subscriptions at the 10 Mbps threshold.<sup>79</sup>

If you wanted to plug more than one device into your home network and simultaneously allow two people in your household to watch

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-Time-Warner-Cable-Expand-Verizon-Wireless-Partnership-121744?nocomment=1, *archived at* <http://perma.cc/P6TX-4XA4>.

<sup>75</sup> In August 2012, the FCC approved Verizon Wireless's purchase of spectrum from several cable companies. As part of the spectrum transfer, Verizon Wireless entered into commercial agreements with the respective cable companies that, among other things, permitted the cross-selling of services. *See* Applications of Cellco P'ship d/b/a Verizon Wireless & SpectrumCo LLC & Cox TMI, LLC for Consent to Assign AWS-1 Licenses, 27 FCC Rcd. 10,698, 10,700, 10,750-53 (2012).

<sup>76</sup> *See* Press Release, *supra* note 58.

<sup>77</sup> MOFFETT/NATHANSON RESEARCH, *supra* note 54, at 4.

<sup>78</sup> *How Fast Should My Internet Connection Be to Watch Netflix?*, NETFLIX, <https://support.netflix.com/en/node/306#gsc.tab=0> (last visited May 10, 2014).

<sup>79</sup> *See* FED. COMM'NS COMM'N, INTERNET ACCESS SERVICES: STATUS AS OF JUNE 30, 2012, at 30 tbl.10 (2013), *archived at* <http://perma.cc/S3KN-3UW6> [hereinafter INTERNET ACCESS SERVICES AS OF JUNE 2012].

(or participate in) two different sessions of HD video, DSL would be useless: for connections of at least 10 Mbps, DSL's share as of mid-2012 was just 2.9% of fixed connection subscriptions — less than one out of every thirty connections.<sup>80</sup> The FCC's latest figures state that about 33% of fixed high-speed Internet access subscriptions are DSL.<sup>81</sup> But Americans with a choice are leaving DSL: while the cable industry's share of net new high-speed Internet access subscriptions steadily climbed between 2008 and 2012, DSL's share has been declining over the same period and is now firmly (and deeply) negative.<sup>82</sup>

By the second quarter of 2008, telco DSL services had begun losing subscribers, a trend that has continued since then. As a result, telco shares of new high-speed wired internet access subscriptions have plummeted from a healthy 54% in 2005 and 2006 to 20% for the first nine months of 2013.<sup>83</sup> The DSL customer base of the two big phone companies, AT&T and Verizon, shrank by nearly 56% for AT&T between 2009 and 2013 and 40% for Verizon.<sup>84</sup> During that same period, the nation's top two cable distributors, Comcast and Time Warner Cable, increased their cable modem subscriber base by 30% and 23%, respectively.<sup>85</sup> According to Leichtman Research Group, in 2012, 88% of new high-speed Internet access subscriptions went to the largest cable providers. For 2012 as a whole, less than one out of every seven new high-speed Internet access subscriptions went to anyone other than the cable companies.<sup>86</sup> Traditional DSL is not substitutable for cable at this point, given the availability of much higher speeds over cable.

DSL and cable modem services were roughly competitive in 2002:

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<sup>80</sup> *See id.*

<sup>81</sup> *Id.* at 27.

<sup>82</sup> *See id.*

<sup>83</sup> Author's own calculations, calculated using AT&T, INVESTOR BRIEFING: STRONG GROWTH IN WIRELESS & U-VERSE DRIVES REVENUE AND ADJUSTED EARNINGS PER SHARE GROWTH IN AT&T'S FOURTH-QUARTER RESULTS 8-10 (2013) [hereinafter AT&T'S FOURTH-QUARTER RESULTS]; Press Release, *supra* note 71.

<sup>84</sup> Author's own calculations, calculated using AT&T, AT&T FINANCIAL & OPERATIONAL RESULTS (2014), *archived at* <http://perma.cc/EYB4-PVPR>; AT&T'S FOURTH-QUARTER RESULTS, *supra* note 83; and VERIZON COMM'NS, INVESTOR QUARTERLY FOURTH QUARTER 14 (2013), *archived at* <http://perma.cc/Q4SK-LHSZ>. As of 2012, about a third of U.S. households subscribing to fixed high-speed Internet access took DSL; almost 60% of subscribing households had signed up for cable. INTERNET ACCESS SERVICES AS OF JUNE 2012, *supra* note 79, at 30 tbl.11.

<sup>85</sup> Author's own calculations, calculated using Press Release, Leichtman Research Group, 2.7 Million Added Broadband from Top Cable and Telephone Companies in 2012 (Mar. 19, 2013), *archived at* <http://perma.cc/F9B6-MT74>.

<sup>86</sup> *Id.*



about the same capacity and speed for about the same price. Since then, the upgrade path for cable, allowing far higher-speed downloads and uploads than DSL, has been much less expensive than that for the phone companies because the latter would have to dig up their copper and replace it with fiber. When cable operators, starting with Comcast, began rolling out DOCSIS 3.0 technology in 2008, DSL's ability to compete on speed went from limited to virtually non-existent.<sup>87</sup>

Now consider fiber. The communications capacity of a fiber-optic network running all the way into a home or business is, as far as we know, unlimited. Fiber connections are made of thin glass tubes through which lasers are shot; unlike DSL communications, which degrade very sharply over distance, the lights of fiber can go for miles, and photonics are continuing to improve. Fiber to the home (FTTH) (or business) is inarguably the best and most future-proof technology on the market; fiber installations will last thirty to fifty years. FTTH is also not subject to regulation or oversight in the United States, including any nondiscrimination or interconnection mandates. FTTH is substitutable for cable; indeed, it is a better technology because it allows for equal upload speeds while cable's shared neighborhood architecture severely crimps uploads.

But Verizon's FiOS is the only nationwide FTTH product, and this service is not available as a substitute for most cable subscribers.<sup>88</sup> Verizon has plans to reach 18 million U.S. households with its FiOS FTTH service,<sup>89</sup> and announced in March 2010 that it would go no further.<sup>90</sup> Although cable passes 93% of American homes,<sup>91</sup> Time

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<sup>87</sup> See Joel Hruska, *DOCSIS 3.0, Possible 100 Mbps Speeds Coming to Some Comcast Users in 2008*, ARS TECHNICA (Nov. 30, 2007, 7:19 AM), <http://arstechnica.com/gadgets/2007/11/docsis-3-o-possible-100mbps-speeds-coming-to-some-comcast-users-in-2008/>, archived at <http://perma.cc/467X-BBSB>. DOCSIS 3.0 is a cable modem protocol that can provide speeds of 160 Mbps down and 120 Mbps up by combining multiple channels to stream data. See *id.*; Iljitsch van Beijnum, *Meet DOCSIS, Part 2: The Jump from 2.0 to 3.0*, ARS TECHNICA (May 16, 2011, 2:00 PM), <http://arstechnica.com/business/2011/05/meet-docsis-part-2-the-jump-from-20-to-30/>, archived at <http://perma.cc/B2GL-HVXQ>.

<sup>88</sup> Interestingly, Verizon sells asymmetric service — slower uploads than downloads — and a relatively slow speed of download, even though there is likely no cost component to selling a different service.

<sup>89</sup> See Roger Cheng, *Verizon to End Rollout of FiOS*, WALL ST. J. (Mar. 30, 2010, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052702303410404575151773432729614>, archived at <http://perma.cc/X8PT-M3PQ>.

<sup>90</sup> See Susan P. Crawford, *The Communications Crisis in America*, 5 HARV. L. & POL'Y REV. 245, 248 (2011). FiOS will exist in the Washington metro area, and in some parts of California, Florida, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Texas, and Virginia. See *FiOS Coverage Areas & Availability*, VERIZON, <http://fios.verizon.com/fios-coverage.html> (last visited May 10, 2014), archived at <http://perma.cc/VV9Q-S2TS>.

<sup>91</sup> See *Industry Data*, NAT'L CABLE & TELECOMM. ASS'N, <https://www.ncta.com/industry-data> (last visited May 10, 2014), archived at <http://perma.cc/LY5F-FRHZ>.

Warner Cable faces competition from FiOS in just 11% of its territory;<sup>92</sup> Comcast, in 17% of its territory.<sup>93</sup>

AT&T, even more conservatively, has upgraded some of its DSL connections with additional fiber — fiber to the node, or neighborhood, plus copper wire going into houses. This fiber-to-the-node (FTTN) “U-verse” provides about 25 Mbps download speeds; with some expensive technical wizardry, some of these connections could be upgraded to as much as 45 Mbps download speeds (and very cramped uploads) that would be devoted to shared television and data connections.<sup>94</sup> But FTTN’s reliance on copper into homes limits its ability to communicate information swiftly. By contrast, cable will be capable of providing 1 Gbps speeds and, soon, 3 Gbps.<sup>95</sup> Faced with a choice between FTTN and cable, experts say Americans will choose cable.<sup>96</sup>

In the largest sense, AT&T and Verizon have effectively ceded the wired marketplace to the cable operators (with limited exceptions in targeted areas) and have retreated to wireless communications, where their profits are more secure.

Although most Americans have some kind of wired high-speed (more than 4 Mbps download speed) Internet access at home, nearly 100 million do not.<sup>97</sup> (And 19 million Americans cannot buy fixed Internet access at any price.) Recent data demonstrates that the digital divide is persistent, with close correlations between socioeconomic status and the presence or absence of fixed home Internet access.

According to a recent Pew Research Center (Pew) report, almost 90% of college graduates have “high-speed” Internet access at home, as do households earning more than \$75,000 per year.<sup>98</sup> Compare that to

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<sup>92</sup> MOFFETT/NATHANSON RESEARCH, *supra* note 54.

<sup>93</sup> MOFFETT/NATHANSON RESEARCH, CHARTER Q3 2013 EARNINGS 1 (2013).

<sup>94</sup> See Susan Crawford, *Was That a Book Review?*, 127 HARV. L. REV. F. 137, 139 (2014); Karl Bode, *AT&T Says 24 Mbps U-Verse Now Available Everywhere*, DSL REPORTS (Mar. 29, 2010), <http://www.dslreports.com/shownews/ATT-Says-24-Mbps-UVerse-Now-Available-Everywhere-107613>, archived at <http://perma.cc/XA55-RDYE>. With a substantial investment in pair-bonding and vectoring, some of these FTTN connections may get up to 45 Mbps. But these connections will be highly distance sensitive and will still need to be shared between TV and data. See Crawford, *supra*, at 139–40.

<sup>95</sup> See Jon Brodtkin, *Why Comcast and Other Cable ISPs Aren’t Selling You Gigabit Internet*, (Dec. 1, 2013, 8:00 PM), <http://arstechnica.com/information-technology/2013/12/why-comcast-and-other-cable-isps-arent-selling-you-gigabit-internet/>, archived at <http://perma.cc/BDH9-37P4>.

<sup>96</sup> See, e.g., MOFFETT, DEL DEO & CHAN, *supra* note 51.

<sup>97</sup> FED. COMMUN’NS COMM’N, EIGHTH BROADBAND PROGRESS REPORT 60 n.351 (2012), archived at <http://perma.cc/HXA6-FDHF>; JOHN B. HARRIGAN, KNIGHT FOUND., ADOPTION OF INFORMATION & COMMUNICATIONS TECHNOLOGIES IN THE UNITED STATES: NARROWING GAPS, NEW CHALLENGES 10 (2013).

<sup>98</sup> PEW RESEARCH CTR., HOME BROADBAND 2013, at 3 (2013), archived at <http://perma.cc/D2Q5-XVDG>.

only 37% of those who have not completed high school — as well as 54% of households with income less than \$30,000 — that have such access.<sup>99</sup> There continue to be racial differences as well, with blacks (64%) and Latinos (53%) less likely to have “high-speed” Internet access than whites (74%).<sup>100</sup> The urban (70%) versus rural (62%) divide also persists for high-speed Internet access.<sup>101</sup> But socioeconomic class trumps race when it comes to high-speed Internet access.<sup>102</sup>

Pew points out that many blacks and Latinos have smartphones — bringing their “high-speed” adoption numbers almost equal to that of whites if smartphone access is included in “high-speed.”<sup>103</sup> It should not be. Pew’s reports are reminders that people who depend on smartphones only are not able to do as many things online as those who have a truly high-speed, high-capacity wire at home. Again, because of cost and capacity limitations, wired and wireless methods of Internet access are not substitutes.

At the same time, consumer data consumption and delivery is a major revenue generator — not a cost center — for both wired and wireless high-speed Internet access providers. Some estimates put the incremental costs of delivering data from the edge of the access provider’s network to the consumer at about 1.4 cents per GB, down to about 1 cent per GB for the highest volume user.<sup>104</sup> Bernstein Research has called high-speed Internet access service from the cable companies an “almost comically profitable service, with direct gross margins of about 97%.”<sup>105</sup> In effect, the cable companies are close to having — if they do not have already — a terminating access monopoly in their clustered areas. Likewise, AT&T and Verizon have great power in the wireless marketplace.

In sum, deep factual confusion confounds the policy discussion in this area. Because the FCC labels anything other than dialup — any connection of at least 4 Mbps for downloads and 1 Mbps for uploads — as fast enough to be counted as “high speed,”<sup>106</sup> both the existing companies and

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<sup>99</sup> See *id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See Laura Sydell, *Class Trumps Race When It Comes to Internet Access*, NPR (Jan. 7, 2014, 4:29 AM), <http://www.npr.org/blogs/codeswitch/2014/01/07/260409016/class-trumps-race-when-it-comes-to-internet-access>, archived at <http://perma.cc/47US-JD8V>.

<sup>103</sup> See PEW RESEARCH CTR., *supra* note 98, at 5.

<sup>104</sup> See LEMAY-YATES ASSOCS., INC., *THE COST OF INCREMENTAL INTERNET TRANSIT BANDWIDTH IN THE LOCAL ACCESS CLOUD* 30 (2011).

<sup>105</sup> BERNSTEIN RESEARCH, *U.S. TELECOMMUNICATIONS AND U.S. CABLE & SATELLITE: NATURE VERSUS NURTURE* 44 (2012).

<sup>106</sup> See *INTERNET ACCESS SERVICES AS OF DEC. 2012*, *supra* note 50, at 4 n.5.

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the FCC can argue that there exists no dearth of competition in the market for “high-speed” access because above the FCC’s low threshold, there exist ample alternatives — including wireless, satellite, DSL, cable modem, and fiber — and if Americans are not subscribing, it is because they have no interest in doing so.

Available data reveals a very different picture. On the wired side of the picture, Americans are fleeing DSL for cable modem service. And the cable industry, which is the only choice for high-capacity uses for more than 80% of Americans, is under no pressure from either competition or oversight to charge reasonable rates or upgrade its last mile lines to the fiber-optic services that would allow for symmetrical (equal upload and download) uses. Americans have vanishingly few choices when it comes to reasonably priced, high-capacity, high-speed Internet access.<sup>107</sup> And we are leaving more Americans behind all the time, because communications inequalities will amplify and further entrench existing socioeconomic inequalities.

In this country we have a stagnant, uncompetitive market for wired high-capacity, high-speed access and a slightly less-stagnant separate market for (very expensive) mobile Internet access.

### C. *The Providers’ Attack*

The providers’ challenge to the FCC’s Open Internet Rules is historic. It is an attack on the idea that the government has any role in ensuring ubiquitous, open, world-class, interconnected, reasonably priced Internet access, either administratively (by virtue of authority delegated to the FCC by Congress) or through Congress itself. The attack at the agency level is strong and stems from some elaborate legal gymnastics that the FCC has carried out in order to regulate with one hand while claiming to deregulate with the other. (This Article does not address those arguments.<sup>108</sup>) That attack is all about policy — decisions made by an expert agency against a backdrop of assumed legal authority. My view is that we will get through that policy battle one way or another.

The far more profound attack represented by Verizon’s lawsuit and the arguments of the cable industry is on congressional authority under the Commerce Clause to say anything at all about high-speed Internet access without intense and speech-protective judicial scrutiny. The

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<sup>107</sup> Google Fiber will serve just 0.5% of Americans. MOFFETTRESEARCH LLC, *supra* note 59, at 12.

<sup>108</sup> For a discussion of these issues, see Susan Crawford, Op-Ed, *An Internet for Everybody*, N.Y. TIMES, Apr. 11, 2010, at WK12.

providers are claiming that in their capacity as companies selling general-purpose two-way transport of communications they are the same as the *New York Times*, and that any effort by the government to constrain their ability to slice, dice, discriminate, or make deals with content providers or other interconnecting networks about the conditions of high-speed Internet access should be subject to heightened judicial scrutiny and potentially found unconstitutional under the First Amendment.

As revealed by Verizon's filings in its D.C. Circuit appeal, the providers' quest for editorial freedom is wholly economic in nature. Deep in Verizon's opening brief, the company claimed that the Rules "limit [high-speed Internet access providers'] own speech and compel carriage of others' speech,"<sup>109</sup> but its introduction to its arguments said that the rules "limit[] the ability of providers to employ two-sided pricing models" in which high-speed Internet access providers charge additional fees to content and application providers and "effectively prohibit[] price discrimination among edge providers because all must pay the *identical* rate."<sup>110</sup> It is these economic freedoms on which the providers are focused.

Saying that the Constitution protects all those who participate in the "communication of ideas,"<sup>111</sup> Verizon made four speech-related functional claims, all of which have been echoed by the cable industry. First, Verizon argued that it (and all other high-speed Internet access providers) develops its own content.<sup>112</sup> Second, it pointed out that it "partner[s] with other content providers and adopt[s] that speech as [its] own."<sup>113</sup> Third, it argued that it "transmit[s] the speech of others."<sup>114</sup> Fourth, it claimed that with respect to all three of these functions it possesses "editorial discretion."<sup>115</sup> As to this editorial discretion, Verizon said:

Just as a newspaper is entitled to decide which content to publish and where, broadband providers may feature some content over others. Although broadband providers have generally exercised their discretion to allow all content in an undifferentiated manner, they nonetheless possess discretion that these rules preclude them from exercising. For example,

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<sup>109</sup> Joint Brief for Verizon and MetroPCS, *supra* note 2, at 43.

<sup>110</sup> *Id.* at 17.

<sup>111</sup> *Id.* at 42 (quoting *City of L.A. v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986)) (internal quotation marks omitted).

<sup>112</sup> *Id.* at 43.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (internal quotation marks omitted).

they could distinguish their own content from that of other speakers or offer that capability to others. In fact, some types of speech, such as live streaming high-definition video, could benefit from (or may only be available with) differential treatment, such as prioritization. Broadband providers could also give differential pricing or priority access to their over-the-top video services or other applications they provide, or otherwise feature that content.<sup>116</sup>

Verizon argued that the Open Internet Rules contravene its speech-related editorial powers in five ways. First, the Rules remove Verizon's control over transmission — what speech it transmits and how that speech is transmitted.<sup>117</sup> Second, the Rules force Verizon to carry others' speech.<sup>118</sup> Third, the Rules limit Verizon's ability to obtain access to additional streams of revenue, which will have the secondary result of limiting Verizon's "ability to speak and deliver speech."<sup>119</sup> Fourth, the Rules threaten non-Internet access services (called "specialized services") by saying that such services may be regulated if the FCC decides that they are "retarding the growth" of high-speed Internet access service.<sup>120</sup> Fifth, the Rules constrain Verizon's commercial speech by forbidding the company from advertising "specialized services"<sup>121</sup> as "Internet" services.<sup>122</sup>

Verizon claimed that heightened scrutiny should be applied to the Rules. First, the company argued that the Rules' constraints and limitations are speaker-based — they "treat[] broadband providers differently than other similarly-situated speakers (like content providers)" — and are thus subject to strict scrutiny.<sup>123</sup> Second, Verizon asserted that even as a content-neutral regulation, the Rules have an effect on speech that should be subject to intermediate scrutiny.<sup>124</sup> Under that standard, the Rules must (1) "advance[] important governmental interests unrelated to the suppression of free speech" and (2) "not burden substantially more speech than necessary to further those interests."<sup>125</sup>

To push onto the playing field to which heightened scrutiny of any flavor (as compared to ordinary review of an economic statute or regulation) would be applied, Verizon's goal is to have a court (any court) say that when it is selling high-speed Internet access it is "just like" a

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<sup>116</sup> *Id.* at 43–44 (citations omitted).

<sup>117</sup> *Id.* at 44.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (quoting Preserving the Open Internet, 76 Fed. Reg. 59,192, 59,214 (Sept. 23, 2011)).

<sup>121</sup> *Id.* at 44 (quoting Preserving the Open Internet, 76 Fed. Reg. at 59,193) (internal quotation marks omitted).

<sup>122</sup> *See id.* at 44–45.

<sup>123</sup> *Id.* at 45 n.13 (citing *Turner I*, 512 U.S. 622, 659 (1994)).

<sup>124</sup> *Id.* at 45 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

<sup>125</sup> *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 189 (1997) (citing *O'Brien*, 391 U.S. at 377); *accord* *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 97 (2d Cir. 2009).

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newspaper or a cable television distributor. Once it has achieved that status, it will be able to tie its fortunes to at least one of two major Supreme Court First Amendment cases: the seminal right-of-reply newspaper freedom case, *Miami Herald Publishing Co. v. Tornillo*,<sup>126</sup> or the more recent must-carry case in the pay television arena, *Turner I*. If and when the Communications Act of 1996 is rewritten, the providers' constitutional arguments will, if adopted by a court or taken seriously by Hill staffers, give them great negotiating latitude.

Both of these cases are inapposite, however, because the providers' status when selling high-speed access to the Internet is indistinguishable from a telephone system's function as a conduit for others' speech — notwithstanding what the FCC has said about this topic as a policy matter over the last few years. The next Part of this Article explains why.

## II. THE PUBLIC PERSPECTIVE

The game of regulatory-classification Twister for high-speed Internet access services that has been playing out since 2005 is beside the point: however high-speed internet access services are characterized by the FCC, the public expects them to be nondiscriminatory, general-purpose, and interconnected, just as our landline telephone services are. And, indeed, the companies themselves sell Internet access services in just this fashion. As it turns out, there are deeply rooted legal reasons for this perspective that turn on the function being provided by Comcast, Time Warner Cable, Verizon, and AT&T when they sell high-speed Internet access. Following centuries of social and legal practice, that function should be overseen by government, whether or not its providers have market power.<sup>127</sup> Here, of course, there is ample evidence of market failure, but that is just icing on the cake. It is the function that matters.

### A. *The Legal Classification of General-Purpose Transport Providers*

Certain industries, particularly in telecommunications and transportation, operate under a common law tradition of public interest regulation in England and America that has not been forgotten by the

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<sup>126</sup> 418 U.S. 241 (1974).

<sup>127</sup> Given the difficulty the FCC has in overseeing this industry, it may make sense as a first step for mayors in the United States to build a neutral ("dark," unlit) fiber infrastructure that would be controlled by each city but would not serve customers directly. With this wholesale facility in place, new competitive FTTH providers could provide an array of competing services to homes and businesses. This model has been employed with great success in Stockholm. See generally BENOÎT FELTEN, DIFFRACTION ANALYSIS, STOCKHOLM'S STOKAB: A BLUEPRINT FOR UBIQUITOUS FIBER CONNECTIVITY? (2012), archived at <http://perma.cc/9NNY-LNB2>. Over time, federal policy would need to change in response to the actions of mayors.

general public. Much ink has been devoted to this history. As a reminder, courts formulated separate but closely related “public utility” and “common carrier” doctrines over hundreds of years in order to ensure that industries “affected with a public interest”<sup>128</sup> provided equal access to goods and services that were viewed as essential to the growth of the nation.<sup>129</sup> The terms “public utility” and “common carrier” overlap and are sometimes used interchangeably;<sup>130</sup> both of these terms carry with them the idea that these sorts of entities were required by the state to provide service “under rates and practices that were just, reasonable, and non-discriminatory.”<sup>131</sup>

This shared essence reflects the common heritage of these two concepts: both are rooted in medieval laws that imposed special duties — such as nondiscrimination and liability for losses — on *professionals* offering services to the public.<sup>132</sup> A small group of professionals, in

<sup>128</sup> *Munn v. Illinois*, 94 U.S. 113, 130 (1877) (internal quotation marks omitted).

<sup>129</sup> “Public utility” refers to an industry that provides a homogenous commodity, such as electrical power or water, over a distribution network that it owns and operates. See Thomas B. Nachbar, *The Public Network*, 17 *COMMLAW CONSPPECTUS* 67, 108 (2008) (“[P]ublic utilities . . . are integrated firms that provide both a commodity and the network over which it is carried . . .”). Although they may be privately owned, public utilities are regulated by the government in order to achieve uniformity in the quality and price of the commodity they offer, and to ensure the continued maintenance and expansion of their distribution network. *Id.* at 73–74. Public utilities are often franchised by the government, insulating them from competition in exchange for consent to regulation. *Id.* (noting that the franchise includes a duty to serve all who apply, may include a duty to expand service, and often is accompanied with the grant of a monopoly).

“Common carrier” refers to publicly accessible entities charged with transporting people, goods, or communications from one point to another for a fee. Common carriers historically faced liability for losses and were required to make their services available to all similarly situated customers on equal terms. See Barbara A. Cherry, *How Elevation of Corporate Free Speech Rights Affects Legality of Network Neutrality*, 63 *FED. COMM. L.J.* 591, 619 (2011); Crawford, *supra* note 21, at 878. The Telecommunications Act of 1996’s definition of “common carrier” is circular. See 47 U.S.C. § 153(11) (2006 & Supp. V 2011) (defining a “common carrier” as “any person engaged as a common carrier for hire”). The Commission has interpreted this term to exclude providers of “information services,” defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, . . . or making available information via telecommunications,” *id.* § 153(24). See *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 *FCC Rcd.* 5901, 5919 (2007). The more commonsense approach to this classification issue would be to say that high-speed Internet access providers that also sell pay television packages are selling both common carriage services and cable television; one entity can provide several different types of services.

<sup>130</sup> Cherry, *supra* note 129, at 620.

<sup>131</sup> Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 *COLUM. L. REV.* 1323, 1331 (1998).

<sup>132</sup> See Edward A. Adler, *Business Jurisprudence*, 28 *HARV. L. REV.* 135, 154 (1914) (“[C]ommon’ . . . meant in this connection, ‘open to public service.’”); Joseph H. Beale, Jr., *The Carrier’s Liability: Its History*, 11 *HARV. L. REV.* 158, 163 (1897) (“From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a ‘common’ or public occupation; and for a similar reason public officials were subjected to the same exceptional treatment. Such persons were innkeepers, victuallers, taverners, smiths, farriers, tailors, carriers, ferrymen, sheriffs, and gaolers.” (footnotes omitted)).



those ancient days, was labeled as being engaged in a “common employment.”<sup>133</sup> As society developed larger free markets, the medieval nomenclature of “common employment” (or “public calling”) fell out of use. However, certain industries — including those classified as common carriers or public utilities — continued to be governed by the rules against discrimination that had applied to anyone engaged in a “common employment.”<sup>134</sup>

In the United States, longstanding judicially created common law duties became the basis for upholding public interest legislation imposed on critical, infrastructural, networked industries. For instance, in upholding price and access regulations on grain elevators, *Munn v. Illinois*<sup>135</sup> quoted an English common law treatise to support the idea that the state was constitutionally permitted to regulate the use of private property particularly for those industries that were “affected with a public interest” by requiring nondiscrimination and public access.<sup>136</sup> Transportation-related industries were frequently found to be affected by that same interest and subject to the same duties.<sup>137</sup> (Even during the *Lochner* era, during which economic regulations were viewed with unprecedented judicial skepticism as being unconstitutional infringements on the use of private property, courts continued to uphold regulations directed at common carriers and public utilities.<sup>138</sup>) Then, in

<sup>133</sup> Beale, *supra* note 132, at 163.

<sup>134</sup> See Adler, *supra* note 132, at 157–60 (“In ordinary trades there ceased to be any need for a distinction between the *common* and the private exercise of a trade. . . . In the case of the carrier’s trade, however, there were peculiar internal characteristics which brought it constantly before the courts.” *Id.* at 157–58.).

<sup>135</sup> 94 U.S. 113 (1877).

<sup>136</sup> *Id.* at 126 (“[A person] may make a ferry for his own use or the use of his family, but not for the common use of all the king’s subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable.” (quoting Matthew Hale, *De Jure Maris*, in 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 5, 6 (Francis Hargrave ed., 1787))); see also *Budd v. New York*, 143 U.S. 517, 545 (1892) (upholding regulation of grain elevators as “being incident to the business of transportation and to that of a common carrier, and thus of a quasi-public character”).

<sup>137</sup> Common carriers, like railroads, ferries, and taxi services, were regulable, as were grain elevators, cold-storage units, and stockyards. See *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 427 (1914) (Lamar, J., dissenting) (“The fact that rate-statutes, enacted and sustained since the adoption of constitutional government in this country, all had some reference to transportation or distribution, is a practical illustration of the accepted meaning of ‘public use’ when that phrase was first employed in American constitutions, and when turnpikes and carriers, wharfingers and ferrymen had rates, tolls and fares fixed by law.”); *State Pub. Utils. Comm’n v. Monarch Refrigerating Co.*, 108 N.E. 716, 720 (Ill. 1915) (cold storage); *Ratcliff v. Wichita Union Stockyards Co.*, 86 P. 150, 153 (Kan. 1906) (stockyards).

<sup>138</sup> See, e.g., *Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418 (1927); *German Alliance*, 233 U.S. 389.

1934, the Supreme Court in *Nebbia v. New York*<sup>139</sup> said that judicial line drawing between industries affected with a public interest and other industries was no longer necessary: all industries were subject to state police power, and economic regulation would be deferred to without the necessity of carrying out the *Munn* categorization.<sup>140</sup>

Nonetheless, the idea of “common carriage” persisted, both in public consciousness and in the regulation of telegraph and telephone companies as general-purpose, networked industries akin to transportation (but now carrying communications from place to place instead of goods).<sup>141</sup> We continue to understand that these medieval concepts of nondiscrimination and public access are relevant. And implementation of these concepts is justified not because of the market power of the actors (after all, inns in olden days and taxis today are both common carriers even though they do not hold monopolies) but because of the status these categories of entities occupy.<sup>142</sup> They are critical

<sup>139</sup> 291 U.S. 502 (1934).

<sup>140</sup> *Id.* at 533 (“Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.’ Thus understood, ‘affected with a public interest’ is the equivalent of ‘subject to the exercise of the police power’; and it is plain that nothing more was intended by the expression.” (citation omitted) (quoting *Munn*, 94 U.S. at 126)).

<sup>141</sup> See *Tyson*, 273 U.S. at 430 (“The authority to regulate the conduct of a business . . . exists only where the business or the property involved has become ‘affected with a public interest.’ . . . Certain properties and kinds of business it obviously includes, like common carriers, telegraph and telephone companies, ferries, wharfage, etc.”); *Chesapeake & Potomac Tel. Co. v. Balt. & Ohio Tel. Co.*, 7 A. 809, 811 (Md. 1887) (“The telegraph and telephone are important instruments of commerce, and their service, as such, has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public.”); see also *Budd*, 143 U.S. at 541–43 (citing numerous cases where regulation of telephone and telegraph services was upheld as within the boundaries of common carrier regulations); *Ellis v. Am. Tel. Co.*, 95 Mass. 226, 231–32 (1866) (upholding a law imposing nondiscrimination and price controls on a telegraph service as merely “assimilat[ing] the duties and obligations . . . which the law attaches to that of common carriers,” *id.* at 232); *State ex rel. Webster v. Neb. Tel. Co.*, 22 N.W. 237, 239 (Neb. 1885) (“That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great portion of the civilized world, cannot be questioned. . . . It has assumed the responsibilities of a common carrier of news. It has and must be held to have taken its place by the side of the telegraph as such common carrier.”).

<sup>142</sup> Nachbar, *supra* note 129, at 96–100 (“Not only does the market power theory face historical problems, but it also faces jurisprudential ones. The early history of common carrier regulation is devoid of any mention of monopoly, nor is market power an element of modern common carrier regulation of many industries.” *Id.* at 97 (footnote omitted)); cf. Brief of Amici Curiae Reed Hundt et al. in Support of Appellee, *supra* note 3, at 27 n.8 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964)) (“While mature threats to competition can be important reasons for imposing antidiscrimination or equal access obligations, they are not constitutionally-required prerequisites.” (internal quotation marks omitted)).

general-purpose nodes in networked, physical systems associated with moving things or speech across the surface of the earth.<sup>143</sup>

High-speed Internet access services are the functional, modern-day equivalent of these earlier networks and must plainly be included in this conceptual framework. As Professor Thomas Nachbar has persuasively argued, “[i]t should be self-evident . . . that modern communications networks like [those providing access to] the Internet are prototypical candidates for the imposition of traditional non-discriminatory access obligations.”<sup>144</sup>

Indeed, today’s providers of high-speed Internet access themselves market their services on this basis. All of their materials convey information about speed and price, the basic parameters of transport, and say nothing about editing or quality — much less private negotiations. Comcast tells customers that the company has “The Fastest Internet,” saying “High Speed Internet Service by XFINITY gives you reliably fast speeds with the most coverage in your home so everyone can get online and connect all of their devices at the same time.”<sup>145</sup> “What’s so great about FiOS [Quantum Internet]?” asks Verizon.<sup>146</sup> It answers its own question: “FASTER DOWNLOADS, BETTER STREAMING. Get to the entertainment you love faster. Download an album or HD movie in minutes.”<sup>147</sup>

Both this ancient history and the companies’ current practices fit with the two-prong legal test requiring the FCC to designate a communications company as a common carrier under certain circumstances. This test stems from a pair of 1976 D.C. Circuit decisions: *National Ass’n of Regulatory Utility Commissioners v. FCC*<sup>148</sup> (*NARUC I*) and *National Ass’n of Regulatory Utility Commissioners v. FCC*<sup>149</sup> (*NARUC II*). The first prong explores whether the service provider offers to carry communications indifferently. The second prong assesses whether those communications are of the user’s own choosing.

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<sup>143</sup> Nachbar, *supra* note 129, at 102–09 (“Nondiscriminatory access appears to be the rule for physical networks even in the absence of economic forces that typically characterize networks.” *Id.* at 102.).

<sup>144</sup> *Id.* at 113.

<sup>145</sup> *High Speed Internet Service by XFINITY Internet from Comcast*, COMCAST, <http://www.comcast.com/internet-service.html> (last visited May 10, 2014), *archived at* <http://perma.cc/Y3J8-RVZS>.

<sup>146</sup> *FiOS Internet*, VERIZON, <http://fios.verizon.com/fios-internet.html> (last visited May 10, 2014), *archived at* <http://perma.cc/4L7A-47FC>.

<sup>147</sup> *Id.*

<sup>148</sup> 525 F.2d 630 (D.C. Cir. 1976) (upholding FCC designation of a group of private mobile service providers as common carriers not subject to the traditional rate and service provisions of the Communications Act of 1934). So-called “private carriage” services are those for which terms are individually negotiated.

<sup>149</sup> 533 F.2d 601 (D.C. Cir. 1976).

Both steps of the *NARUC* test clearly apply to high-speed Internet access.

In *NARUC I*, the court held that in deciding whether to impose common carrier duties on a service provider, “[t]he key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use.”<sup>150</sup> From the D.C. Circuit’s perspective, the dividing line between private and common carriers was the carrier’s own undertaking to “carry for all people indifferently.”<sup>151</sup> Where, as a matter of “practice and experience,” a particular category of entity was shown to be holding its services out to the public, “then the Commission *must* determine its responsibilities from the language of the Title II common carrier provisions.”<sup>152</sup>

Similarly, in *NARUC II*, the court reviewed the classification by the FCC of two-way, non-television, intrastate communications over cable systems as non-common carriage.<sup>153</sup> Cautioning that “it has long been held that ‘a common carrier is such by virtue of his occupation,’ that is by the actual activities he carries on,”<sup>154</sup> the D.C. Circuit found that,

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<sup>150</sup> 525 F.2d at 642.

<sup>151</sup> *Id.* at 641–42 (quoting *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960)) (“Since given private and common carriers may therefore be indistinguishable in terms of the clientele actually served, it is difficult to envision a sensible line between them which does not turn on the manner and terms by which they approach and deal with their customers. The common law requirement of holding oneself out to serve the public indiscriminately draws such a logical and sensible line between the two types of carriers.” *Id.* at 642. “It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so.” *Id.* at 641.); see also *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (“[T]he indiscriminate offering of service on generally applicable terms . . . is the traditional mark of common carrier service.”). The FCC has itself used the *NARUC* test. See, e.g., *NORLIGHT Request for Declaratory Ruling*, 2 FCC Rcd. 5167, 5168 (1987) (ruling that offering was private carriage because it involved a relatively stable clientele, was tailored to the special requirements of each customer, and was provided under negotiated contract terms).

<sup>152</sup> *NARUC I*, 525 F.2d at 644 (emphasis added); see also *id.* (“[W]e reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. . . . A particular system is a common carrier by virtue of its *functions*. . . .” (emphasis added)). The FCC’s 1998 Universal Service Report is to the same effect: “Congress[] direct[ed] that the classification of a provider should not depend on the type of facilities used. . . . Its classification depends rather on the nature of the service being offered to customers.” Federal-State Joint Board on Universal Service, 13 FCC Rcd. 11,501, 11,530 (1998) (footnote omitted). The Commission also noted that “[a] telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure.” *Id.* The nature of the service in turn “depends on the functional nature of the end-user offering.” *Id.* at 11,543.

<sup>153</sup> The Commission had wanted to classify those services as “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting” under its Title I ancillary jurisdiction. *NARUC II*, 533 F.2d at 611 (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968)) (internal quotation mark omitted).

<sup>154</sup> *Id.* at 608 (quoting *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211 (1927)).

in fact, two-way transmission service provided by a cable operator was a common carriage service.<sup>155</sup>

Importantly, the *NARUC II* court added a second prong to the test used by the *NARUC I* court to draw a line between private and common carriage: if the system is designed such that “customers ‘transmit intelligence of their own design and choosing,’”<sup>156</sup> and the first test of “holding out” is met, then the system is a common carriage system and must be designated as such by the Commission.<sup>157</sup> Under this second prong, the two-way point-to-point data path that had been sold by the cable distributors in *NARUC II* was a common carriage system; as the court put it, “most, if not all, of the uses to which the two-way, non-video cable capability is likely to be put fall within the term ‘carrier.’”<sup>158</sup>

In the context of high-speed Internet access, both prongs of the *NARUC II* test (which expanded on the *NARUC I* formulation) are met.<sup>159</sup> First, the providers of high-speed Internet access unquestionably hold themselves out to the public as being willing to “carry for all people indifferently.” Second, the information they transport in connection with their high-speed Internet access services is carried at the

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<sup>155</sup> *Id.* at 616–17. And such two-way cable services, at that point in history, were regulated at the state level. *Id.* at 616.

<sup>156</sup> *Id.* at 609 (quoting Amendment of Parts 2, 91, and 919 of the Commission’s Rules Insofar as They Relate to the Industrial Radiolocation Service, 5 F.C.C.2d 197, 202 (1966)).

<sup>157</sup> *See id.* at 608–09. The court was quite firm on this point: “any two-way use of cable in which the customer explicitly or implicitly determines the transmission or content of the return message, satisfies this second prerequisite to common carrier status.” *Id.* at 610 (footnote omitted). This “indifferent carriage” test of *NARUC II* came from a 1966 report and order issued by the Commission, which interpreted the Communications Act of 1934 to apply common carrier regulations to industries that served as common carriers “in the ordinary sense of the term.” Amendment of Parts 2, 91, and 99 of the Commission’s Rules Insofar as They Relate to the Industrial Radiolocation Service, 5 F.C.C.2d at 202. Thus, while the *NARUC* test was devised by the D.C. Circuit, it was crafted in a way that reflected both the common law history of common carriage, discussed extensively in *NARUC I*, and the FCC’s own understanding of how that designation applied in the communications context. *See NARUC II*, 533 F.2d at 609–11. The FCC has also found that the eligible public is not limited to end users but may include services offered to other carriers or service providers. *See, e.g.,* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd. 21,905, 22,032–33 (1996).

<sup>158</sup> *NARUC II*, 533 F.2d at 610. Because the congruence between the FCC’s desire to preempt state authority over this common carriage service and its clear statutory power over broadcast was slight or nonexistent, the court found that its claim that its authority in the *NARUC II* context was “reasonably ancillary to broadcasting” was unsustainable. *Id.* at 617.

<sup>159</sup> *See U.S. Telecom Ass’n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (“[C]ommon carrier status turns on: (1) whether the carrier ‘holds himself out to serve indifferently all potential users’; and (2) whether the carrier allows ‘customers to transmit intelligence of their own design and choosing.’” (quoting Fed.-State Joint Bd. on Universal Serv., 14 FCC Rcd. 3040, 3050 (1999))). The “transmission” element of the *NARUC* test often takes on less importance than the “holding out” prong. *See Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 746–47 (8th Cir. 2009).

direction of customers. Accordingly, these are common carriage-like services, however the FCC has chosen to designate them currently as a matter of political expediency. It is the FCC that deviated from the traditional definition by failing to follow decades of shared understanding about basic two-way communications infrastructure; its classification as a policy matter of high-speed Internet access service as a non-common carriage service should not be deferred to by courts<sup>160</sup> — or Hill staffers.

The providers themselves elect to be treated like common carriers when it is convenient. Although Verizon attempts to liken its provision of high-speed Internet access services to the publication of newspaper content<sup>161</sup> or the distribution of pay television services,<sup>162</sup> when selling this transport service it is not considered to be liable for the “printed” content it transmits. Unlike a “provider . . . of an interactive

<sup>160</sup> Deference would be inappropriate under either *Chevron* Step One or Step Two. Under Step One, “[t]he judiciary . . . must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (citations omitted). Under Step Two, the FCC’s classification is manifestly contrary to the statute and, therefore, cannot survive scrutiny. *See id.* at 843–44. At the least, the FCC’s classification is not supported by reasoned decisionmaking and, therefore, is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting) (“[T]he Commission has attempted to establish a whole new regime of *non-regulation* . . . through an implausible reading of the statute . . .”). The analysis of disputed agency action under *Chevron* Step Two and arbitrary and capricious review is often “the same, because under *Chevron* step two, [the court] ask[s] whether an agency interpretation is ‘arbitrary or capricious in substance.’” *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011) (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011)) (internal quotation marks omitted). In recent years, the FCC has ignored the *NARUC II* test, focusing instead on market power considerations when deciding whether a particular category of service should be “common carriage.” *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 84 F.C.C.2d 445, 534 (1981) (“[T]he holding out test developed from cases dealing with the tort liability standard for transportation common carriers. These liability standards were never applied to communications companies.”); Richard S. Whitt, *Evolving Broadband Policy: Taking Adaptive Stances to Foster Optimal Internet Platforms*, 17 COMMLAW CON-SPECTUS 417, 477 (2009) (describing evolution of FCC view of *NARUC II* test). In this instance, the market power of the carriers provides merely an additional reason to classify them as common carriers. Their function in society is sufficient for this classification to be appropriate, and the statutory language being construed by the Commission — the definition of “telecommunications services” — is decisive.

<sup>161</sup> *See* Joint Brief for Verizon and MetroPCS, *supra* note 2, at 43 (“Just as a newspaper is entitled to decide which content to publish and where, broadband providers may feature some content over others.”); *see also* *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>162</sup> *See* Joint Brief for Verizon and MetroPCS, *supra* note 2, at 43 & n.12 (citing *Turner I*, 512 U.S. 622, 628–29 (1994)). *Turner I* is cited routinely by the providers for two propositions: First, “cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.” *Turner I*, 512 U.S. at 636. And second, absent a finding of market power, the government may not infringe on the cable operators’ editorial discretion. *See id.* at 661.

computer service” under the Communications Decency Act,<sup>163</sup> a “newspaper may not defend a libel suit on the ground that the falsely defamatory statements [it published] are not its own.”<sup>164</sup> Indeed, Verizon itself has frequently successfully avoided liability for content or other obligations by availing itself of the status of a conduit rather than a publisher.<sup>165</sup> And it is unquestionably aware that it is doing something different than the *New York Times* is doing. A reader of the *New York Times* does not expect to be able, as Verizon suggested to the FCC in connection with its negotiations over the Order, “to connect with any other person . . . he or she wants to”<sup>166</sup> or be provided with unmediated access to “content . . . as diverse as human thought”<sup>167</sup> under *Reno v. ACLU*.<sup>168</sup>

As for Internet access being “just like” cable pay distribution services, *Turner I* did not say that when a cable distributor acts like a conduit it is “speaking” under the First Amendment; cable operators’ distribution functions were protected “[o]nce [they] . . . selected the

<sup>163</sup> 47 U.S.C. § 230(c)(1) (2006).

<sup>164</sup> *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 386 (1973) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)).

<sup>165</sup> See, e.g., *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1237 (D.C. Cir. 2003) (overturning subpoena seeking personal information of Verizon customers where Verizon was “acting as a mere conduit for the transmission of information sent by others”); *Doe v. GTE Corp.*, 347 F.3d 655, 656, 659, 661–62 (7th Cir. 2003) (affirming dismissal of case against “subsidiaries of Verizon,” *id.* at 656, for hosting website that featured illegally recorded videos, explaining that the company, “like a delivery service or phone company, is an intermediary and [not] . . . liable for the sponsor’s deeds,” *id.* at 659); Brief for Appellant at 3, *Recording Industry Ass’n*, 351 F.3d 1229 (Nos. 03-7015, 03-7053) (arguing that “[t]he [Digital Millennium Copyright Act] . . . makes clear that Internet service providers, such as Verizon, enjoy the same immunities that have traditionally applied to other entities that provide pure ‘transmission’ or ‘conduit’ functions”). Other cases are in accord. See *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 132 (2d Cir. 2008) (holding that cable system operator did not “make[]” unauthorized copies of copyrighted broadcasts its equipment recorded at subscribers’ direction); *In re Charter Commc’ns, Inc., Subpoena Enforcement Matter*, 393 F.3d 771, 777 (8th Cir. 2005) (quashing subpoena on cable Internet access provider because it was “acting as a conduit”). In an amicus brief filed in *National Cable & Telecommunications Association v. Gulf Power Co.*, 534 U.S. 327 (2002), Verizon explained that the statutory definitions of “cable service,” see 47 U.S.C. §§ 522(6), 153(7) (2000), “plainly cannot encompass” broadband Internet access, Brief for the United States Telecom Association and Verizon Communications as Amici Curiae in Support of Reversal at 19, *National Cable & Telecommunications Ass’n*, 534 U.S. 327 (Nos. 00-832, 00-843), which Verizon described as a “transport service,” *id.* at 18, and a “transparent conduit’ for content . . . selected by an end user and [o]riginated by a third party,” *id.* at 22.

<sup>166</sup> Google and Verizon Joint Submission on the Open Internet at 2, GN Docket No. 09-191 (Fed. Commc’ns Comm’n Jan. 14, 2010); see also Brief of Amici Curiae Reed Hundt et al. in Support of Appellee, *supra* note 3, at 11.

<sup>167</sup> *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)) (internal quotation mark omitted).

<sup>168</sup> 521 U.S. 844.

programming sources.”<sup>169</sup> The providers of high-speed Internet access in America are not — yet — doing that.

It is unquestionably true that all the high-speed Internet access providers *also* sell noninteractive, one-way, television-like services. That has no effect on the common carriage-like, conduit status of their Internet access services.<sup>170</sup> As the *NARUC II* court said, “Since it is

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<sup>169</sup> 512 U.S. 622, 629 (1994). The relevant language in *Turner I* comes from a case in which a city had *rejected* a competing cable distributor’s application for a municipal franchise, at a time when that behavior was still legal. See *Preferred Commc’ns, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff’d sub nom. City of Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488 (1986). The Supreme Court later agreed that “[t]he business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content.” *Preferred Communications*, 476 U.S. at 494 (quoting statements of respondents) (internal quotation marks omitted). The Ninth Circuit had previously decided that the city’s interest in protecting public land from additional infrastructure was not enough “to counterbalance the risk that diversity in editorial judgments will be limited by the City’s determination to choose the cable providers that it will permit to use the medium,” *Preferred Communications*, 754 F.2d at 1406–07, and the Supreme Court then upheld the competing cable operator’s claim that his operations would *increase* that diversity, see *Preferred Communications*, 476 U.S. at 494 (“Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats.”). Here, in the context of high-speed Internet access — providing access to something that is as “diverse as human thought” — there can be no argument that Verizon’s selective discrimination will increase communications diversity, much less convey a substantive message. For this reason, once Verizon starts selecting programming for special treatment (something it has declared it would like to do), it may be, in effect, choosing its First Amendment status for itself. See *infra* section III.B, pp. 2388–91.

Verizon also cited *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000), a strange case from the very early days of the commercial Internet brought by cable companies that wanted to choose their own ISPs out of thousands of existing ISPs, a choice that was restricted by a county ordinance, *id.* at 686–87. See Joint Brief for Verizon and MetroPCS, *supra* note 2, at 44. The *Broward* court understood the operators’ argument to be about the choice of an “Internet *information channel*,” 124 F. Supp. 2d at 694 (emphasis added), and gave credit to the operators’ claims that the choice was based on content because they “consider[ed] some Internet providers unacceptable because of offensive or hateful programming,” *id.* at 691. The court agreed with the operators that if the ordinance required them to connect to any ISP that asked, the result might be “offensive” “Internet information services” programming crossing the operators’ systems. *Id.* at 697. The court also credited the idea that choosing an ISP required the operators “to forego other programming because of the physical limitations of their system.” *Id.* at 691. In the end, the court decided that the cable operators were not selling transmissions but instead offering “a collection of content,” *id.* at 693, that Internet access was just one of several channels the operator would sell, and that the operators had made a choice of Internet access channel based on avoiding “offensive or hateful programming,” *id.* at 691. The court accordingly found a county ordinance requiring cable operators to allow subscribers to choose their own Internet access providers to be an unconstitutional content-based regulation of speech. *Id.* at 698. *Broward* has no application today. None of the large marketers of high-speed Internet access today says that it is providing “less offensive” Internet access. Indeed, none of them claims it is doing anything other than selling a particular speed of access at a particular price. And no consumer views Internet access as one of many channels. It is its own separate category.

<sup>170</sup> As the Commission has noted, “services composing a single bundle at the point of sale — for instance, local telephone service packaged with voice mail — can retain distinct identities as sepa-



clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.”<sup>171</sup>

Increasingly, Americans expect that high-speed Internet access — now essential to modern life, as the telephone was in its day — is available to anyone willing to pay for it and carries the data he or she wants it to carry on his or her behalf. The providers of that service have identified themselves for legal purposes as conduits when that classification is expedient. Most consumers would be shocked by the idea that the providers of that service could have escaped all forms of oversight by virtue of mere administrative classification; the common carriage concept lives deeply in both common law and our collective memory.

### B. *The Economic Goals of the Carriers*

While the providers’ filings are full of lofty language about “First Amendment freedoms”<sup>172</sup> and the “communication of ideas,”<sup>173</sup> admissions made by Verizon’s counsel at oral argument make clear that Verizon’s interest in the case is primarily economic. By escaping the nondiscrimination rules that come with common carriage, the providers stand to become the gatekeepers of a “two-sided market,”<sup>174</sup> in which they can charge edge providers for access to their captive subscribers (as well as continue capturing consumer surplus on the subscriber side). (The cable operators say much the same things to their investors that Verizon said to the D.C. Circuit at oral argument.) Rather than expanding to additional subscribers or upgrading their systems to fiber optics, the providers want to make more money from

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rate offerings for classification purposes.” Framework for Broadband Internet Service, 25 FCC Rcd. 7866, 7891 n.158 (2010) (citing, among other things, Federal-State Joint Board on Universal Service, 13 FCC Rcd. 11,501, 11,530 (1998) (“It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail.”)). Similarly, that Comcast and other network access providers bundle their Internet access services with other services at the point of sale (television, home security, email boxes, storage) would not change the classification of their high-speed Internet access offering.

<sup>171</sup> *NARUC II*, 533 F.2d 601, 608 (D.C. Cir. 1976); see also *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181, 196 (4th Cir. 1994), *vacated sub nom. United States v. Chesapeake & Potomac Tel. Co. of Va.*, 516 U.S. 415 (1996) (per curiam) (holding that telephone companies “are not members of ‘the press’” when transmitting telephone calls, but had speech rights in providing video programming).

<sup>172</sup> Joint Brief for Verizon and MetroPCS, *supra* note 2, at 45 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>173</sup> *Id.* at 42 (quoting *Preferred Communications*, 476 U.S. at 494) (internal quotation marks omitted).

<sup>174</sup> Oral Argument at 28:53–28:54, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (Nos. 11-1355, 11-1356), available at <http://www.c-span.org/video/?314904-1/verizon-v-federal-communications-commission-oral-argument>.

their existing infrastructure.<sup>175</sup> They are in harvesting mode. They want to lower the risk that economic regulation lies ahead, and they are using the First Amendment as a means toward that end.

Given the current tension between the market structure of fixed high-speed Internet access (highly concentrated) and the function of that service (basic two-way transport connectivity offered to the end-user public), absent government intervention (through reclassification and effective oversight) the providers' own economic desires will likely dictate how Internet access evolves in America.

When asked by Judge Rogers during the September 9 argument what the facts were about Verizon's charging of "edge providers" (like Netflix and YouTube) as a condition of reaching Verizon's subscribers, Helgi Walker, Verizon's lawyer, said:

[W]hat the Agency has done here is shut down and prevent the development of a two-sided market with respect to Internet services. . . . And I'm authorized to state by my client today that, but for these rules, we would be exploring those commercial arrangements. . . . [T]here would be a market were it not for these rules, and my client wants the freedom to explore that.<sup>176</sup>

Verizon's plan is to act like a cable pay television distributor when it is selling high-speed Internet access. It would like the power to choose channels, make deals with them, and then distribute them to end-user subscribers.

Judge Silberman understood Verizon's suggestion:

Judge Silberman: And furthermore, if you're allowed to charge . . . if someone refused to pay, then just like in the dispute between CBS and [Time Warner Cable], you could refuse to carry.

Counsel for Verizon: Under these rules, we can't, but in a free market, we could.<sup>177</sup>

The kerfuffle between CBS and Time Warner Cable during the late summer of 2013, when CBS content was unavailable to 3.2 million Time Warner Cable subscribers in Los Angeles, New York, Dallas, and smaller markets for a month, had been resolved one week prior to the

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<sup>175</sup> As Michael Fries, Liberty Global's chief executive officer, puts it:

So our goal is not to maximize customers per se, that's not what we're in business to do. We're in business to generate optimal returns to shareholders, and that means driving the most profitable growth we can out of the marketplace [by making more money from the same number of people], and driving revenue and operating cash flow improvements quarter after quarter.

Online Recording: Telephone Conference on Q2 2013 Earnings, held by Liberty Global plc, at 26:05–26:24 (Aug. 2, 2013), available at <http://edge.media-server.com/m/p/ydtkuop6/lan/en>.

<sup>176</sup> Oral Argument at 28:49–30:16, *Verizon*, 740 F.3d 623.

<sup>177</sup> *Id.* at 25:50–26:12.

argument.<sup>178</sup> Judge Silberman was pointing out that, absent government intervention, Verizon's Internet access services would be just like Time Warner Cable's television distribution product from an end-user perspective — a curated, managed, subscription-based product.

The cable industry has the same gatekeeping plan for high-speed Internet access. John Malone, the cable titan who chairs the board of the largest international cable operator, Liberty Global,<sup>179</sup> sees high-speed Internet access as the center of the cable industry's strategy. His vision is that cable distributors will be able to charge online programming distributors (or at least exact favorable wholesale pricing from them), thus creating the two-sided market that Verizon plans to explore. He is also urging the cable industry to move en masse to usage-based billing of customers, applying the same kinds of caps to data access over wires that the wireless companies have been charging for wireless data connectivity:

In my view, in the world of the future, you'll have various tiers of connectivity with various levels of over-the-top [online video] access bundled into it. You probably also get to bit charges, buckets, where there is a use-based program that goes into broadband connectivity, so that, you know, Reed [Hastings, Netflix CEO] has to bear in his economic model some of the cost of the capacity that he's burning. So I think all of those will come to pass over time.<sup>180</sup>

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<sup>178</sup> Ronald Grover & Liana B. Baker, *CBS Win Squeezes Time Warner Cable's Margins: Analysts*, YAHOO! NEWS (Sept. 3, 2013, 10:44 AM), <http://news.yahoo.com/cbs-win-squeezes-time-warner-cables-margins-analysts-041149610--finance.html>, archived at <http://perma.cc/Q88Y-R45J>. CBS had sought "retransmission consent" payments from Time Warner Cable for rights to online distribution of CBS content through Time Warner Cable's TV Everywhere product, and withheld its content from Time Warner Cable's pay television product until the distributor conceded. Cynthia Littleton & Todd Spangler, *CBS, Time Warner Cable Reach Deal to End Blackout*, VARIETY (Sept. 2, 2013, 2:14 PM), <http://variety.com/2013/tv/news/cbs-time-warner-cable-reach-deal-to-end-blackout-1200596315>, archived at <http://perma.cc/XVS4-GB3P>. According to Fusion Research, "[t]he dispute ended in a fee increase per subscriber from around \$0.56 per month [for CBS programming] to around \$2.00, signaling a percentage change of around 250%. . . . If we assume the fee increase on this [3.2 million] subscriber base, it would result in Time Warner increasing its payment to CBS by around \$55.29 million per year." Fusion Research, *Time Warner Cable: Doing It the Microsoft/Comcast Way*, SEEKING ALPHA (Sept. 13, 2013, 3:19 AM), <http://seekingalpha.com/article/1692412-time-warner-cable-doing-it-the-microsoft-comcast-way>, archived at <http://perma.cc/XX8Q-VC3P>.

<sup>179</sup> As of June 30, 2013, Liberty Global had 24.5 million customers in 47 million homes across fourteen markets (including twelve contiguous countries in Europe). Online Recording, *supra* note 175, at 2:23-2:32.

<sup>180</sup> Online Recording: Annual Meeting of Shareholders, held by Liberty Media Corporation, at 25:37-26:15 (June 4, 2013), available at <http://www.shareholder.com/visitors/event/build2/mediapresentation.cfm?companyid=ABEA-4CW8ZW&mediaid=59488>.

All of this is about price discrimination being carried out by the dominant industry provider of wired high-speed Internet access. That's the way Malone sees it:

Cable is clearly winning in the U.S., the broadband connectivity game. I think something like 90% plus of all net adds of broadband are on the cable side of the equation. Once FiOS ran out of steam, the game is really being won by cable. And if cable can get its act together [through further consolidation and collaboration as an industry] and add to that access to [online] content, I wouldn't be surprised if you'll see over-the-top service providers that are wholesale to the cable operator, retail to the consumer, and that are bundled and discounted with the broadband connectivity side of the product offering. As that transpires, I think it's going to change the game pretty dramatically.<sup>181</sup>

Compared to the ideal of common carriage, in which information is transported on a nondiscriminatory basis from one place to another, Malone's strategy would unquestionably create dramatic change. Successful execution of this strategy will not be difficult: absent oversight, these actors (Verizon and AT&T for wireless, Comcast and Time Warner Cable for wired access) will have the power to act as gatekeepers on both sides of the two-sided market these companies envision, charging both programmers (think any Internet application that requires high capacity and high bandwidth) and end-user subscribers without restraint, and shaping the information ecosystem for Americans.<sup>182</sup>

### III. OPTIMAL FIRST AMENDMENT TREATMENT OF HIGH-SPEED INTERNET ACCESS

During oral argument on September 9, Judge Silberman suggested strongly that Verizon, wearing its hat as a provider of high-speed Internet access services, was protected by the First Amendment:

I'm a little concerned about the First Amendment issue. . . . Suppose an edge provider is offering anybody with access lessons on how to build or construct chemical weapons to be used against the United States. . . . And Verizon says "we're not going to allow that edge provider to have access to our customers." Is it your view that there's no First Amendment issue when FCC says "no, no, you have to have free access"?<sup>183</sup>

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<sup>181</sup> *Id.* at 26:34–27:18.

<sup>182</sup> The providers are already squeezing interconnecting networks, charging them more to connect. See Jon Brodtkin, *Why YouTube Buffers: The Secret Deals That Make — And Break — Online Video*, ARSTECHNICA (July 28, 2013, 9:00 PM), <http://arstechnica.com/information-technology/2013/07/why-youtube-buffers-the-secret-deals-that-make-and-break-online-video/>, archived at [perma.cc/7S72-YM9E](http://perma.cc/7S72-YM9E).

<sup>183</sup> Oral Argument at 1:03:41–1:04:26, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (Nos. 11-1355, 11-1356), available at <http://www.c-span.org/video/?314904-1/verizon-v-federal-communications-commission-oral-argument>.

The FCC's general counsel, Sean Lev, responded that he didn't believe Verizon had a stronger First Amendment argument than the law schools had in *FAIR*, pointing out that Verizon had argued many times in other contexts that it was a conduit.<sup>184</sup> Judge Silberman pressed Lev to concede that his argument led to the inevitable conclusion that the Commission was treating Verizon as a common carrier,<sup>185</sup> and then noted that the court would not have to reach the First Amendment issue "under certain circumstances."<sup>186</sup>

The D.C. Circuit overturned the FCC on statutory grounds while ignoring the First Amendment issues raised by Verizon.<sup>187</sup> But Verizon and the cable companies will undoubtedly continue to make the claim (both in the media and in courts and legislatures) that their high-speed Internet access services are entitled to the protection of the First Amendment. This Part engages the doctrinal, policy, and normative issues involved in responding to these claims. In section A, I look at the relationship between Chief Justice Roberts's careful decision in *FAIR* and the key arguments made by the providers. I then describe the government's reasons for taking steps to preserve the openness of general-purpose communications networks. Section B considers the providers' attempt to constitutionalize the government's exercise of power from an institutional perspective.

#### A. Case Analysis

1. *FAIR* and *Verizon*. — Chief Justice Roberts's opinion on behalf of a unanimous Supreme Court in *FAIR* provides the framework for any consideration of the providers' First Amendment claims as high-speed Internet access providers. In *FAIR*, the Solomon Amendment<sup>188</sup> compelled law schools to grant military recruiters access to the schools' job recruiting facilities, notwithstanding the schools' disapproval of the recruiters' views about gay and lesbian students' fitness for service.<sup>189</sup> The schools claimed that the requirement amounted to compelled speech.<sup>190</sup> The Court rejected that argument, noting that the

<sup>184</sup> *Id.* at 1:04:50–1:05:02.

<sup>185</sup> *Id.* at 1:06:46–1:07:10.

<sup>186</sup> *Id.* at 1:07:10–1:07:16. At this point in the argument, Judge Silberman appeared to be convinced by Verizon's suggestion that there would have to be a showing of "bottleneck monopoly control" by distributors of high-speed Internet access in order for the FCC (or Congress) to require common carriage-like treatment of their facilities. Joint Brief for Verizon and MetroPCS, *supra* note 2, at 46 (quoting *Turner I*, 512 U.S. 622, 661 (1994)) (internal quotation marks omitted). As discussed *supra*, market power is not an essential element of common carriage treatment. It is the nature of the service, not the power of the operator, that dictates its categorization as a common carrier.

<sup>187</sup> *See Verizon*, 740 F.3d at 634, 655–59.

<sup>188</sup> 10 U.S.C. § 983 (2012).

<sup>189</sup> *See FAIR*, 547 U.S. 47, 51–53 (2006).

<sup>190</sup> *See id.* at 62.

statute involved neither limited what the law schools could say nor required them to say anything.<sup>191</sup>

The *FAIR* Court first addressed whether the Solomon Amendment regulated speech at all. Chief Justice Roberts found that the requirement to provide equal access to military recruiters, “as a general matter, . . . regulates conduct, not speech. It affects what law schools must *do* — afford equal access to military recruiters — not what they may or may not say.”<sup>192</sup> Here, similarly, any common carriage–like treatment of high-speed Internet access providers, as a general matter, is not regulating their speech. As in *FAIR*, the providers’ obligation would be merely to transmit the speech of others on an equal basis.<sup>193</sup>

Chief Justice Roberts’s opinion in *FAIR* emphasized that the law schools were not being told to deliver any particular message, noting that the Solomon Amendment did not require expression by law schools akin to the forced Pledge of Allegiance in *West Virginia State Board of Education v. Barnette*<sup>194</sup> or the forced “Live Free or Die” motto in *Wooley v. Maynard*.<sup>195</sup> Here, similarly, any common carriage–like treatment of high-speed Internet access would not involve any obligation to adopt a governmental message or, indeed, dictate the content of speech at all.

The providers claimed that by being required to carry the speech of others they were being forced to accommodate or host other speakers’ messages, and cited *Turner I* in support of this claim.<sup>196</sup> This is the crux of the matter: Verizon, in particular, claims that it retains the right to edit transmissions, that its “exercis[e] [of] editorial discretion”<sup>197</sup> puts it in the same category as a pay television distributor, and that this editorial discretion is being interfered with.<sup>198</sup> (Indeed, Verizon implied that it plays the same role as the editorial staff in *Tornillo*, saying, “Just as a newspaper is entitled to decide which content to

<sup>191</sup> See *id.* at 60.

<sup>192</sup> *Id.* *FAIR*’s focus on conduct has been criticized. See Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217, 243 (“No prior majority opinion on the subject has suggested that in deciding whether conduct is expressive we should look *only* at the conduct itself, rather than at both the conduct and the context in which it occurs.”). But whether the focus is on conduct alone or conduct plus context, the key point is that there must be meaningful expression.

<sup>193</sup> See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981) (“[T]he government has legitimate interests in controlling the noncommunicative aspects of the medium, but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects.” (citation omitted)); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 47 (D.C. Cir. 1977), *cert. denied sub nom. FCC v. Home Box Office, Inc.*, 434 U.S. 829 (1977) (noting that the First Amendment does not preclude government regulation of noncommunicative aspects of speech).

<sup>194</sup> 319 U.S. 624 (1943).

<sup>195</sup> 430 U.S. 705 (1977); see *FAIR*, 547 U.S. at 61.

<sup>196</sup> See Joint Brief for Verizon and MetroPCS, *supra* note 2, at 42–43 (citing *Turner I*, 512 U.S. 622, 636 (1994)).

<sup>197</sup> *Id.* at 42 (first alteration in original) (quoting *Turner I*, 512 U.S. at 636).

<sup>198</sup> See *id.* at 42–45, 43 n.12.

publish and where, broadband providers may feature some content over others.”<sup>199</sup>) As in *FAIR*, however, Verizon would have to show that its own message was affected by the speech it was required to accommodate, or that the requirement interfered with its ability to communicate its own message.<sup>200</sup> But Verizon’s compelled-speech claim is far less plausible than the one rejected unanimously in *FAIR*.<sup>201</sup>

What the providers are doing is not inherently expressive. Verizon appears to have claimed that because much of the data that passes over the network Verizon operates is “speech” protected by the First Amendment,<sup>202</sup> Verizon’s act of transmitting data in the course of providing its customers access to the Internet is itself within the freedom of speech.<sup>203</sup> But as a transmitter of bits it lacks the expressive quality of a parade,<sup>204</sup> a newsletter,<sup>205</sup> the editorial page of a newspaper,<sup>206</sup> or

<sup>199</sup> *Id.* at 43.

<sup>200</sup> *Cf.* Nat’l Ass’n of Mfrs. v. NLRB, 717 F.3d 947, 958 (D.C. Cir. 2013) (intimating that in the absence of compulsory government-devised messages, a compelled-speech violation can only occur where “the complaining speaker’s own message was affected by the speech it was forced to accommodate” (quoting *FAIR*, 547 U.S. at 63) (internal quotation marks omitted)). *Tornillo* involved a challenge to a Florida right-of-reply statute, which afforded any candidate for public office who was “assailed regarding his personal character or official record by any newspaper” the right to have the newspaper print the candidate’s reply statement. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 244 (1974). The disposition of *Tornillo* turned on the Court’s recognition that the statute ignored the reality that the imposition on the newspaper consumed “space that could be devoted to other material the newspaper may have preferred to print.” *Id.* at 256; *see also id.* at 256–57. Verizon’s claim of “compelled speech” is also far less substantial than the one upheld in *National Association of Manufacturers v. NLRB*, 717 F.3d 947. Unlike the regulation *National Association of Manufacturers* invalidated, which required employers to convey to employees a particular, government-formulated message with which they disagreed (and pressured employers who might otherwise maintain silence on the subject of union organization to express their objections), *see id.* at 950, 958, the FCC’s noninterference requirements raise no specter of government-enforced orthodoxy.

<sup>201</sup> Indeed, Verizon’s claim that it is being forced to subsidize speech with which it may not agree is uncomfortably similar to claims made by racially discriminating businesses during the civil rights movement and should be summarily dismissed if made again before a court today as those claims were then. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 175–76 (1976) (“[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.” *Id.* at 176.); *Bell v. Maryland*, 378 U.S. 226, 245–46 (1964) (“The corporation that owns this restaurant did not refuse service to these Negroes because ‘it’ did not like Negroes. The reason ‘it’ refused service was because ‘it’ thought ‘it’ could make more money by running a segregated restaurant.” *Id.* at 245.); *cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243–44, 261 (1964) (dismissing hotel’s Thirteenth Amendment challenge to federal antidiscrimination law).

<sup>202</sup> *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].”).

<sup>203</sup> *See Joint Brief for Verizon and MetroPCS, supra* note 2, at 42–44.

<sup>204</sup> *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572–73 (1995).

<sup>205</sup> *See Pac. Gas. & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 13 (1986).

<sup>206</sup> *See Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974).

a pay television distributor.<sup>207</sup> There is nothing inherently expressive about transmitting others' data packets, at a subscriber's direction, over the Internet. Instead, Verizon — wearing its hat as a high-speed Internet access provider — facilitates the speech of others in order to make money.<sup>208</sup>

Nor does Verizon explain what particularized message (of Verizon's) such transmission would seek or likely be understood to convey. Only conduct that is (1) "inherently expressive"<sup>209</sup> (which this is not) or (2) evinces "[a]n intent to convey a particularized message . . . that . . . would be understood [as such]" by its audience is considered to be within the circle of the freedom of speech.<sup>210</sup> Communication of a particular message requires a speaker who transmits some substantive message or messages to a listener who can recognize that message. Here, by contrast, even if Verizon did start discriminating against particular network interconnection points or began to favor particular transmissions, it is likely that the company would hide this behavior in order to protect its reputation. After all, Verizon has recently said:

[W]hen a person accesses the Internet, he or she should be able to connect with any other person that he or she wants to . . . [T]he minute that anyone, whether from the government or the private sector, starts to control how people access and use the Internet, it is the beginning of the end of the Net as we know it.<sup>211</sup>

In the past, network operators that have throttled or blocked particular content have done so secretly.<sup>212</sup> Such secretive behavior is

<sup>207</sup> See *Turner I*, 512 U.S. 622, 636–37 (1994).

<sup>208</sup> *Turner I*'s support for discretion over channels as a basis for First Amendment protection for pay television operators does not — at the moment — apply to Verizon's function as a high-speed Internet access provider. Verizon has said that all broadband providers now allow all content to flow in an undifferentiated manner. Joint Brief for Verizon and MetroPCS, *supra* note 2, at 43; see also *id.* at 51 ("[B]roadband providers today generally provide subscribers access to all lawful [Internet] content and have strong economic incentives to continue to do so." (citation omitted)). As section III.B describes, the providers' ability to say that they are "just like" a pay television operator will increase with the passage of time and continued deregulatory treatment. See *infra* pp. 2388–91.

<sup>209</sup> *FAIR*, 547 U.S. 47, 66 (2006).

<sup>210</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (first alteration in original) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)) (internal quotation mark omitted); cf. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 957–59 (D.C. Cir. 2013) (striking down as compelled speech NLRB requirement that employers post notification of collective bargaining rights where government had "selected the message and ordered its citizens to convey that message," *id.* at 957). See generally Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673 (2011).

<sup>211</sup> Google and Verizon Joint Submission on the Open Internet, *supra* note 166, at 2, 7.

<sup>212</sup> See, e.g., Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13,028, 13,031 n.23, 13,031–32 (2008) (noting that Comcast had denied trying to degrade service purposefully and had instead accomplished its aim by "injecting forged RST packets," *id.* at 13,031 n.23, that instructed both ends of a connection to hang up on one another); *id.* at 13,065 (statement of Chairman Kevin J. Martin)



very distant from announcing a particular viewpoint. Indeed, network access providers today systematically disfavor interconnecting networks that have not paid them for access to the providers' subscribers; although the reduced quality of service is perceived by end-users, no one explains what has happened or why. Again, this is hardly the conveyance of a substantive message. And Verizon makes no claim that its own actual speech would be eliminated or narrowed by the imposition of common carriage-like rules.

To the extent that high-speed Internet access providers are obliged to transmit speech with which they might disagree (the "chemical weapons" hypothetical raised by Judge Silberman<sup>213</sup>), and this requirement somehow amounts to compelling speech, such an effect is plainly incidental to legal treatment of providers' networks as general-purpose, two-way communications transport vehicles — that is, incidental to regulation of conduct. As Chief Justice Roberts pointed out in *FAIR*: "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."<sup>214</sup> And, as in *FAIR*, compelling a communications carrier to carry all the speech of interconnecting networks "is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is."<sup>215</sup> Common carriage is a neutral regulation.

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("Comcast was delaying subscribers' downloads and blocking their uploads. . . . Even worse, Comcast was hiding that fact by making effected [sic] users think there was a problem with their Internet connection or the application.")

<sup>213</sup> See Oral Argument at 1:03:40–10:04:26, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (Nos. 11-1355, 11-1356), available at <http://www.c-spanvideo.org/program/Veriz>.

<sup>214</sup> *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501–04 (1949) (holding that the state may enjoin conduct with an expressive component where that conduct is designed to violate a neutral state antitrust law)) (internal quotation marks omitted). *FAIR* picked up on this point, noting that a ban on race-based hiring may require employers to remove "White Applicants Only" signs. *Id.* (internal quotation marks omitted). Similarly, "an ordinance against outdoor fires" might legitimately forbid "burning a flag," as opposed to "an ordinance against dishonoring the flag." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992).

<sup>215</sup> *FAIR*, 547 U.S. at 62. The Second Circuit recently reached a similar conclusion in the context of program carriage (a regime set up under the 1992 Cable Act requiring distributors of video not to discriminate against programmers based on their ownership affiliations). See *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 142–43, 158–59 (2d Cir. 2013). In that case, cable television operators claimed that strict scrutiny applied because the Commission examined content in deciding whether the program carriage regime was triggered by a particular programmer's complaint. See *id.* at 158. The Second Circuit rejected the content-based argument in its entirety, pointing out that the program carriage regime neither was triggered by any particular message nor mandated that the cable companies support views they opposed. See *id.* at 158–59.

Inssofar as the providers are arguing that their equivalent carriage of others' speech would send the message that these companies agree with speech that they find objectionable, the *FAIR* opinion makes clear that this claim will fail. As in *PruneYard Shopping Center v. Robins*,<sup>216</sup> there is little risk that the owner of a high-speed two-way general-purpose data transport network will be identified with the views of those using the facilities.<sup>217</sup>

Verizon implicitly argues that its conduct in charging for access to its subscribers is expressive; it suggests that what it wants to "express" is its wish to disadvantage a competitor or "disapproval" of an application unwilling to pay Verizon to prioritize data packets.<sup>218</sup> Taken to its extreme, Verizon's position would allow any business conduct, however illegal, to be constitutionally protected expression every time it had an expressive intent behind it or called on a medium of expression in order to be understood.

*FAIR*, again, is instructive. Chief Justice Roberts pointed out that in order for a law school's disapproval of military recruiters to be understood as a message, the school would have to say what it meant; that "explanatory speech is necessary is strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants" protection by the First Amendment.<sup>219</sup> And the Court noted that if conduct plus an explanation was enough to summon heightened scrutiny, then every tax evader could "announce[] that he [or she] intends . . . to express . . . disapproval of the Internal Revenue Service by refusing to pay . . . income taxes," and courts would have "to determine whether the Tax Code violates the First Amendment."<sup>220</sup> If business decisions made for business reasons were constitutionally protected speech, every government regulation would be a presumptively unconstitutional abridgment.<sup>221</sup>

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<sup>216</sup> 447 U.S. 74 (1980); *see id.* at 87–88 (upholding a state-law prohibition against excluding peaceful expressive activity from shopping centers because "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the [shopping center's] owner," *id.* at 87).

<sup>217</sup> *See FAIR*, 547 U.S. at 65.

<sup>218</sup> *See* Joint Brief for Verizon and MetroPCS, *supra* note 2, at 44 (suggesting that the regulation's negative impact on Verizon's ability to engage in differential pricing or treatment strategies directly flows from the alleged infringement of Verizon's "speech rights").

<sup>219</sup> *FAIR*, 547 U.S. at 66.

<sup>220</sup> *Id.*

<sup>221</sup> Although this issue was not raised in *FAIR*, Verizon claimed that strict scrutiny of any common carriage-like regime is required because high-speed Internet access providers have been singled out for regulation while search portals and app-store operators have been excluded. Joint Brief for Verizon and MetroPCS, *supra* note 2, at 46–48. The recent Second Circuit opinion in the context of cable-distributor program carriage rules found that speaker-based distinctions can be appropriate where they are not "based on the content of programming each group offers." *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 159 (2d Cir. 2013) (quoting *Turner I*, 512 U.S. 622, 658–59 (1994)) (internal quotation marks omitted). That court noted that the application of strict scru-

Finally, Verizon claims that any common carrier–like treatment of its facilities must be shown to serve an “important or substantial governmental interest”<sup>222</sup> and not to “burden substantially more speech than is necessary to further the government’s legitimate interests” in order to survive scrutiny.<sup>223</sup> Because common carriage is a neutral regulation entitled to ordinary economic review, heightened scrutiny would be inappropriate. At the most, the lower standard of intermediate scrutiny articulated in *FAIR* would be called for, and common carriage would survive that test. *FAIR* says that “an incidental burden on speech is no greater than is essential, and therefore is permissible under [*United States v. O’Brien*] so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”<sup>224</sup> As I discuss below, common carriage–like treatment of high-speed Internet access providers would satisfy this requirement; but heightened scrutiny of any flavor remains inappropriate in this arena.

2. *Substantial Government Interest in Common Carriage–Like Treatment.* — Congress clearly has the power under the Commerce Clause to seek the ordinary end of a national communications system, and made the existence of that power manifest in the Communications Act of 1934.<sup>225</sup> The purpose of the Act, and the reason the FCC was created, was to “regulat[e] interstate . . . commerce in communication by wire and radio so as to make available . . . to all the people of the United States, . . . a rapid, efficient, Nation-wide . . . wire and radio communication service with adequate facilities at reasonable charges”<sup>226</sup> in accordance with the public interest. The basic assumption that underlies the entire Act is that two-way modes of communications that cross state lines both affect interstate commerce and are

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tiny to speaker-based laws in *Citizens United v. FEC*, 558 U.S. 310 (2010), occurred in the context of political speech and declined to extend the application of strict scrutiny to all speaker-based preferences. *Time Warner Cable*, 729 F.3d at 159–60. Here, moreover, the difference between communications infrastructure and application is salient: the distinction between the sidewalk and the conversation makes differential regulatory treatment appropriate. Justice Breyer’s dissent in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), makes clear the vacuity of speaker-based arguments in the context of regulated industries. See *id.* at 2678 (Breyer, J., dissenting) (“Nor, in the context of a regulatory program, is it unusual for particular rules to be ‘speaker-based,’ affecting only a class of entities, namely, the regulated firms.”).

<sup>222</sup> Joint Brief for Verizon and MetroPCS, *supra* note 2, at 45 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>223</sup> *Id.* (quoting *Turner I*, 512 U.S. at 662) (internal quotation marks omitted).

<sup>224</sup> *FAIR*, 547 U.S. at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (internal quotation marks omitted).

<sup>225</sup> Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

<sup>226</sup> *Id.* § 151. Access to the Internet substantially affects interstate commerce. See generally *United States v. Morrison*, 529 U.S. 598, 609 (2000).

essential to every member of a functioning, civilized polity.<sup>227</sup> We have known for decades that, left to their own devices, the private providers of basic communications lines on which the country depends will consolidate, cooperate, divide markets, drive up prices, and systematically underserve remote locations, as they have in the case of high-speed Internet access.<sup>228</sup> The policy choice made by Congress under the authority of the Commerce Clause is that in this kind of marketplace the public will be best served by oversight of communications companies, and it has used an ordinary regulatory means — delegation to the FCC — to achieve it.<sup>229</sup>

<sup>227</sup> For example, the Telecommunications Act of 1996 lists four categories a service should satisfy to be eligible for disbursements from the Universal Service Fund, which was established by Congress in 1996 to ensure equitable public access to “essential” communications facilities (such that costs nationwide are reasonably comparable to urban areas). See 47 U.S.C. § 254. The requirements for such services include:

the extent to which such telecommunications services:

- (A) are essential to education, public health, or public safety;
- (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
- (C) are being deployed in public telecommunications networks by telecommunications carriers; and
- (D) are consistent with the public interest, convenience, and necessity.

*Id.* § 254(c)(1). High-speed Internet access clearly fits (A), (B), and (D), and the FCC has had to carry out interpretive gymnastics in order to ensure that this service is supported notwithstanding its regulatory classification of high-speed Internet access service as an unregulated “information” service rather than a regulated “telecommunications” service. See Connect America Fund, 26 FCC Rcd. 4554, 4580–81 (2011). “‘Telecommunications service’ does not include information services, cable services, or ‘wireless’ cable services, but *does include the transmission, without change in the form or content, of such services.*” S. REP. NO. 104-23, at 18 (1995) (emphasis added). Also: “As defined under the 1934 Act (as amended by this bill), ‘telecommunications services’ includes the transport of information or cable services, but not the offering of those services. *This means that information or cable services are not included in the definition of universal service*; what is included is that level of telecommunications services that the FCC determines should be provided at an affordable rate to allow all Americans *access* to information, cable, and advanced telecommunications services that are an increasing part of daily life in modern America.” *Id.* at 27 (first emphasis added). See generally *id.* at 1–124.

<sup>228</sup> Cf. Joe Nocera, Op-Ed., *Merge Is What Airlines Do*, N.Y. TIMES, Aug. 17, 2013, at A19 (“Hey, wait a minute. Wasn’t airline deregulation supposed to bring lower prices and increased competition?”). Although a finding of monopoly status is not necessary for regulation in this area to be appropriate, the fixed and high upfront cost of constructing a high-speed Internet access service and the steeply declining cost curves for that business signal that these are natural monopolies, like railroads and aviation. See CRAWFORD, *supra* note 38, at 14–17.

<sup>229</sup> Indeed, within recent years, “Congress has passed three significant pieces of legislation that reflect its strong interest in ubiquitous deployment of high speed broadband communications networks . . . .” Framework for Broadband Internet Service, 25 FCC Rcd. 7866, 7877 (2010) (citing the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (2008) (codified as amended in scattered sections of 7 and 16 U.S.C.), which directed the FCC Chairman to submit to Congress “a comprehensive rural broadband strategy,” Food, Conservation, and Energy Act of 2008 § 6112, 122 Stat. at 1966; the 2008 Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (codified at scattered sections of 15 and 47 U.S.C.); and the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (codified as amended in scattered sections of the U.S. Code), which, among other things, appropriated

The reason we have a First Amendment is to restrain government efforts to suppress speech or pick acceptable messages; to support that interest, courts look sharply at laws or regulations that may be masking censorship. But common carriage–like treatment raises few threats along these lines. No responsible lawyer, even one hired by the providers to advance their interests, could plausibly claim that the government is using oversight of high-speed Internet access providers in order to advance or stymie particular points of view.<sup>230</sup> And so if our government’s reason to exercise oversight over high-speed Internet access providers is sufficiently substantial, that oversight should be upheld if heightened review is found appropriate.<sup>231</sup>

There are many substantial reasons supporting the government’s role in overseeing high-speed Internet access providers. There is unquestionably a substantial national interest in maintaining open networks, because we know both that Internet access has become a general-purpose technology (an input into everything we do) and that these providers have the incentive and ability to act in ways that may endanger both competition and consumer welfare.<sup>232</sup> As the FCC said in its opening brief:

Openness has been essential to the Internet’s extraordinary success. By keeping barriers to entry low, openness enables anyone — from large corporations, to start-up companies, to college students — to create innovative applications. The resulting explosion of services has increased the Internet’s usefulness in ways that have made it central to modern communications.<sup>233</sup>

Nondiscrimination and neutral behavior by high-speed Internet access providers is increasingly important, and openness is only possible if these basic two-way networks interoperate and interconnect on reasonable terms subject to government oversight. Additionally, now that high-speed access is increasingly common around the globe, the

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up to \$7.2 billion to evaluate, develop, and expand access to and use of high-speed Internet access services, *see id.* div. A, 123 Stat. at 118–19, 128, and required the FCC to develop a National Broadband Plan to ensure that every American has “access to broadband capability and . . . establish benchmarks for meeting that goal,” 47 U.S.C. § 1305(k)(2).

<sup>230</sup> *Cf. Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663–64 (2011) (“Formal legislative findings accompanying [Vermont’s Prescription Confidentiality Law] confirm that the law’s express purpose and practical effect are to *diminish* the effectiveness of marketing by manufacturers of brand-name drugs. . . . Given the legislature’s expressed statement of purpose, it is apparent that [the law] imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint.” (emphasis added)).

<sup>231</sup> *See id.* at 2673 (Breyer, J., dissenting) (arguing that the test should be “whether . . . regulatory provisions work harm to First Amendment interests that is disproportionate to their furtherance of legitimate regulatory objectives”).

<sup>232</sup> Preserving the Open Internet, 25 FCC Rcd. 17,905, 17,909 (2010).

<sup>233</sup> Brief for Appellee/Respondents at 3, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (No. 11-1355).

government will want to ensure that all members of American society have world-class service at a reasonable cost, that Americans' privacy rights are respected when they use high-speed Internet access, that communications services and equipment are accessible to people with disabilities, and that broad interests in public safety are protected — including 911 emergency and public warning and alerting services. None of this will happen absent oversight, and all of these powers are squarely within traditional governmental roles.

Neutral oversight of general-purpose two-way communications providers directly promotes substantial U.S. interests in economic growth,<sup>234</sup> assists in the remediation of inequality,<sup>235</sup> supports innovation, and facilitates functioning free markets. There is no subterfuge here, and there are many good reasons for the government to proceed.<sup>236</sup> On the other side of the scale, the only harm caused by oversight of high-speed Internet access providers will likely be to their own ability to reap additional profits from their activities, which is modest harm at most and hardly the kind of injury the First Amendment was designed to prevent.<sup>237</sup>

### B. *The Providers' First Amendment Plan*

Direct treatment of high-speed Internet access providers as conduits or common carriers should trigger no more than the ordinary scrutiny normally applied to economic regulation.<sup>238</sup> Even that scrutiny should be cabined by the deference accorded administrative agen-

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<sup>234</sup> See Preserving the Open Internet, 25 FCC Rcd. at 17,927 (“[E]rosion of Internet openness threatens to harm innovation, investment in the core and at the edge of the network, and competition in many sectors, with a disproportionate effect on small, entering, and non-commercial edge providers that drive much of the innovation on the Internet.”).

<sup>235</sup> It is likely that unequal Internet access, which itself is closely correlated with socioeconomic status, is exacerbating existing inequalities in American society. See, e.g., Anton Troianovski, *The Web-Deprived Study at McDonald's*, WALL ST. J., Jan. 29, 2013, at A1 (noting that demographic gaps in home access to fixed Internet connection is a key challenge for educators).

<sup>236</sup> Cf. *Sorrell*, 131 S. Ct. at 2670–71 (expressing concern that the Vermont legislature sought to achieve its policy objectives indirectly through the impermissible means of restricting certain speech).

<sup>237</sup> See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 (1997) (“The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm’s advertising budget. The fact that an economic regulation may indirectly lead to a reduction in a handler’s individual advertising budget does not itself amount to a restriction on speech.”). In fact, recognizing economic harm as a First Amendment injury would lead to perverse consequences. Cf. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (“It would be strange indeed . . . 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.”).

<sup>238</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (“[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional [if] . . . it rests upon some rational basis within the knowledge and experience of the legislators.”).

cies.<sup>239</sup> But the extreme logical endpoint of the providers' First Amendment claims would be to constitutionalize all oversight of their activities when it comes to controlling, charging for, or editing the information moving over their networks; after all, there is no necessary limiting tie between these First Amendment claims and the Open Internet context. Many constraints on their ability to do business could ultimately be couched as dilemmas prompting application of the First Amendment dilemma. What the providers are after is classification as First Amendment actors, which, like *Turner I*'s classification of pay-television operators as First Amendment actors, may then be cited in all contexts to raise substantial hurdles to economic regulation.<sup>240</sup> To apply a heightened First Amendment standard to oversight of the business decisions of high-speed Internet access providers would be to shift from legislatures to judges the primary Commerce Clause power to weigh the legislative ends I have described above and to choose the means by which these ends will be achieved. Indeed, such a course would risk a "retur[n] to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies."<sup>241</sup> And that is exactly what the providers are after. In the end, they would like to remove policy decisions about high-speed Internet access from the FCC and Congress and put those decisions in the hands of courts slowly handling post hoc questions.<sup>242</sup>

As a first step, the providers are seeking to avoid deference to any future FCC's decision to change its mind about statutory classification of high-speed Internet access services. Their lever is constitutional avoidance. Verizon claims that "[t]he doctrine of constitutional avoidance counsels strongly against any finding of statutory authority for the [Open Internet] rules because they present serious constitutional problems . . . . To the extent there is any doubt about the FCC's lack of authority here, the avoidance canon must tip the balance."<sup>243</sup> But

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<sup>239</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868–73 (2013) (holding that the FCC was entitled to *Chevron* deference even in its interpretation of a statutory ambiguity that concerns the scope of its authority to issue rules). Interestingly, the *City of Arlington v. FCC*, 133 S. Ct. 1863, Court used as an example of statutory ambiguity the question whether an Internet service provider is a "common carrier." *Id.* at 1869.

<sup>240</sup> See *supra* note 162.

<sup>241</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting) (citation omitted). Communications carriers have not tried this flavor of constitutionalization in the past; no one said unbundling under section 251 raised any plausible compelled-speech concern following enactment of the Telecommunications Act of 1996. See 47 U.S.C. § 251(c)(3) (2006).

<sup>242</sup> Such a backward-looking approach would be particularly dangerous for new competitive Internet applications seeking to avoid paying tribute to discriminatory network-access providers.

<sup>243</sup> Joint Brief for Verizon and MetroPCS, *supra* note 2, at 42.

the avoidance doctrine “does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious.”<sup>244</sup> It is triggered only by a serious constitutional doubt,<sup>245</sup> and courts may avoid the doctrine (and instead employ *Chevron* deference) if an agency is construing an ambiguous statute.<sup>246</sup> Indeed, if a court availed itself of the constitutional avoidance canon when interpreting an ambiguous statute, it would be contributing to exactly the kind of statutory ossification that the Supreme Court decried in *National Cable & Telecommunications Association v. Brand X Internet Services*.<sup>247</sup>

Here, Congress has devolved policymaking in the area of communications infrastructure to the FCC. The Commission will be making decisions about access and nondiscrimination obligations that will require it to weigh sometimes incommensurable values and make difficult predictive judgments. The public values at stake will spark disagreements; there may be tussles over the extent of competition in the high-speed Internet access marketplace; and there will be a constant back-and-forth about the views of the regulated entities themselves, because incumbents always say that regulatory measures are counterproductive. This is why we have a regulatory superstructure designed to handle these debates.

And, as a second step, the providers are seeking to impose a distorting threshold condition for these policy discussions by claiming that the First Amendment somehow limits or raises questions about original congressional power to authorize access, nondiscrimination, or even full common carrier duties, or that common carrier regulation is, as a *constitutional* matter, limited to monopolists.

The providers will succeed if they merely make a single court (and, someday, the Supreme Court) take their First Amendment claim seriously. But there is no serious constitutional doubt sufficient to trigger constitutional avoidance in this context, because the government has plenty of good reasons to take and authorize steps that preserve the openness of communications networks, even if those steps have some indirect effects on speech activities.

In making these arguments loudly and repetitively, the providers of high-speed Internet access are joining tobacco companies,<sup>248</sup> pharma-

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<sup>244</sup> *Almendarez-Torres v. United States*, 523 U.S. 224, 239 (1998).

<sup>245</sup> *See Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) (“Statutes should be interpreted to avoid serious constitutional doubts, not to eliminate all possible contentions that the statute *might* be unconstitutional.” (citation omitted)).

<sup>246</sup> *See Rust v. Sullivan*, 500 U.S. 173 (1991) (giving *Chevron* deference to HHS regulations in light of statutory ambiguity and refusing to apply the constitutional avoidance canon).

<sup>247</sup> 545 U.S. 967 (2005); *see id.* at 983.

<sup>248</sup> *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208 (D.C. Cir. 2012) (striking down on First Amendment grounds, by a 2-1 vote, nine graphic warnings proposed by the FDA for cig-



ceutical companies,<sup>249</sup> energy companies, and others in seeking to constitutionalize any regulatory oversight of their activities. Given the market power enjoyed by the existing large Internet service providers in the United States, and their increasing ability to wring increasing profits from their activities rather than invest in their networks, the providers' legally untenable claims are dangerous to the economic competitiveness of the United States. We have no plan in place to upgrade the nation's communications capacity for open, world-class fiber networks; absent clear legal authority over the existing network providers, neither a future Congress nor a future FCC will be able to take steps toward this goal.

#### IV. CONCLUSION

The providers' breathtaking claim to First Amendment protection for their high-speed Internet access services will be heard many times over the next few years. The companies can do more than just make this argument in legal filings, however: they can change the facts on the ground. Because Verizon, AT&T, Comcast, and Time Warner Cable have the ability to pick and choose among Internet applications they allow to reach subscribers, and the market power to force these applications (or the networks they use) to pay tribute before being allowed to cross over their wires or connect to their networks, they may in time come to be much more "just like" the cable pay TV distributor protected by the First Amendment in *Turner I*. They will be, in fact, exercising editorial discretion. They will have succeeded in recharacterizing their own activities for First Amendment purposes, all on their own.

And that is why it is important that courts and commentators not allow the providers' First Amendment assertions to go unexamined. It is essential that these conduits' claims to First Amendment protection be nipped in the bud, clearly and deliberately. *FAIR* provides the structure for such a refutation; *Verizon* may have been the right case in which to lay out the argument. I am confident there will be additional opportunities.

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arette packaging and advertising); Recent Case, 126 HARV. L. REV. 818, 819 (2013) (citing Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524, 69,531 (2010)). See generally R. George Wright, *Are There First Amendment "Vacuums?": The Case of the Free Speech Challenge to Tobacco Package Labeling Requirements*, 76 ALB. L. REV. 613 (2013).

<sup>249</sup> See Isabelle Bibet-Kalinyak, *A Critical Analysis of Sorrell v. IMS Health, Inc.: Pandora's Box at Best*, 67 FOOD & DRUG L.J. 191, 191-92 (2012); Andrew J. Wolf, Note, *Detailing Commercial Speech: What Pharmaceutical Marketing Reveals About Bans on Commercial Speech*, 21 WM. & MARY BILL RTS. J. 1291, 1297-99 (2013).