

**Utilizing “Essentiality of Access” Analyses
To Mitigate Risky, Costly and Untimely Government Interventions
In Converging Telecommunications Technologies and Markets**

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Abstract

In various contexts the government has intervened to ensure the provision of essential services and facilities to the public, and the legal principles employed have varied with the type of access problem. This paper asserts that “essentiality of access” – that is, the historical alignment of access problems to legal principles – should be used as an organizing principle for examining future broadband policy objectives to better enable the adoption of appropriate government interventions. “Essentiality of access” analysis shows that pursuit of broadband policy objectives affects different categories of legal rights of access recipients and access providers - economic, welfare and free speech rights – which policymakers and the courts must balance. Furthermore, should broadband later be considered an essential service or facility, current or pending policy actions could adversely affect these rights of intended access recipients. For example, lack of a common carriage requirement as well as some duty to serve on cable modem access and wireline broadband Internet access providers could adversely affect the ubiquitous and non-discriminatory availability of broadband and narrowband telecommunications services at reasonable rates. In addition, lack of a requirement on broadband providers to share their physical infrastructure with competitive ISP’s or to interconnect with each other could diminish viewpoint diversity – a longstanding government interest.

“Essentiality of access” analysis also reveals an even more fundamental challenge for policymakers and the courts. When balancing the competing interests of access recipients and access providers, the constitutionality of broadband policy choices may depend on characteristics of broadband providers that are unique to the corporate form. It has been long established that the legal rights and duties of individuals (natural persons) and corporations are not synonymous under U.S. law, and that government has created legal principles to specifically address abuses of power by corporations. The courts will need to clarify the principles for determining the constitutional rights of corporations under the U.S. Constitution in order to address the constitutional challenges that new broadband policies will likely engender.

Table of Contents

	Page
I. Introduction	4
II. “Essentiality of Access” As An Organizing Principle	5
III. The Complexity of Broadband Policy	7
IV. Legal Principles Mandating Access to Essential Services or Facilities	9
A. Sources of Governmental Powers	10
B. Access Issues Affecting Economic Rights	12
1. Common Carrier and Public Utility Regulation	12
2. Interstate Regulation of Common Carriers	14
3. Sherman Act and Refusals to Deal	15
4. “Businesses Affected With a Public Interest”	16
C. Access Issues Affecting Welfare Rights	18
D. Access Issues Affecting Free Speech Rights	19
V. Applying “Essentiality of Access” to Broadband Access Issues	21
A. Access for Individual Endusers	23
B. Access for Communities of Individual Endusers	25
C. Access for Competitors	26
D. Broadband as Universal Service	28
E. Access by Speaker as Enduser of Competitor	29
F. Summary of Effects on Broadband Access Issues	30
VI. Constitutional Rights of Individuals versus Corporations	33
A. No Consistent Theory of Constitutional Rights for Corporations	34
B. Takings Clause: Constitutional Rights Independent of Corporate Form	35
C. Due Process Clause: Policy Rationale Affected by Corporate Form	36
D. Free Speech Rights: Constitutional Rights Affected by Corporate Form	37
Conclusion	40
Table 1: Legal Principles to Address Different Access Problems Regarding Essential Services or Facilities	10
Table 2: Applying “Essentiality of Access” to Broadband Access Issues	22
Table 3: Obstacles to Achieving “Essentiality of Access” For Broadband Access Issues	32

I. Introduction

Throughout history, nations have regulated communications industries to varying degrees in pursuit of policy goals that are deemed unachievable without government intervention. Traditionally, government intervention has occurred in an environment that permitted – or, some might argue, necessitated – the development of regulatory frameworks that relied on monopoly providers and imposed rules that differed substantially with the type of communications technology. In recent years circumstances have changed dramatically. Policymakers are actively seeking to encourage competition and implement deregulatory policies in many industries of traditionally heavily-regulated monopoly providers. Furthermore, advancements in communications technology are converging what have been economically distinct communications markets. These developments are increasing the complexity of developing, evaluating and implementing appropriate government interventions in communications markets. As a result, the risks of adverse unintended consequences of government interventions are greater, the costs caused by such consequences are higher, and the ability to implement timely corrections is reduced.

This paper asserts that “essentiality of access” – that is, the historical alignment of access (to essential service or facility) problems to legal principles – should be used as an organizing principle for examining many of the future policy objectives in communications industries in order to better enable the adoption of appropriate government interventions. This is because policy problems that have been previously handled by distinct legal rules for a given technology must now be addressed simultaneously across competing technology platforms. In particular, “essentiality of access” is applied here to debates regarding broadband policy in the U.S., as broadband access issues entail legal complexities that serve as a useful microcosm of the convergence of legal paradigms hastened by recent technological change.

Through use of “essentiality of access” as a focal point, this paper shows that differing types of access objectives based on viewing broadband as an essential service or facility require reference to distinctive legal principles. By juxtaposing differing access problems and legal principles, this paper explains how pursuit of broadband policy objectives will require recognition of the differing relationships of access recipients to the

access providers – as enduser customer, competitor, speaker, or audience member – that at times conflict and require policymakers to choose some interests over others. This legal reality makes the selection of broadband policy objectives and associated government interventions a tremendously complex endeavor.

In making broadband policy choices, however, this paper shows that there is an even more fundamental challenge for policymakers and the courts. When balancing the competing interests of access recipients and access providers, the constitutionality of broadband policy choices may depend on characteristics of broadband providers that are unique to the corporate form. It has been long established that the legal rights and duties of individuals and corporations are not synonymous under U.S. law. However, the distinction is perhaps less obvious in recent times given the prevalence of the corporate form throughout the twentieth century. The courts will need to clarify the principles for determining the rights of broadband corporations under the U.S. Constitution in order to address the constitutional challenges that new broadband policies will likely engender.

II. “Essentiality of Access” As An Organizing Principle

In the U.S., there are various contexts in which concerns of access to some essential service or facility have arisen and for which legal principles have been devised. Access issues have varying characteristics, depending upon what services or facilities are deemed to be essential, for who (access recipient) they are deemed to be essential, the nature of the relationship between the access recipient and the access provider, and what circumstances are impeding the accessibility of the service or facilities. Specific legal principles have developed, both under the common law and by statutes, to address access issues bearing similar characteristics. The mapping of access situations bearing similar characteristics with the legal principles applied to them can be a valuable tool for determining the appropriate course of government intervention for future “access to essential service or facilities” problems.¹

¹ It is important to use the historically developed legal principles for several reasons. First, many of the broadband access issues stem from long-recognized economic or societal problems that the legal system has had to address in other contexts and for which specific legal principles have already been established. Second, awareness of these preexisting principles is not only insightful of prior experience but is often necessary to address legal constraints on transitioning from preexisting regimes. Third, trends underlying the development of existing legal principles reveal a more fundamental legal problem unresolved by the courts – the scope of corporations’ constitutional rights - that will affect judicial enforcement of agency or legislative interventions to achieve broadband objectives.

Using this access problem-to-legal principle typology for purposes of evaluating broadband access issues is what is meant in this paper by applying “essentiality of access” as an organizing principle. More specifically, each broadband access objective is analyzed *in terms of the specific form of access deemed to be essential* – to whom, from whom, and for what purpose - *and the underlying problems or obstacles impeding that access*. Then existing legal principles that have been developed to address access problems with similar characteristics are identified and evaluated for their suitability to address the broadband access issue.

In terms of determining the appropriateness of any government intervention – whether an existing legal principle or the need to define a new one – it is helpful to recognize that different legal principles affect different types of legal rights. In particular, the legal principles that are relevant here affect economic rights, welfare-related rights, or free speech rights. Awareness of the types of rights that are affected – both rights of the access recipient and of the access provider – is necessary for determining when there may be conflicts of differing types of rights when simultaneously pursuing multiple access objectives as well as the options available for resolving them. For example, some rights may have greater constitutional protections than others thereby limiting legislative prerogative for choosing among constituent interests. In this regard, the distinction in constitutional rights of individuals (as natural persons) as opposed to corporations may be critical.

The rest of the paper is organized as follows. Section III briefly describes the diversity of perceived benefits from widespread broadband deployment and the breadth of the corresponding demands for government intervention. It also stresses the complexity of developing broadband policy due to the legal, economic and political constraints on government action. Section IV identifies the important legal principles that evolved in the U.S. in response to different types of access problems regarding an essential service or facility. The historical development and meaning of each legal principle is provided, with the discussion organized according to the type of affected rights (economic, welfare, or free speech). Section V identifies broadband access issues in terms of the type of access problem posed and the legal rights affected. Assuming the relevant aspect of broadband access to be an essential service or facility and the

circumstances require government intervention, it then identifies the associated legal principles discussed in section IV and describes how differing principles and rights may be in conflict. Section VI discusses why pursuit of broadband policy objectives will require policy makers and the courts to explicitly consider and clarify the differing rights of natural persons and corporations. The paper ends with a section of conclusions.

III. The Complexity of Broadband Policy

Recent policy debates affecting the communications industries place great emphasis on encouraging the widespread deployment of broadband technology. In this context, broadband refers to a technical capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.² However, the perceived benefits of broadband deployment are vast and diverse, as succinctly stated by FCC Chairman Michael Powell:

The widespread deployment of broadband infrastructure has become the central communications policy objective. It is widely believed that ubiquitous broadband deployment will bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance many other worthy objectives – such as improving education, and advancing economic opportunity for more Americans. We share this view and intend to do our party in advancing reasonable and timely deployment.³

Reports, studies and proposed legislation related to broadband also reflect this diversity in alleged benefits, and, consequently, call for varying and distinctly different forms of government intervention. For example, the ACLU advocates that regulators mandate open access of cable systems to Internet service providers (ISPs) because Internet access makes available to citizens a form of speech and self-expression that is perhaps the closest thing ever invented to a true free market of ideas.⁴ The Economic Policy Institute proposes adoption of a model of symmetric intermodal regulation for digital subscriber line (DSL) services and cable modem services to foster private sector investment in broadband infrastructure to reap the benefits of improved business

² See, e.g. Telecommunications Act of 1996, section 706 (c); Remarks of Michael K. Powell, Chairman of the FCC, at the National Summit on Broadband Deployment, Washington, D.C. (October 25, 2001).

³ FCC Chairman Michael K. Powell, Digital Broadband Migration, Part II, FCC Press Conference (October 23, 2001).

⁴ No Competition: How Monopoly Control of the Broadband Internet Threatens Free Speech, ACLU White Paper (2002) (supported by a study that it commissioned, jointly with the Center of Digital Democracy, to Columbia Telecommunications Corporation regarding the technical prospects for maintaining the Internet's open nature as it makes the shift from dial-up to cable).

productivity, greater consumer prosperity and economic growth.⁵ The Leadership Conference on Civil Rights Education Fund and the Benton Foundation urge the federal government to continue funding for the e-rate⁶, the Technology Opportunities Program⁷ and the Community Technology Centers Program⁸ in order to narrow gaps in access to computers and the Internet that arise from a digital divide based on income, race and ethnicity, geography and disability.⁹ Senator Lieberman plans to introduce a series of legislative initiatives – including an FCC regulatory plan, tax incentives, government support for research on advanced infrastructure technology, and government use of e-commerce broadband applications – to achieve major economic growth and productivity gains from making affordable broadband Internet connections available to American homes, schools, and small businesses.¹⁰

As these examples illustrate, the type of government intervention deemed likely to encourage the deployment of broadband technology depends on the perception of the desired benefits to be reaped as well as the remedies necessary to overcome the obstacles in achieving them. Thus, simply stating support of government policy to encourage widespread deployment of broadband infrastructure is hopelessly vague. Rather, development of broadband policy requires a clear articulation of the purposes for which government intervention is being sought and an assessment of how that intervention should be designed to accomplish those goals.

The complexity of developing broadband policy is further heightened by the difficulties in transitioning from preexisting regulatory regimes that vary with historically

⁵ Stephen Pociask, Putting Broadband on High Speed: New Public Policies to Encourage Rapid Deployment, Economic Policy Institute (2002).

⁶ The e-rate program was implemented by the FCC under section 254 of the Telecommunications Act of 1996 to support the provision of universal service to certain educational institutions.

⁷ The Technology Opportunities Program was initiated in 1994 by the U.S. Department of Commerce's National Telecommunications and Information Administration, and provides matching grants to nonprofit organizations to make use of innovative telecommunications and information technologies and to promote widespread availability and use of digital network technologies in the public and non-profit sectors.

⁸ The Community Technology Centers Program was established in 1999 by the Department of Education to promote the development of model programs that demonstrate the educational effectiveness of technology in urban and rural areas and economically distress communities.

⁹ Bringing a Nation Online: The Importance of Federal Leadership, A Report by the Leadership Conference on Civil Rights Education Fund and the Benton Foundation With Support from the Ford Foundation (July 2002)(the report was written by Leslie Harris & Associates for the Digital Media Forum, a project of the Ford Foundation).

¹⁰ Broadband: A 21st Century technology and Productivity Strategy, Office of Senator Joseph I. Lieberman (May 2002).

distinct communications technologies. Some changes in government policy may pose legal or economic – not to mention political – problems that undermine the sustainability of achieving the desired policy objectives over time. These problems have been extensively discussed by the author in prior work.¹¹ Failure to adequately anticipate and address these problems will likely increase the risk of adverse unintended consequences of government interventions (or lack of interventions) and their associated costs, as well as reduce the ability to implement timely corrections.

IV. Legal Principles Mandating Access to Essential Services or Facilities

This section first provides an overview of significant legal principles that have developed in response to different problems regarding access to some essential service or facility. Subsection A reviews the underlying sources of governmental power on which these legal principles are based. Subsections B-D then review the meaning of these legal principles and the historical reasons underlying their development. The discussion in subsections B-D is organized to address legal principles affecting economic rights, welfare rights and free speech rights, respectively. The background provided throughout this section is necessary for evaluating the application of legal principles to broadband access problems in section V, and for understanding the need to consider and clarify the differing constitutional rights of individuals and corporations in section VI.

Table 1 provides an overview of important legal principles that have developed in the U.S. to address different types of access problems regarding an essential service or facility. The table first describes the access problem - for what reason access is deemed

¹¹ B. Cherry, “Filling the Political Feasibility and Economic Viability Gap to Achieve Sustainable Telecommunications Policies,” presented at the Sixth Asia Pacific Regional Conference of the International Telecommunications Society, Kowloon, Hong Kong (2001) (provides a framework to satisfy both political feasibility and economic viability constraints in designing policies affecting a nation’s telecommunications infrastructure); B. Cherry & S. Wildman, “Preventing Flawed Communication Policies by Addressing Constitutional Principles,” 2000 L. Rev. M.S.U.-D.C.L. 55 (provides a framework for addressing the constitutional and economic problems that limit options for modifying communication policies in response to new technologies and deregulatory philosophy); B. Cherry & S. Wildman, “Institutional Endowment as Foundation for Regulatory Performance and Regime Transitions: The Role of the US Constitution in Telecommunications Regulation in the United States,” 23 Telecommunications Policy 607-623 (1999) (analyzing the relationship of constitutional principles to economic efficiency goals, with application to recovery of stranded costs); B. Cherry & S. Wildman, “Unilateral and Bilateral Rules: A Framework for Increasing Competition While Meeting Universal Service Goals in Telecommunications,” in Making Universal Service Policy: Enhancing the Process Through Multidisciplinary Evaluation (B. Cherry, S. Wildman, & A. Hammond, eds.) (Mahwah, NJ: Lawrence Erlbaum Associates) (1999) (analyzes legal and economic problems of pursuing universal service goals in a market without legal monopolies).

necessary, the relationship of the access recipient to the access provider, and the nature of the underlying problem or purpose to be addressed – and then the legal principle and associated obligations of the access provider that developed to address that problem. The first two rows of Table 1 describe legal principles related to economic rights, the third row to welfare-related rights, and the last row to free speech rights.¹²

**Table 1: Legal Principles to Address Different Access Problems
Regarding Essential Services or Facilities**

Access is Needed to Sustain What	Relationship of Access Recipient to Access Provider	Underlying Purpose or Problem	Legal Principle(s)	Obligations of Access Provider
Provision of essential service, not adequately supplied in a competitive market, throughout the community.	Customer as endusers	Economic coercion; dependence of customer requires protection.	Common carrier; public utility; business affected with a public interest	Provide access to essential service without discrimination, at reasonable rates, and with adequate skill and care.
Viable competition in a related market of a monopolist	Competitors	Economic characteristics of supply require access to monopolist's essential facilities.	Prohibit refusal to deal with competitors (e.g. essential facilities doctrine)	Provide access to essential facility (input) under reasonable prices, terms and conditions.
Equality of access to essential services	Targeted customers as endusers	High cost of providing service; indigence of customers.	Universal service as a form of welfare benefit	Contribute funds to and/or provide subsidized essential services.
Legitimacy of, and citizen's participation in, democracy.	Speaker as enduser or competitor (for benefit of audience)	Viewpoint diversity and channel provider's potential refusal to deal with speaker.	Free speech rights	Provide access to channel of communication.

IV.A. Sources of Governmental Powers

The U.S. Constitution allocates governmental powers among the States and the federal government. The federal government has powers specifically enumerated to it under the Constitution; remaining powers are reserved to the States. The federal government has the exclusive power to regulate interstate commerce and the States retain the power to regulate intrastate commerce. In addition, State powers include inherent

¹² The classification of rights is apparent from the content of the second and third columns.

powers of the sovereign that have their origin under English common law.¹³ These inherent powers include the police power, franchising, and the creation of corporations. The legal principles in Table 1 can be traced, in large part, to the exercise of these powers.

The police power is the power to legislate for the common welfare.¹⁴ The police power is the basis of broad regulatory authority that State legislatures have exercised to implement a wide array of policy objectives, such as those affecting economic, welfare, and free speech rights. However, a State's exercise of the police power is limited by the provisions of the U.S. Constitution, enforceable upon judicial review by the courts. As discussed in subsection B.4, judicial interpretation of the permissible scope of a State's police power has played an important role in shaping the economic regulation of "essential services" in the U.S.

State governments also have the inherent authority to delegate certain powers to private individuals for the purpose of benefiting the public. Such a delegation of power is referred to as the granting of a *franchise*.¹⁵ As discussed in subsection B.1, the franchise power has been used extensively in the U.S. to enable the widespread deployment of infrastructures by private entities, such as railroads and public utilities, that are deemed to be essential.

State governments also have the power to create *corporations*.¹⁶ Based on the traditional meaning of this power under English common law, a corporation was considered a quasi-governmental body – that is, a private government holding delegated

¹³ Each State also has its own constitution that allocates power among the legislative, executive and judicial branches, and may place limitations on the State legislature's inherent powers. However, State constitutional limitations are not explored in this paper.

¹⁴ For a discussion of the history of the police power and its development in the U.S., see L. Levy, The Law of the Commonwealth and Chief Justice Shaw, (New York, NY: Oxford University Press) (1957), pp. 229-265.

¹⁵ Franchises were required to permit private individuals to charge tolls or fees for the use of facilities they built, such as bridges, ferries, aqueducts, and canals. Franchises could also be used to delegate to private parties the governmental authority – such as eminent domain - that was necessary to exercise their functions under the franchise. For a discussion of franchising powers, see J. Hughes, The Government Habit Redux (Princeton, NJ: Princeton University Press) (1991) pp. 37-43, 103-105; S. Payton, "The Duty of a Public Utility to Serve in the Presence of New Competition," in Applications of Economic Principles in Public Utility Industries, (Ann Arbor, MI: Graduate School of Business Administration, University of Michigan) (1981) pp. 121-152.

¹⁶ For a detailed discussion of the development of the corporation, see A. Creighton, The Emergence of Incorporation as a Legal Form for Organization, unpublished doctoral dissertation, Stanford University (1990); and Payton, note 15, *supra*.

public authority – that was self-governing and could hold property. A special legislative act was required to grant a charter of corporation, and the corporation’s activities were limited to what was specified in the charter. By the seventeenth century, some charters of corporation were granted to establish enterprises formed for the purposes of making profits for its stockholders. However, it was not until the nineteenth century that general incorporation statutes were gradually enacted by the States to eliminate the need for special legislative acts to grant charters and to permit private persons to create corporations. As described in subsections B.2 and B.3, these general incorporation statutes gave rise to economic abuses that the Interstate Commerce Act and the Sherman Act were enacted to address.

IV.B. Access Issues Affecting Economic Rights

The legal principles affecting economic rights in Table 1 address evolving concepts of economic coercion for which government intervention has been deemed necessary to provide access to an essential service or facility. The legal principles that relate to economic coercion of customers (as endusers) are based on: the law of common carriers and public utilities; the codification of common carrier regulation of railroads in the Interstate Commerce Act (ICA) in 1887; and the State’s power to regulate “businesses affected with a public interest”. The legal principles related to economic coercion affecting competitors is the essential facilities doctrine, a doctrine that has evolved from judicial interpretation of the Sherman Act in 1890, and related cases addressing refusals to deal. Furthermore, a common thread running throughout the evolution of these legal principles is the changing form and growing importance of corporations.

IV.B.1. Common Carrier and Public Utility Regulation

Common carriers and public utilities are subject to a greater degree of regulation than general businesses. Furthermore, as a subset of “businesses affected with a public interest”, discussed in subsection B.4, the greater regulatory burdens are permissible under the U.S. Constitution. Under current law, telecommunication service providers are both common carriers and public utilities. To the extent that provision of broadband access is considered the provision of telecommunications services, the legal obligations imposed on common carriers and public utilities become involved.

Unique obligations have been imposed on common carriers since the Middle Ages and are based on the English common law of “public callings”.¹⁷ These obligations evolved in medieval England to address numerous situations of economic coercion, exploitation and the illegal wielding of bargaining power. These obligations are: to charge reasonable prices (“just price”);¹⁸ to serve without discrimination; and to exercise their calling with adequate care, skill and honesty.

The same obligations were subsequently applied to a new category of entities, public utilities,¹⁹ which developed during the nineteenth century in the U.S. A public utility is a private corporation that provides a service of special public importance or necessity under a government grant of privileges that imposes an affirmative duty to render service demanded by any member of the public. Public utilities were initially created by local government grants of franchises, which were subsequently preempted by the codification of public utility law in State statutes.²⁰ It should be noted, however, that a public utility’s obligations tend to be greater than those of a common carrier because a

¹⁷ Public callings originated with passage of the Statute of Laborers in 1349 to prevent workers from extracting unreasonable wages due to large population loss from the Black Death. Over time, any service performed for the public outside of the feudalistic relationship of lord-to-man was considered a public calling. Examples include common carriers, innkeepers, blacksmiths and surgeons. With the decline of feudalism, most businesses came to be governed by the evolving common law of contracts. However, the tort obligations of public callings remained for a few classes of businesses, including common carriers. Notwithstanding the declining scope of businesses to which the obligations of public callings still applied, they were also imposed on a new class of businesses - public utilities - that evolved during the nineteenth century. For a discussion of the development of public callings, see M. Glaeser, Public Utilities in American Capitalism (New York, NY: The Macmillan Co.)(1957); and E. Adler, “Business Jurisprudence,” 28 Harv. L. Rev. 135.

¹⁸ A significant component of the obligations of public callings is the doctrine of the “just price”. Originating in medieval England, the just price doctrine required equivalence of value in exchange so that the price of a good or service reflects its value for the community in general, and is not excessively high or low due to unique circumstances of specific buyers or sellers. Its purpose was to enforce justice in economic transactions that involved coercion, exploitation and misuse of bargaining power. For a discussion of the origins of the just price doctrine, see J. Baldwin, “The Medieval Theories of the Just Price,” in Transactions of the American Philosophical Society, Vol. 49, Part 4 (Philadelphia, PA: The American Philosophical Society) (1959); and O. Langholm, Economics in the Medieval Schools (The Netherlands: E.J. Brill) (1992).

¹⁹ The common law of public utilities initially developed with the construction of railroads, and was later applied to services resulting from other inventions, such as the provision of telegraph service, telephone service, electricity and gas. See Levy, note 14, *supra*.

²⁰ During the nineteenth century, States enacted statutes to regulate railroads. An important legal innovation in these laws was the creation of state regulatory commissions, or expert agencies, to implement and enforce the statutory scheme. Starting in the late nineteenth century but primarily during the early twentieth century, States also placed telegraph and telephone companies under the jurisdiction of state regulatory commissions - frequently the same agencies that regulated railroads.

public utility usually also bears the affirmative duty to extend facilities to serve an entire community and is constrained in its ability to discontinue the provision of service.²¹

IV.B.2. Interstate Regulation of Common Carriers

As previously discussed, throughout the nineteenth century the States also enacted general incorporation statutes. The ease with which corporations could then be created provided the means to accumulate vast levels of capital for industrial enterprises and to conduct interstate business on an unprecedented scale.²² During the latter part of the nineteenth century, common law remedies were inadequate to address the economic abuses of large corporations, and corporations' interstate activities were beyond the jurisdictional reach of the States' police powers.²³ In response, a special U.S. Senate committee (known as the Cullom Committee) was created to study the problems associated with the economic powers of large corporations, particularly in the context of the railroads. In 1886 the committee issued its report, the Cullom Report, which is considered the classical statement of the railroad problem and the need for federal economic regulation.²⁴

[N]o general question of governmental policy occupies at this time so prominent a place in the thoughts of the people as that of controlling the steady growth and extending influence of corporate power and of regulating its relations to the public; and as no corporations are more conspicuously before the public eye, and as there are none whose operations so directly affect every citizen in the daily pursuit of his business or avocation as the corporations engaged in transportation, they naturally receive the most consideration in this connection.²⁵

In recognition of the railroads' importance to commerce and every citizen, and of its historical grant of privileges to perform a public function (of building and operating a public highway) and to charge tolls, the Report stressed how railroads have a different

²¹ However, a few businesses are *both* common carriers and public utilities, such as railroads and telecommunications companies. See Levy, note 14, *supra*.

²² The rise of "big business" began in the 1880's, "that is, the development of a new economic institution, the large enterprise, that commercialized, produced, and marketed goods on an unprecedented scale for national and international markets." A. Chandler, "The Information Age in Historical Perspective," in (A. Chandler & J. Cortada (eds.), A Nation Transformed By Information (New York, NY: Oxford University Press) (2000), p. 15. The railroad and telegraph brought into being a new institution that "consisted of a managerial, integrated corporate enterprise that transformed existing industries while creating new ones, during what historians have termed the Second Industrial Revolution." Ibid.

²³ Wabash, St. Louis & Pacific Railway Co. v. State of Illinois, 118 U.S. 557 (1886).

²⁴ For a discussion of the origins of the Interstate Commerce Act and extracts from the Cullom Report, see B. Schwartz, The Economic Regulation of Business and Industry: A Legislative History of U.S. Regulatory Agencies, Vol. 1, (New York, NY: Chelsea House Publishers) (1973) p. 17-87).

relationship to the public than do general businesses for which they bear greater obligations. To address economic abuses of railroads – particularly discrimination in rates among customers, speculative building, and irresponsible financial manipulation – it recommended a federal statutory scheme of regulation. The next year the Interstate Commerce Act (ICA) (1877) was enacted based on the Cullom Report, creating the first federal expert agency to implement an interstate regulatory statute.²⁶

IV.B.3. Sherman Act and Refusals to Deal

As stated in the Cullom Report, the economic abuses of large corporations were not confined to railroads. However, it was easier politically to first enact a federal statute regulating only the railroad industry.²⁷ But, the ICA was soon followed by enactment of the Sherman Act in 1890. The Sherman Act was the first federal antitrust statute, prohibiting certain anticompetitive and monopolistic practices by all general businesses.

Importantly, the Sherman Act was enacted to regulate a broader concept of economic coercion, which had been developing under neoclassical economics, than what had been recognized under the common law. For example, neoclassical economists began to view economic coercion as also encompassing collective refusals to deal and loss of market opportunities that a competitive market would have afforded.²⁸

Although the economic abuses underlying passage of the Sherman Act were primarily in response to concerns for consumers as endusers, plaintiffs have also pursued claims in their role as competitors. More specifically, cases have been brought involving collective or unilateral refusals to deal with competitors. Assertion of such claims prior to the Sherman Act were uncommon, as tort common law imposed liability for refusals to deal only on “businesses affected with a public interest” (see section IV.B. 4), which included common carriers and public utilities (see section IV.B. 1).²⁹ Over time the courts have interpreted the Sherman Act to prohibit refusals to deal for a broader set of

²⁵ *Ibid.* at 33 (emphasis in original).

²⁶ The enactment of the ICA is part of a larger legal trend towards statutorification that started in the nineteenth century to address the inadequacies of common law remedies. See G. Calabresi, *A Common Law for the Age of Statutes*, (Cambridge, MA: Harvard University Press) (1982).

²⁷ The decision of the U.S. Supreme Court in *Wabash v. Illinois*, see note 23, *supra*, was also a significant catalyst for the passage of ICA. See Schwartz, note 24, *supra*, at p. 31.

²⁸ P. Areeda & H. Hovenkamp, *Antitrust Law, Vol. I* (second edition) (New York, NY: Aspen Law & Business) (2000), sections 104a & 104b.

²⁹ P. Areeda & H. Hovenkamp, *Antitrust Law, Vol. IIIA* (second edition), (New York, NY: Aspen Law & Business) (2002), sections 770c & 770d.

businesses and circumstances.³⁰ This trend has also led to the development of the essential facilities doctrine.³¹ The primary use of this doctrine is to require a monopolist to share with competitors at a reasonable price an input that is deemed essential for viable competition in a related market.³² A commonality of these refusal to deal cases is the availability of a legal remedy requiring access by a competitor to some service or facility deemed essential for viable competition.

IV.B.4. “Businesses Affected With A Public Interest”

An important function of the courts is to determine when government regulation exceeds constitutional limits. In the nineteenth century, important cases were decided to delineate the permissible scope of State regulation under the U.S. Constitution. Of particular importance here is the concept of “*businesses affected with a public interest*” developed by the U.S. Supreme Court. Under this concept, the permissible scope of State regulation under its police power is greater for businesses affected with a public interest than for general businesses. Businesses affected with a public interest are those for which it was deemed that the dependence of the customer required protection, including common carriers and public utilities.³³ Under the case law the attributes in common

³⁰ See, e.g., United States v. Terminal Railroad Association, 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1 (1945); United States v. Griffith, 334 U.S. 100 (1948); Otter Tail Power Co. v. United States, 410 U.S.366 (1973).

³¹ Although the U.S. Supreme Court has provided remedies for refusals to deal in some cases, what has come to be known as the essential facilities doctrine was developed in lower federal courts and has not been accepted by the U.S. Supreme Court. Areeda & Hovencamp, Antitrust Law, Vol. IIIA (second edition), section 771c. Furthermore, having evolved as a result of some courts’ interpretation of the Sherman Act, the essential facilities doctrine is considered common law in some federal courts’ jurisdictions. See P. Areeda & H. Hovencamp, Antitrust Law, Vol. II (revised edition), section 302.

³² Liability under the essential facilities doctrine is based on the following criteria: (1) control of an essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. See MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

³³ Businesses affected with a public interest fell into three categories:

- “1. Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, common carriers and public utilities.
2. Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills.
3. Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have become to hold such a peculiar relation to the public that this is superimposed upon them.”

among these categories of businesses are: (1) that the service is of special public importance or necessity; (2) that circumstances or characteristics of supply are such that the service is not available in a competitive market;³⁴ and (3) that the activity has current and/or future widespread effects on the community at large.

In Nebbia v. New York (1934), the Supreme Court effectively broadened the scope of permissible regulation under the police power *for any business*, so that the need to prove that a business did or did not fall into the historical classes of businesses affected with a public interest fell into disuse.³⁵ However, the traditional definition of businesses affected with a public interest is not irrelevant. This is because, even though the Court found that the police power was coextensive with regulation in the public interest, it still maintained that permissible regulation as to *a given business* depends on the specific circumstances in each case.³⁶ The significance of a proper reading of Nebbia v. New York is that, even though a wider range of businesses can now be subject to some government regulation, what is deemed a reasonable assertion of that governmental authority is still likely to be greater for a business in which the circumstances are similar to those of the traditional justifications for regulating “businesses affected with a public interest”.

Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U.S. 522, 535 (1923). In the landmark case of Munn v. Illinois, 94 U.S. 113 (1876), the Court found that a grain elevator fell under the third category because the “elevator was strategically situated and ... a large portion of the public found it highly inconvenient to deal with others” (Nebbia v. New York, 291 U.S. 502 (1934)).

³⁴ Significantly, the second attribute includes numerous situations in which competition is considered impracticable. Such situations might arise from the grant of some special governmental privilege, even a legal monopoly, such as to common carriers or public utilities. However it also includes situations that arise without government involvement, such as firms being strategically situated in terms of location (grain elevators) or time (innkeepers with respect to travelers). *See also* note 33, *supra*.

³⁵ “It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.” 291 U.S. at 536.

³⁶ In fact, the Court proceeded to examine the specific circumstances of the case – concerning the constitutionality of price regulation of retail milk sales in New York – in a manner reflective of the traditional attributes of businesses affected with a public interest. The Court found that, even though the dairy industry was clearly not a public utility (having not received any public grant or franchise) nor a monopoly, the importance of the product, maladjustments of the market, and widespread impact on the community – conclusions of state legislative investigation - were compelling reasons for upholding the state statute.

IV.C. Access Issues Affecting Welfare Rights

The legal principles affecting welfare rights in Table 1 represent government efforts to institutionalize some minimum level of rights in terms of access to essential goods and services. Under English law this concept originated with the passage of the Elizabethan Poor Laws in the sixteenth century to address beggary and civil disorder caused by famine.³⁷ Under these statutes, a poor tax was imposed to finance the care of paupers.

In the U.S., early forms of governmentally funded relief for “needy” groups of individuals began with pension benefits for Civil War veterans in the nineteenth century and mothers’ pensions in the early twentieth century.³⁸ What has become the modern relief system in the U.S. developed during two periods of social policy innovation. One is the New Deal of the 1930’s in response to the Great Depression. The other consists of the Great Society, largely in response to the Civil Rights movement, and the Nixon era reforms of the 1960’s and early 1970’s.³⁹ During the first period, innovations included the establishment of old-age pensions, unemployment benefits, and relief programs for the aged, the blind and the orphaned in the Social Security Act of 1935. During the second period, the federal government intervened to break down State barriers that had evolved to impede eligibility for the relief programs.⁴⁰ All of these U.S. welfare-related programs are intended to provide (who are perceived to be) needy individuals - whether old, unemployed, poor, or disabled – with the financial means to meet basic human needs, such as food, housing, transportation and health care.

However, government has also intervened to ensure access by all citizens – rather than just targeted, needy groups of individuals - to other essential services, such as education.⁴¹ Modern universal service policy⁴² with regard to telecommunications

³⁷ See F. Piven & R. Cloward, Regulating the Poor: The Functions of Public Welfare (second edition), (New York, NY: Vintage Books) (1993) pp. 8-22.

³⁸ T. Skocpol, Protecting Soldiers and Mothers, (Cambridge, MA: Harvard University Press) (1996), pp. 7-11.

³⁹ See, e.g. M. Weir, A. Orloff, & T. Skocpol (eds.), The Politics of Social Policy in the United States (Princeton, NJ: Princeton University Press) (1988); Piven & Cloward (1993), note 37, *supra*.

⁴⁰ See Piven & Cloward, note 37, *supra*, at pp. 248-284.

⁴¹ For a discussion of how common carrier and public utility regulation can also be viewed as an early form of welfare state regulation in providing universalistic - rather than residualistic (means-tested) – benefits, see B. Cherry, “Crisis of Public Utility Deregulation and the Unrecognized Welfare State,” presented at the 29th Telecommunications Policy Research Conference (2001).

services has characteristics of both, by requiring nondiscriminatory just and reasonable rates for all customers as well as funding mechanisms to subsidize access for targeted groups. As previously discussed, the requirements of nondiscrimination and just and reasonable rates for all customers are based on common carrier and public utility law. Subsidy mechanisms for targeted groups began with implicit subsidies in the regulated price structure, and explicit funding mechanisms for the benefit of certain targeted groups were recently codified by Congress in section 254 of the Telecommunications Act of 1996.⁴³

IV.D. Access Issues Affecting Free Speech Rights

The First Amendment of the U.S. Constitution provides that “Congress shall make no law ... abridging the freedom of speech.” By its terms, this prohibition limits actions of the federal government; however, it has also been held applicable to the States through the Due Process Clause of the Fourteenth Amendment.⁴⁴ Freedom of speech is viewed not only as protecting the interests of individuals but also as making a fundamental contribution to sustaining a constitutional democracy.⁴⁵

For this reason, the courts recognize this dual role when addressing constitutional challenges to governmentally imposed access mandates under the freedom of speech clause of the First Amendment. First, the courts recognize that government intervention may be permissible in order to promote free speech given the essential role that free speech plays in maintaining the legitimacy of the government itself. In this regard, “ ‘it has long been a basic tenet of national communications policy that “the widest dissemination of information from diverse and antagonistic sources is essential to the

⁴² In this context, reference is being made to universal service policy as it developed in the second half of the twentieth century as distinguished from its early meaning as interconnection policy in the early twentieth century. See M. Mueller, Universal Service Policy (Cambridge, MA: The MIT Press; Washington, D.C.: The AEI Press) (1997).

⁴³ For a more extensive of universal service mechanisms and policies, see Cherry & Wildman (1999), note 11, *supra*.

⁴⁴ See Near v. Minnesota, 283 U.S. 697 (1931).

⁴⁵ “The First Amendment means ... that the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire, that even its most fundamental postulates are bad and should be changed. ‘Therein lies the security of the Republic, the very foundation of constitutional government.’” Barenblatt v. United States, 360 U.S. 109, 145-146, quoting DeJonge v. Oregon, 299 U.S. 353 (1937).

welfare of the public.”⁴⁶ This is often referred to as the viewpoint diversity principle⁴⁷ and its focus is the benefits to the public.⁴⁸ Second, in determining whether a given access mandate is permissible, the courts review the impact on the free speech rights of the party bearing the obligation to provide access to other speakers. As discussed more fully in section VI.D, the jurisprudence for determining when the government’s interest and form of regulation justifies limiting a party’s free speech rights is very complex.

The viewpoint diversity principle has been the basis for government imposition of requirements on owners of channels of mass communication to open access to their facilities to certain speakers. Mandates to provide access to certain speakers have been upheld in numerous situations, such as: the equal time rules for political candidates⁴⁹ and the now repealed fairness doctrine⁵⁰ imposed on broadcasters; the must carry requirements imposed on cable companies;⁵¹ and the carry one, carry all rule imposed on satellite television carriers.^{52 53}

At this juncture, it is important to recognize the differences in the free speech rights of electronic mass media and telecommunications carriers. As previously discussed in section IV.B.1, telecommunications carriers are considered both common carriers and public utilities, and, as such, are required to provide nondiscriminatory

⁴⁶ Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663-664 (1994) (Turner I) (quoting United States v. Midwest Video Corp., 406 U.S. 649, 668, n. 27 (1972) (plurality opinion) (quoting Associate Press v. United States, 326 U.S.1, 20 (1945)).

⁴⁷ See, e.g., Note, “The Message in the Medium: The First Amendment on the Information Superhighway,” 107 Harv. L. Rev. 1062, 1069-1077 (1994).

⁴⁸ In this context, the public’s status is that of an audience.

⁴⁹ For a discussion of the FCC rules regarding political broadcasts, see M. Botein, Regulation of The Electronic Mass Media (3rd edition) (St. Paul, MN: American Casebook Series, West Group) (1998) pp. 499-508.

⁵⁰ For a discussion of the convoluted history of the fairness doctrine, see Botein, note 49, *supra* at pp. 469-499.

⁵¹ Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997)(Turner II)(Congress required cable companies to dedicate some of their channels to local broadcast television stations to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable).

⁵² Satellite Broadcasting and Communications Association v. FCC, 275 F.3d 337 (4th Cir. 2001) (Congress required satellite television carriers to carry all requesting local broadcast stations in the market where the carrier voluntarily decides to carry one local station in order to, in part, preserve a multiplicity of local broadcast outlets for over-the-air-viewers who do not subscribe either to satellite or cable service).

⁵³ Significantly, both the must carry provisions on cable companies and the carry one, carry all rule on satellite television carriers are access mandates for speakers (broadcasters) who are also providers of competitive mass media facilities. In this way, these access mandates have similarities to the essential facilities doctrine discussed in section IV.B.3. On the other hand, the cited requirements imposed on

access to all customers. Given the two-way (and essentially one-on-one) interactive nature of telecommunications service, in essence all subscribers are speakers.⁵⁴ The subscribers – not the carriers – control the content of the information transmitted over the facilities. With regard to the provision of telecommunications services over their own facilities, therefore, telecommunications carriers are not speakers. On the other hand, electronic mass media consist primarily of one-way transmissions from a speaker to many viewers. The owner of the channel of communication controls the content that is transmitted over the facilities, and the viewers are passive members of an audience. Therefore, under these circumstances, providers of electronic mass media – but not telecommunications carriers – are considered speakers entitled to some First Amendment protection.⁵⁵ With the convergence of technology platforms, the courts will have to revisit the First Amendment distinctions in speaker status between telecommunications carriers and electronic mass media providers.

V. Applying “Essentiality of Access” to Broadband Access Issues

This section applies “essentiality of access” as an organizing principle for analyzing a sampling of broadband access issues. For purposes of discussion here, for each issue the relevant aspect of broadband access is considered an essential service or facility and the circumstances are such that the underlying purpose or problem must be addressed through government intervention. Given this assumption, the purposes of this section are to identify, for each broadband access issue: (1) what legal principles should be applied based on the mapping of access issues-to-legal principles described in section IV; (2) what policy actions have taken place or are pending; and (3) the consistencies or inconsistencies between (1) and (2). Section VI extends the analysis in Section V by incorporating the distinction between individuals’ and corporations’ constitutional rights and the implications for addressing broadband access issues.

broadcasters are access mandates for speakers who are users, but not also competitors, of mass media facilities. In this respect, the access mandates are similar to a limited form of common carrier regulation.

⁵⁴ In addition, for each transmission, each party is usually both a speaker to and an audience of the other party.

⁵⁵ Although it is beyond the scope of this paper to discuss the complexities of the jurisprudence in this area, it is important to recognize that court interpretation of the First Amendment also requires differing levels of judicial scrutiny among the channels owners of electronic mass media. *See, e.g.,* Botein, note 49, *supra* at pp. 292-456.

The array of broadband access issues presented here was selected so that each type of access problem-to-legal principle identified in section IV would arguably be applicable to a broadband issue. In addition, the broadband access issues are defined with reference to the layered model of the Internet as described by Werbach.⁵⁶ The layered model is a useful analytical tool for discussing the relationship of the technological realities of broadband to regulatory principles applied to it.⁵⁷

Table 2 provides an overview of the “essentiality of access” analysis discussed in this section. The broadband access issues are described in terms of the essential service or facility for which access is being sought and for whom. For each broadband issue, the table then describes: the nature of the relationship between the intended access recipient and the access provider; the nature of the underlying purpose or problem to be addressed; the applicable legal principle from Table 1; and recent or pending policy actions.

Table 2: Applying “Essentiality of Access” to Broadband Access Issues

Broadband Access Issue	Relationship of Access Recipient to Access Provider	Underlying Purpose or Problem	Applicable “Essentiality of Access” Legal Principles	Policy Actions to Date
Enduser access to physical infrastructure of broadband (Internet) network.	Individual enduser customers	Economic coercion arising from inequality of bargaining power between provider and customer as to an essential service.	Non-discriminatory access at reasonable rates and with adequate standard of care (i.e. “business affected with a public interest”, common carrier, or public utility regulation).	Cable modem service is an integrated information service with no common carriage regulation. The same may apply to wireline broadband Internet access providers.

⁵⁶ K. Werbach, “A Layered Model for Internet Policy,” presented at the 28th Telecommunications Policy Research Conference (2000).

⁵⁷ The layered model reflects the architectural design of the Internet as an end-to-end design and a layered protocol stack. Four layers of a vertical stack are considered relevant for regulatory purposes. They are: the physical layer; the logical layer; the applications (or service) layer; and the content layer. The physical layer is the physical infrastructure of the underlying networks, whatever the technology platform (copper, cable, fiber, terrestrial wireless, or satellite). The logical layer is the logical infrastructure, which includes the management and routing functions to keep information flowing within and among networks. The applications layer consists of the functions that are perhaps most familiar to endusers. These functions include, but are not limited to, basic voice telephony, Internet access, IP telephony, and video programming. The content layer is the information delivered to and from users as part of the applications that run over the networks. Werbach, note 56, *supra*.

Physical and/or logical infrastructures of broadband network need to be ubiquitously available throughout the community.	Communities of enduser customers	Potential unavailability of essential service in portions of community.	Duty to serve (e.g. build-out requirement; exit barrier); perhaps also some form of subsidization or government privilege (e.g. franchise) to address financial burden of requirements.	Telecommunications carriers have build out requirements for <i>narrowband service</i> ; eligible carriers must serve the entire service area. Cable companies have build out requirements for <i>cable service</i> in franchise area.
Access to the physical layer, through interconnection at the logical layer, for ISP's, who are competitors at the logical layer.	Competitors	Viewpoint diversity principle and provider's refusal to provide access to its essential facility with competitors in a related market.	Mandatory access to address refusal to deal (e.g. essential facilities doctrine).	Cable modem service providers not required to provide access to competitive ISP's. Wireline Internet access providers may not have to unbundle transmission component for sale under tariff.
Access to physical, and possibly logical, infrastructure of broadband service within definition of universal service.	Targeted enduser customers	Inequality among individuals to access essential services due to specific unaffordability factors (e.g. indigence or high cost of serving customer).	Some form of subsidization for benefit of needy customers; perhaps also coupled with some form of duty to serve.	Internet access is within definition of universal service for eligible schools and libraries and for rural health care providers. Greater discounts for economically disadvantaged and rural schools and libraries.
Interconnection among broadband networks.	Speakers as competitors (for benefit of audience)	Viewpoint diversity principle coupled with potential refusals to deal.	Refusals to deal with speakers prohibited.	Interconnection among telecommunications carriers; must carry requirements on cable companies; carry one, carry all rule on satellite television carriers.

V.A. Access for Individual Endusers

The first broadband issue described in Table 2 is to ensure that all individual enduser customers have access to the physical layer of the broadband network. Without access to fundamental transmission facilities, endusers have no access to broadband services. For this issue, the underlying problem that may impede such access is economic coercion arising from inequality of bargaining power between the broadband

provider of the physical layer and the endusers. The disparate bargaining power could manifest itself in practices such as provider refusals to deal, excessively high prices, unreasonable terms and conditions, and unreasonable discrimination among otherwise similarly situated endusers. This is the same issue and underlying problem that led to the imposition of special obligations on “businesses affected with a public interest”, and particularly common carriers and public utilities, as described in sections IV.B.1 and B.4. Referring to Table 1, the longstanding legal principle to address such situations – with origins in the doctrine of “public callings” from medieval England – is to impose a legal duty on the provider of the essential service or facility to provide non-discriminatory access at reasonable rates and with an adequate standard of care.

There are policy actions that have recently occurred - some still pending - that would affect the achievability of this broadband access objective. First, in its Cable Modem Access Order,⁵⁸ the FCC defined cable modem service to endusers as an information service under the Telecommunications Act of 1996. Furthermore, the FCC declared that cable modem service is an integrated offering with no separable telecommunications component. As a result, provision of cable modem service involves the provision of no service subject to common carrier regulation. This means that individual endusers have no common carrier access rights to the physical layer of the cable companies’ networks which are used for Internet access. The Cable Modem Access Order is currently on appeal.⁵⁹

In recognition of the fact that the declaratory ruling in its Cable Modem will pose asymmetric regulatory obligations between cable modem service providers and wireline broadband Internet access providers (DSL providers), the FCC has issued a Wireline Broadband Internet Access NPRM. In this NPRM, the FCC tentatively concludes that wireline broadband Internet access service to endusers is also an integrated information service, with no offering of a separable telecommunications service.⁶⁰ If this tentative

⁵⁸ Declaratory Ruling and Notice of Proposed Rulemaking, In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, GN Docket No. 00-185, 17 FCC Rcd 4798 (released March 15, 2002)(hereinafter referred to as the “Cable Modem Access Order”), pars. 31-41.

⁵⁹ Brand X Internet Services v. FCC, Dkt. No. 02-70518 (9th Cir. 2002).

⁶⁰ Notice of Proposed Rulemaking, In the Matter of the Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, 17 FCC Rcd 3019 (released Feb. 15, 2002)(hereinafter referred to as the “Wireline Broadband Internet Access NPRM”), pars.17-26 .

conclusion is adopted, then common carrier obligations would also not apply to the physical layer of wireline broadband providers, even though wireline providers would still be common carriers as to the provision of their narrowband physical network infrastructures.

By attempting to provide intermodal regulatory parity in this manner, the FCC would create *intramodal asymmetric regulation* between the physical layers of narrowband and broadband services. This is because a wireline carrier provides both narrowband and broadband services over the same physical lines (at least for residential customers). The fundamental question is whether such intramodal asymmetric regulation is sustainable. If not, then the entire common carrier regulatory regime for telecommunications services could erode.

V.B. Access for Communities of Individual Endusers

The second broadband issue described in Table 2 is to ensure that all communities have access to the physical (and perhaps also the logical) infrastructure of the broadband networks. This issue differs from the first one in an important respect. The first issue is concerned with access to existing essential services or facilities, whereas the second contemplates that such services or facilities may not yet exist in some (or at least portions of) communities. For the latter issue, the underlying problem is that providers may refuse to invest in and serve some areas. Reasons for refusing to serve may include business plans based on targeting higher profit areas, or costs of providing service that exceed the revenue that would reasonably be expected to be generated. This is similar to the issue and underlying problem that led to the use of franchises and public utility regulation to impose an affirmative duty to serve, as discussed in section IV.B.1. Franchises (granting an exclusive privilege to serve) customarily imposed requirements on the public utility to build out and serve the entire franchise area – that is, imposed an affirmative duty to serve - as well as placed limitations on the utility's ability to discontinue provision of service.

For telecommunications carriers, similar requirements have been codified in State statutes and/or enforced through the imposition of carrier of last resort obligations⁶¹ with regard to the provision of *narrowband services*. Similar build-out requirements have been included in local governments' franchise agreements with cable companies as to the provision of *cable service*. However, regulation of telecommunications carriers has also included some form of subsidization scheme, whether implicitly through the rate structure or explicitly through funding mechanisms, to help carriers remain financially viable while providing essentially ubiquitous networks. Such subsidization has been used to implement universal service policy, affecting welfare rights as discussed in section IV.C.

Section 706 of the Telecommunications Act of 1996 directs the FCC and State commissions to encourage the deployment of advanced telecommunications capability on a reasonable and timely basis to all Americans. Thus far no provider of broadband services has been required to build out physical (or logical) infrastructure to serve communities. As previously described, the existing affirmative duties to serve apply to narrowband and cable services, but not to broadband services. To impose an affirmative obligation to build out broadband facilities would be an expansion of, but not inconsistent with, the current regulatory regimes for telecommunications carriers and cable companies.

V.C. Access for Competitors

The third broadband issue described in Table 2 is to ensure that competitive Internet service providers (ISP's) have access to the physical infrastructure of a broadband provider through interconnection at the logical layer. The primary purpose underlying a policy for such access is government's interest in viewpoint diversity. More specifically, viewpoint diversity at the application and content layers can be achieved through diversity at the logical layer. This is because choice and quality of both applications and content vary among ISP's. For refusal to deal with competitors, the applicable legal principle from Table 1 is to prohibit the refusal to deal. In particular, if

⁶¹ Carrier of last resort obligations were historically imposed by the States on incumbent monopoly providers, for both local exchange and toll services. The continuing enforcement of such obligations in a market open to competition is an untested legal question.

the provider's facilities are considered essential to viable competition in the related market, the essential facilities doctrine would apply.⁶²

As part of the Cable Modem Access Order discussed in section V.A., the FCC has refused to compel cable modem service providers – even if they also provide local exchange service over the same facilities - to provide access to its physical network to competitive ISP's.⁶³ As previously discussed, in the Wireline Broadband Internet Access NPRM, the FCC also tentatively concludes that wireline broadband Internet access is an integrated information service and is not required to provide the physical layer on a common carrier basis to endusers. As for access by competitive ISP's, the FCC seeks comments as to whether the Bell Operating Companies should be relieved of the Computer Inquiry requirements to unbundle the transmission component for sale under tariff.⁶⁴

If access to broadband should later be considered essential, retention of the Cable Modem Access Order could adversely impact individuals as citizens by diminishing their access to diverse sources of information and viewpoints. In addition, to the extent that individuals' access to ISP's and use of the Internet is considered that of a speaker, then individuals' free speech rights as speakers would also be adversely affected. These adverse effects on the free speech rights of individuals would be further exacerbated should the FCC decide to also relieve the Bell Operating Companies of the obligation to unbundle their transmission component of broadband in the Wireline Broadband Internet Access NPRM.⁶⁵

⁶² One could argue that the purpose of the third broadband issue discussed here is one of antitrust under the Sherman Act. However, this concern is subsumed by the viewpoint diversity principle. Viewpoint diversity provides an additional, distinct government interest from the antitrust concern that may make the need for government intervention more compelling. In this regard, it should be noted that the first broadband issue in Table 2 could also list viewpoint diversity as an added purpose. However, for purposes of discussion, it seemed preferable to address the impact solely on the economic rights as a starting point.

⁶³ Pars. 33 & 38, *see* note 58, *supra*.

⁶⁴ Pars. 43-53, *see* note 60, *supra*.

⁶⁵ Arguably, users of the Internet could be speakers and audience simultaneously, as with telecommunications service. *See* section IV.D. The same could be true of ISP's. But, in order to contrast situations where the competitor denied access is a non-speaker with those where the competitor denied access is a speaker, the third broadband issue here assumes that the ISP's are not speakers. *See* note 70, *infra*.

V.D. Broadband as Universal Service

The fourth broadband issue described in Table 2 is to expand the definition of universal service under section 254 of the Telecommunications Act of 1996 to include access to broadband service. Again, for purposes of discussion here, this issue assumes that broadband is considered an essential service. The underlying purpose or problem is that there is inequality among individuals' access to broadband service due to affordability factors. For example, some individuals (or households) may be indigent or live in high cost areas for which an affordable price is impossible. This is the same underlying issue and problem addressed by legal principles affecting welfare rights discussed in section IV.C. From Table 1, the relevant legal principles are to provide some funding directly to the disadvantaged individuals to obtain the service, or to subsidize the essential service on behalf of the disadvantaged individuals.

At this time, FCC rules do include Internet access within the definition of universal service for eligible schools and libraries as well as for rural health care providers without toll-free access to the Internet.⁶⁶ As a result, these eligible entities receive Internet access at a discount, and, in turn, the eligible carrier providing the access receives federal universal service support to compensate for the relevant discount. Furthermore, the discounts for eligible schools and libraries are significantly greater for those that are economically disadvantaged or in rural areas.⁶⁷ In addition, in section 214(e) of the Telecommunications Act of 1996, eligible carriers are required to provide universal service throughout the serving area. Therefore, there is also a duty to serve to ensure availability of Internet access service.

Thus, as to eligible schools and libraries and rural health care providers, the current universal service mechanism is consistent with the existing legal principles that have been applied to provide disadvantaged individuals with access to essential services. The eligible entities receive discounted rates, with higher discounts for disadvantaged entities. However, the size of the existing funding obligations of the federal universal

⁶⁶ 47 CFR sections 54.503 and 54.621 (Oct. 1, 2001).

⁶⁷ 47 CFR section 54.505 (Oct. 1, 2001).

service support mechanisms – which for eligible schools and libraries and rural health care providers is over \$2 billion per year - is of major concern.⁶⁸

Federal universal service support for disadvantaged individuals (low income households, high cost areas) does exist, but only for access to the *narrowband* physical infrastructure. The existing federal universal service support mechanisms could also be used to support access to broadband if the definition of universal service is modified to include broadband. However, expanding the definition of universal service to include broadband for disadvantaged individuals would only magnify the already large funding burden imposed on the telecommunications industry. To preserve the federal universal support mechanisms for current recipients, much less enable expansion of support for broadband access to individuals directly, the means of raising the funding for these mechanisms may need to change. Alternatives include federal legislation enabling the FCC to also access contributions based on the intrastate revenues of telecommunications carriers, or funding from the federal government's general tax revenues.⁶⁹

V.E. Access by Speaker as Enduser or Competitor

The fifth broadband issue described in Table 2 is concerned with interconnection among broadband networks to ensure that the Internet continues to function as a network of networks and thereby provides viewpoint diversity (access to a diversity of applications and content). Potential interconnection problems are primarily at the physical and logical layers due to refusals to deal among the network providers. Such refusals to deal among competitors pose problems similar to those discussed under the third broadband issue.

The fifth broadband issue is similar to the third broadband issue but differs in an important respect. The third broadband issue addresses access by ISP's in their economic relationship as a competitor of the provider but also as a *non-speaker* under the First

⁶⁸ The FCC is reviewing the system under which contributions are made by telecommunications carriers to fund the federal universal service support mechanisms in light of the existing funding burden. Further Notice of Proposed Rulemaking and Report and Order, In the Matter of the Federal-State Joint Board on Universal Service, FCC 02-43 (released Feb. 26, 2002). Concerns as to the viability of the existing funding burden are driven, in large part, by the FCC's lack of authority to assess contributions based on intrastate revenues. Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 448 (5th Cir. 1999).

⁶⁹ See note 68, *supra*.

Amendment.⁷⁰ However, the fifth broadband issue addresses access by competitors who may also be *speakers* under the First Amendment. Therefore, under the fifth broadband issue, the free speech rights of competitors may also be adversely affected.

The legal principle from section IV is that, where not inconsistent with the constitutional rights of the provider, government may require providers of electronic mass media to open access to speakers. This is true even if the speaker is a mass media competitor using a different technology platform. As discussed in section IV.D., some requirements have already been imposed on cable companies and satellite television carriers to carry local broadcasting stations in support of viewpoint diversity. These are one-way interconnection requirements from local broadcasting stations to cable and satellite systems. Although these requirements do not apply with regard to the provision of broadband, they do provide a precedent for imposing interconnection requirements among competing technology platforms that also have speaker status.⁷¹ Evaluation of the government's interest in imposing access to competitors as speakers will, of course, have to be balanced against the free speech rights (where applicable) of the access provider.

V.F. Summary of Effects on Broadband Access Issues

As the discussion in sections V.A through V.D shows, current regulation and likely outcomes of pending proceedings could pose obstacles for achieving the five types of access issues described in Table 2 should broadband be considered an essential service of facility. These obstacles could create adverse effects for the intended access recipients. Table 3 provides an overview of these obstacles based on the analyses of the five broadband access issues conducted in sections V.A. through V.D. In the first column, each broadband access issue is described as it appears in Table 2. For each broadband access issue, the table then describes: the nature of the current, or pending consideration of, relevant regulation; the likely effect of that regulation, if unchanged, on achieving the

⁷⁰ Some might argue that ISP's may also be speakers. If so, then the problems raised under the third and fifth broadband issues are similar. However, for purposes of analysis here, it is instructive to contrast situations where competitors are non-speakers with those where competitors are speakers. *See* note 65, *supra*.

⁷¹ Telecommunications carriers are also required to interconnect with each other, whether or not they providing competing services. However, telecommunications carriers have a First Amendment status as non-speakers. *See* section IV.D. However, if common carrier regulation erodes – for example, as with the first and third broadband issues – the status of telecommunications carriers as non-speakers may need to change to prevent intermodal regulatory asymmetry.

type of access at issue; and the likely adverse effects on the intended access recipients in terms of the type of rights affected.

At this juncture, it may be helpful to review the results described in the last two columns. For the first broadband issue, the economic rights of individuals as endusers of *both narrowband and broadband* physical infrastructures may be adversely affected due to intramodal asymmetric regulation of narrowband and broadband infrastructures of wireline (non-cable) providers. For the second issue, the economic rights of communities of individual endusers of broadband infrastructure may be diminished.

As for the fourth broadband issue, to the extent that the financial burden of federal universal service support becomes unsustainable, the welfare rights of intended recipients would be adversely affected. Therefore, if the burden is unsustainable under the current definition of universal service, it certainly would not be sustainable upon a broadening of the definition to include broadband service on a wider scale. Furthermore, to the extent that common carrier and public utility regulation for the benefit of the public (not just disadvantaged individuals or communities) is viewed as an early form of welfare state regulation,⁷² welfare rights of individuals and communities under the first two broadband access issues would also be adversely affected.

For both the third and fifth issues, the free speech rights of individuals as citizens of a democracy and, if applicable, as speakers could be adversely impacted. In addition, the fifth issue may also affect the speech rights of competitors as speakers.

⁷² See note 41, *supra*.

**Table 3. Obstacles to Achieving “Essentiality of Access”
For Broadband Access Issues**

Broadband Issue	Current or Pending Regulation	Adverse Effect of Current Regulation	Adversely Affected Rights of Access Recipients
1. Enduser access to physical infrastructure of broadband (Internet) network.	Government may impose intramodal asymmetric regulation of telecommunications carriers’ narrowband and broadband physical layers.	Erosion of common carrier regulation for narrowband physical layer, and potential unavailability of access to broadband physical layer.	Economic (and welfare)* rights of individuals as endusers of narrowband and broadband access.
2. Physical and/or logical infrastructures of broadband network need to be ubiquitously available throughout the community.	Government imposes no affirmative duty to serve communities, or portions thereof, with broadband physical layer.	Some communities, or portions thereof, may not have access to broadband physical infrastructure.	Economic (and welfare)* rights of communities of individuals as endusers of broadband access.
3. Access to the physical layer, through interconnection at the logical layer, for ISP’s who are competitors at the logical layer.	Government imposes no obligation on cable modem access providers to provide access to competitive ISP’s. BOC’s may not have to unbundle transmission component of broadband service.	Goal of viewpoint diversity could be undermined.	Free speech rights of individuals as citizens of democracy (reflected in government interest in viewpoint diversity) and possibly also as speakers.
4. Access to physical, and possibly logical, infrastructure of broadband service within definition of universal service.	Existing funding burden of federal universal service support for Internet access to eligible schools and libraries and rural health care providers is large. Funding burden would increase if support is expanded for broadband services to individuals.	Unsustainability of federal universal service support mechanisms, and therefore unavailability of reasonably priced broadband service.	Welfare rights of intended beneficiaries.
5. Interconnection among broadband networks.	Government may not impose necessary interconnection requirements among broadband networks.	Goal of viewpoint diversity could be undermined.	Free speech rights of: (a) individuals as citizens of democracy (reflected in government interest in viewpoint diversity) and possibly also as speakers; and (b) competitors as speakers.

* Welfare rights would also be applicable if one considers common carrier and public utility regulation to be an early form of welfare state regulation. *See* note 41, *supra*.

VI. Constitutional Rights of Individuals versus Corporations

Should access to broadband be considered essential, changes in regulation would be required to prevent the adverse effects on intended access recipients summarized in section V.F. If the legal principles discussed in section IV are invoked, possible remedies for each of the five broadband access issues, listed in sequence by issue, are: (1) impose common carrier obligations on all broadband providers of the physical layer; (2) impose some duty to serve (build-out) obligations on broadband providers, which could vary among communities, with possible inclusion of some financial relief to mitigate the financial burden; (3) compel broadband providers to provide access to competitive ISP's'; (4) change the method of recovering contributions for the federal universal service support mechanisms, such as to include assessment against telecommunications carriers' intrastate revenues or to have funding come from general tax revenues of the federal government; and (5) require interconnection among broadband networks at whatever layer is necessary.

However, for any suggested remedy that imposes additional burdens on broadband access providers, constitutional challenges should be expected by the affected providers.⁷³ To address the effects on their economic interests, the most likely challenges will be under the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment.⁷⁴ To address the effects on the providers' free speech interests, challenges will be under the First Amendment.

Constitutional challenges by broadband access providers will require the courts to weigh the competing interests of broadband providers and access recipients. This will pose difficulties for the courts in conducting the necessary constitutional analyses. Some difficulties will arise from the need to address conflicts in the differing legal regimes among now competing technology platforms. However, this section discusses difficulties that appear to have been previously unraised in broadband policy debates. More

⁷³ In fact, constitutional challenges are more likely to arise when government responds to change in communications technology by transitions from monopoly-based to deregulatory policies. For a detailed discussion in this regard, *see* Cherry & Wildman (2000), note 11, *supra*.

⁷⁴ Challenges may also be brought under the Equal Protection Clause of the Fourteenth Amendment. However, such claims would be based on allegations of unconstitutional disparate treatment of a regulation among broadband providers. As such claims would most likely be addressing competing economic interests of corporations, it is not discussed here.

specifically, the constitutionality of broadband regulation may depend upon the corporate characteristics of broadband providers.

VI.A. No Consistent Theory of Constitutional Rights for Corporations

It is well established that corporations do have constitutional rights but they are not coextensive with those of individuals as natural persons.⁷⁵ In some instances, corporations have no constitutional rights whatsoever. For example, a corporation is not a “citizen” protected by the Privileges and Immunities Clause of the Fourteenth Amendment, nor is it a “person” with a right against self-incrimination under the Fifth Amendment. Yet, use of the phrase “citizen” or “person” in the U.S. Constitution is not definitive in determining a corporation’s rights. For example, a corporation is a “citizen” for purposes of invoking the diversity jurisdiction of the federal courts, and also a “person” protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The U.S. Supreme Court “has never adopted a single test for applying constitutional rights to corporations, at least in part because it has never agreed upon a single understanding of what a corporation is for constitutional purposes.”⁷⁶ In early cases, the Court relied on a corporate person theory, which views the corporation as an artificial legal entity with a distinct bundle of rights and obligations. Under this theory, “government’s power to create corporations implies and assumes pervasive government power to regulate corporations. This, in turn, provides a basis for denigrating the constitutional protection of corporate activities.”⁷⁷ In the late nineteenth and early twentieth centuries, the view of incorporation as a privilege given by the sovereign came into disfavor in light of concerns with monopoly and corruption.⁷⁸ “As access to corporate status became a right of the many [through State general incorporation statutes], the corporation came to be regarded progressively less as a creation of the

⁷⁵ For a detailed discussion as to the constitutional rights of corporations as compared to natural persons, see Note, “Constitutional Rights of the Corporate Person,” 91 Yale L.J. 1641, 1644 (1982); P. Henning, “The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions,” 63 Tenn. L. Rev. 793 (1996); L. Ribstein, “The Constitutional Conception of the Corporation,” 4 Supreme Court Review 95 (1995).

⁷⁶ Henning (1996), note 75, *supra*, at p. 807.

⁷⁷ Ribstein (1995), note 75, *supra*, at p. 96.

⁷⁸ Note, 91 Yale L. Rev. at 1647. This assertion refers to some of the problems that resulted in the passage of the Interstate Commerce Act and the Sherman Act, as discussed in sections IV.B.2 and B.3.

sovereign and increasingly more as a product of contractual agreement.”⁷⁹ Under this view, known as the contract theory, contract theorists argued that the corporation is simply a device for referring to the summary of rights and duties of the private parties who contractually agreed to create it, and therefore should be afforded the same constitutional protections as natural persons.⁸⁰

The determination of corporate constitutional rights does depend on the theory of the corporation that is used, but the Court has never provided an overall unifying theory of the corporation to explain its holdings.⁸¹ Furthermore, it appears that some constitutional rights are independent of the corporate form, while others are not. Thus, courts’ analyses of constitutional challenges brought by broadband access providers will also likely vary with the specific constitutional right at issue.

Nonetheless, with regard to the broadband access issues discussed in section V, some preliminary conclusions can be made. First, treatment of claims under the Takings Clause of the Fifth Amendment will be independent of the corporate form. Second, protection under the Due Process Clause of the Fourteenth Amendment will not depend on the corporate form, although policy makers’ views of necessary regulation may depend on the unique powers and characteristics of corporations. Third, addressing competing free speech rights between corporate broadband providers and natural persons will be the most troublesome area. There is precedent for restricting the free speech rights of corporations to a greater extent than for natural persons. However, the extent to which greater restrictions can be placed on media-related corporations is unclear. Addressing conflicts in free speech interests among broadband providers and natural persons (as the intended access recipients of broadband policies) will likely be the most compelling and complex challenge for policy makers and the courts.

VI.B. Takings Clause: Constitutional Rights Independent of Corporate Form

One of the most fundamental limits on actions by the federal and state governments is that government may not take private property for public use without providing just compensation. This prohibition arises from the Takings Clause of the Fifth

⁷⁹ *Ibid.*

⁸⁰ *Ibid.* at 1647-48. *See also* Ribstein (1995), note 75, *supra*, at 96.

⁸¹ *See* note 75, *supra*. In each of these articles, the author offers his own theory or model for viewing the corporation in the twentieth century.

Amendment of the U.S. Constitution.⁸² This prohibition protects the owners of private property, regardless of the form by which the owners may be organized. The Takings Clause applies not only when government exercises its eminent domain power to take real property, but also when exercise of its regulatory powers is considered confiscatory. Classic examples of the latter are public utility cases in which the financial viability of the utility is threatened by requirements of state and/or federal regulatory requirements.⁸³ More recent examples are cases regarding physical collocation requirements imposed on incumbent local exchange companies.⁸⁴

The imposition of legal principles discussed in section IV to the second, third and fifth broadband issues discussed in section V could generate takings claims under certain circumstances. For example, imposition of an affirmative duty to serve could be confiscatory if the cost of providing broadband physical infrastructure far exceeds the price that customers could reasonably pay.⁸⁵ A requirement to provide access to facilities to competitors or to interconnect with other broadband providers could be confiscatory if reasonable compensation is not required to be paid to cover relevant costs. Failure to provide for compensation was the primary defect of the physical collocation cases.⁸⁶ Consideration of confiscation claims under these types of circumstances would not be a function of whether or not the affected broadband provider was a corporation.

VI.C. Due Process Clause: Policy Rationale Affected by Corporate Form

A corporation's property interests are protected by the Due Process Clause of the Fourteenth Amendment, which provides that no State shall "deprive any person of life, liberty or property, without due process of law."⁸⁷ To be valid, economic regulation under a State's police power must be consistent with due process. As discussed in section IV.B.4, the scope of permissible economic regulation for a given business depends on the

⁸² The Takings Clause provides in relevant part: "nor shall private property be taken for public use, without just compensation." For a discussion of the applicability of the Takings Clause to communications policies, *see* Cherry & Wildman (2000), note 11, *supra*, at pp. 69-74.

⁸³ *See* Cherry & Wildman (2000), note 11, *supra*, at pp. 69-74.

⁸⁴ Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C.Cir. 1994) (FCC order of physical collocation found to be a physical taking of property under the Fifth Amendment); GTE Northwest Inc. v. Public Utility Commission of Oregon, 900 P.2d 495 (Or. Sup. Ct. 1995) (state commission's order of physical collocation constituted a taking).

⁸⁵ Takings claims in this context would be similar to those that have been raised at times by public utilities. *See* note 83, *supra*.

⁸⁶ *See* note 84, *supra* at p. 102.

specific circumstances in each case. However, there is a well established line of cases that upholds a greater degree of regulation for businesses bearing certain characteristics, referred to as “businesses affected with a public interest.” It is under this body of law that obligations imposed on common carriers and public utilities have been upheld. For such businesses, regulation to protect the public interest is justified to address various forms of economic coercion.

Interestingly, even though the scope of permissible regulation of businesses does depend upon the specific circumstances in each case, the Supreme Court’s decisions in this area have not differentiated situations on the basis of a business’ organizational form. However, as discussed in sections IV.B.2 and B.3, Congress passed the Interstate Commerce Act and the Sherman Act to expressly address economic abuses that it attributed to the development of the modern corporation. Therefore, it appears that the corporate form may be relevant to legislators’ views of appropriate regulation but may not affect the Court’s assessment of its constitutionality under due process.

As for the legal principles affecting economic interests in section IV, it thus appears that the corporate form of the broadband providers may be relevant to policy makers’ decisions of what obligations to impose. The greater the abuses associated with the corporate form, the greater the justification for regulation. However, so long as broadband providers bear characteristics similar to those of “businesses affected with a public interest”,⁸⁸ application of these legal principles for the benefit of endusers should pose no problems under the Due Process Clause. The legal obligations to deal with competitors could also be deemed consistent with prior interpretation of the Sherman Act.

VI.D. Free Speech Rights: Constitutional Rights Affected by Corporate Form

As discussed in section IV.D, the courts recognize the dual role of freedom of speech under the First Amendment to protect the interests of individuals and to contribute to sustaining a constitutional democracy. In this regard, in some cases the courts have upheld governmentally imposed access requirements on electronic mass media in

⁸⁷ See note 75, *supra*.

⁸⁸ For the purposes of discussion in section V, it was assumed that broadband providers did bear similar characteristics.

furtherance of viewpoint diversity even though it would limit the medium's own speech rights.

However, the jurisprudence in this area is very complex for various reasons.⁸⁹ First, the level of judicial scrutiny applied to regulation affecting the speech rights of the mass media differs among technology platforms. This means that a given regulation may be constitutional for one technology platform but not for another. Second, the jurisprudence even for a given technology platform is uncertain. For example, the traditional justification for a lower level of judicial scrutiny for broadcasting – spectrum scarcity – no longer seems appropriate. In addition, the U.S. Supreme Court has refused to unambiguously state the First Amendment status of cable companies, only able to reach its decision in Turner II (must carry requirements) by plurality.⁹⁰ Third, convergence among technology platforms only serves to heighten the complexity of applying First Amendment analysis to the media. The convergence between telecommunications carriers as non-speakers with the electronic mass media as speakers is an example, as discussed in section IV.D.

The need to address the First Amendment status of competing communications technology platforms in providing access to advanced information infrastructure is already receiving much attention. However, the focus of recent commentators has been on the ramifications of differing free speech rights among information infrastructure providers.⁹¹ No attention has been given to the relevance of the corporate form as a factor in addressing the constitutionality of government restrictions on free speech rights. Yet, the discussion as to the third and fifth broadband issues in section V shows that the potential for regulation to cause conflicting free speech interests between access recipients and broadband providers is great. The need to resolve conflicts among the free speech interests of intended access recipients and access providers will often require evaluation of their constitutional rights as natural persons and corporations, respectively.

⁸⁹ For discussion of free speech jurisprudence, see M. Botein, Regulation of the Electronic Mass Media (3rd edition) (St. Paul, MN: American Casebook Series, West Group) (1998); T. Carter, M. Franklin, J. Wright, The First Amendment and the Fourth Estate (8th edition) (New York, NY: Foundation Press) (2001).

⁹⁰ See note 51, *supra*.

⁹¹ See, e.g., H. Perritt, Jr., "Access to the National Information Infrastructure," 30 Wake Forest L. Rev. 51 (1995); A. Auerbach, "Mandatory Access and the Information Infrastructure," 3 CommLaw Conspectus 1 (1995); Note, "The Message in the Medium: The First Amendment on the Information Superhighway," 107 Harv. L. Rev. 1062 (1994).

There is precedent for restricting the free speech rights of corporations to a greater extent than natural persons for reasons directly related to unique characteristics of the corporate form.⁹² Political speech, unlike commercial speech, receives the highest level of First Amendment protection. Nevertheless, in Austin v. Michigan Chamber of Commerce,⁹³ the U.S. Supreme Court upheld a Michigan statute that prohibited certain corporations from using corporate treasury funds for independent expenditures in support or opposition to candidates in state elections. The Court found this restriction on corporations' political speech to be justified because the State had a compelling interest in preventing a specific type of corruption in the political arena: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."⁹⁴ The Court agreed that the Michigan legislature had identified a serious danger that corporate political expenditures could undermine the integrity of the political process. Furthermore, the Court emphasized that "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures."⁹⁵

In Austin the statute did exempt media corporations from the expenditure restriction. It upheld this exemption under the Equal Protection Clause because "[a] valid distinction ... exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public."⁹⁶ However, the Court further stated: "*Although the press' unique societal role may not entitle the press to greater protection under the Constitution, it does provide a compelling interest for the State to exempt media corporations from the scope of political expenditures limitations.*"⁹⁷ By this statement, the Court implies that even placing the same restrictions on the press – the form of mass media with the highest level of First

⁹² For a discussion on this point, see Ribstein (1995), note 75, *supra*, at pp. 124-138.

⁹³ 494 U.S. 652 (1990).

⁹⁴ 494 U.S. at 659-660. The statute applied only to independent expenditures from corporate treasuries for which the means of amassing the funds had little correlation to the public's support for the corporation's political ideas. Corporations could make expenditures through separate segregated funds where contributions are made by people based on the understanding that the funds would be used solely for political purposes.

⁹⁵ 494 U.S. at 660.

⁹⁶ 494 U.S. at 668.

⁹⁷ 494 U.S. at 668 (emphasis added; citations omitted).

Amendment protection – may not be unconstitutional. Although clearly not definitive, this statement shows receptivity by the Court to possible limitations on the free speech rights of mass media providers for reasons related to characteristics unique to the corporate form.

Thus, Austin v. Michigan Chamber of Commerce does support the possibility of allowing government to place restrictions on broadband access providers' free speech rights for reasons related to characteristics unique to corporations. A compelling government interest could be viewpoint diversity, as discussed with regard to the third and fifth broadband access issues in section V. This would present conflicts between the free speech rights of access recipients and broadband providers. In balancing the interests of the access recipients and access providers, a justification for imposing restrictions on the providers' free speech rights could be the various forms of economic coercion discussed under the first three broadband issues discussed in section V. The economic abuses of media corporations could be considered particularly acute given their corporate form, much as Congress found for railroads and large industrial enterprises when it enacted the Interstate Commerce Act and the Sherman Act.⁹⁸

Conclusion

In various contexts the government has intervened to ensure the provision of essential services and facilities to the public. The legal principles employed have varied with the type of access problem – what services or facilities are deemed to be essential, for whom they are deemed essential, the nature of the relationship between the intended access recipient and the access provider, and the circumstances impeding the accessibility of the service or facilities. The mapping of access situations bearing similar characteristics to the legal principles applied to them is referred to here as an “essentiality of access” typology. “Essentiality of access” is a valuable organizing principle for evaluating future public policy objectives affecting the technologically converging communications industries because policy problems that have been previously handled by distinct legal rules for a given technology must now be addressed simultaneously across competing technology platforms.

⁹⁸ See section IV.B.3.

Applying “essential of access” typology to current broadband access issues shows how pursuit of broadband policy objectives requires recognition of the differing relationships of access recipients to the access providers that affect different categories of legal rights: economic, welfare and free speech rights. Different categories of rights implicate different legal principles, which, at times, may conflict. This requires policymakers to choose some interests over others. Furthermore, pursuit of multiple broadband access objectives makes the selection of appropriate government interventions a tremendously complex endeavor.

“Essentiality of access” analysis shows that, if broadband should later be considered an essential service or facility, current or pending policy actions affecting broadband could create adverse effects for the economic, welfare and free speech rights of intended access recipients. For example, lack of a common carriage requirement on cable modem access and wireline broadband Internet access providers could adversely affect the availability of broadband and narrowband services at reasonable rates. Lack of an affirmative duty to serve communities with broadband infrastructure could leave some areas without any broadband access. In addition, lack of a requirement on broadband providers to share their physical infrastructure with competitive ISP’s, or the lack of interconnection requirements among broadband physical or logical infrastructures, could diminish viewpoint diversity – a longstanding government interest.

“Essentiality of access” analysis also shows that there is an even more fundamental challenge for policymakers and the courts. The constitutionality of broadband policies – such as under the Due Process Clause or free speech under the First Amendment – may depend on characteristics of broadband providers that are unique to the corporate form. It has been long established that the legal rights and duties of individuals and corporations are not synonymous under U.S. law, and that government has created legal principles to specifically address abuses of power by corporations. The courts will need to clarify the principles for determining the constitutional rights of corporations under the U.S. Constitution in order to address the constitutional challenges that new broadband policies will likely engender.