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THE FCC'S NEW THEORY OF THE FIRST AMENDMENT

Hannibal Travis*

[FCC licensing permits a broadcaster to] monopolize a radio frequency to the exclusion of his fellow citizens. . . . [It] confers [a] right on licensees to prevent others from [communicating in violation of] an unconditional monopoly of a scarce resource which the Government has denied others the right to use.1

[We believe that taking action to preserve the open character of the Internet "promotes rather than restricts expressive freedom" because it provides consumers with greater choice in the applications they may use to communicate and the content they may access.]2

I. INTRODUCTION

The inauguration of Barack Obama as President prompted new debate about how federal agencies would implement his plan "to restore prosperity," "promote the cause of peace," and "reclaim the American dream."3

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Commission (FCC) carry out its statutory mandate of promoting efficient and world-wide communication by wire and radio without discrimination on the basis of race, color, sex, or religion? Would it, as then-Senator Obama proposed as a presidential candidate, guarantee a neutral Internet to all and move against radio broadcasters that promote racial discrimination? And would this, as some feared, impose "intellectual protectionism in the form of regulations that suppress ideological rivals"? Or would President Obama’s FCC, as others feared, continue to sell out the public airwaves and Internet infrastructure of the United States to large corporations with political connections?

This Article attempts to theorize mass media and Internet regulation as a solution to the problem of discriminatory, biased, and deceptive coverage of the nation’s most important political debates. As Congress considered legislation to regulate mass media

visited Nov. 20, 2010.


5. See, e.g., Obama Pledges Net Neutrality Laws if Elected President, CNET NEWS (Oct. 29, 2007, 2:29 PM), http://news.cnet.com/8301-10784_3-9806707-7.html (“Affixing his signature to federal Net neutrality rules would be high on the list during his first year in the Oval Office, the junior senator from Illinois said during an interactive forum Monday afternoon with the popular contender put on by MTV and MySpace at Coe College in Iowa.”); Joe Torres, FCC to Investigate Link Between Hate Speech and Hate Crimes, HISPANIC MARKETING 101 (Feb. 3, 2009), http://news.newamericamedia.org/news/view_article.html?article_id=53fb0e563bb2e9eb799cb8b69b60a157a (stating that in September 2008, Obama told the Congressional Hispanic Caucus that “[t]his election is about the 12 million people living in the shadows, the communities taking immigration enforcement into their own hands . . . they’re counting on us to stop the hateful rhetoric filling our airwaves, rise above the fear and demagoguery, and finally enact comprehensive immigration reform”).


7. See Chris Hedges, Worry: Everything’s Gonna Be Not All Right, PACIFIC FREE PRESS (Feb. 4, 2009), http://www.pacificfreepress.com/news/13673-worry-everythings-gonna-be-not-all-right.html (arguing that corporate media censored or ridiculed those who warned of America’s economic decline and loss of its fundamental civil liberties, and that President Obama could do nothing to stop the press from continuing to propagate “info-entertainment and fatuous pundits”); Michael Grebb, Broadband Fight Heads to Congress, WIRED (June 28, 2005), http://www.wired.com/news/digiwood/0,1412,68021,00.html?tw=wn_1polihead (reporting claims by public-interest groups Free Press and Public Knowledge that Supreme Court rulings had set the stage for cable and telephone companies to control the content of Internet and prevent nondiscriminatory access by the public).
and the Internet to ensure neutrality or nondiscrimination with respect to the type of content or application available for user access, many scholars have explored in great detail the theoretical justifications for broadcast and Internet neutrality regulation by the FCC. Yet the theorization by the FCC itself of the First Amendment's limits on such broadcast, cable, and Internet neutrality regulation has, surprisingly, escaped the attention of most scholars of telecommunications and Internet law. Several scholars have attempted to theorize broadcast neutrality, and several others Internet neutrality. However, few have considered the two areas of telecommunications regulation together by using common theoretical constructs, or emphasized the FCC's own vision of free speech.  

8. In 2008, the House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet, held hearings and issued a report on the Internet Freedom Preservation Act, which would prohibit certain forms of discriminatory blocking of Internet content or applications. See H.R. REP. NO. 110-941 (2009). Although Congress is not seriously considering a pure broadcast media neutrality bill at this time, President Barack Obama's platform called for increased "diversity in the ownership of broadcast media, . . . the development of new media outlets for expression of diverse viewpoints, and clarifications of the public interest obligations of broadcasters who occupy the nation's spectrum." The Obama-Biden Plan, CHANGE.GOV, http://change.gov/agenda/technology_agenda/ (last visited Nov. 20, 2010); see also John Eggerton, McCain's Media-Lite, BROADCASTING & CABLE (Sept. 7, 2008), http://www.broadcastingcable.com/article/115287-McCain_s_Media_Lite.php. The Media Ownership Reform Act of 2008, which would have achieved some of these objectives and had several prominent sponsors, including then-Senators Joseph Biden, Barack Obama, and Hillary Clinton, was placed on the Senate Legislative Calendar on September 15, 2008. See Bill Summary and Status, 110th Congress (2007-2008), S. 2332, Cosponsors, THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN02332:@@@P (last updated Sept. 15, 2008).

My analysis begins in Part II with the rise and fall of FCC regulation of the mass media and the Internet through four distinct eras in the FCC’s conception of its own authority and the constraints imposed upon it by the First Amendment. In the first era, the “statist regulatory period,” the FCC doled out telecommunications licenses to entities favored by the government and vigorously regulated broadcast content. In the second era, the “democracy-promotion period,” the FCC regulated the content of speech in an attempt to engender a more robust democratic culture in the aftermath of World War II. In the third era, the “deregulatory period” or “dark ages of broadcast media,” the FCC tolerated blatant discrimination against minority political or ethnic viewpoints, as well as long-term campaigns to reduce competition in media content by merging corporate owners. In the fourth and most recent era, which began in 2005 with renewed citizen activism and congressional attention to bias within the mass media and Internet, the FCC announced new nondiscrimination principles focused on the Internet, but with clear implications for broadcast media.


away from the dark ages of selective deregulation of corporate media by prioritizing media consumers' rights to access diverse and antagonistic sources of information and opinion, rather than the right of large corporations to acquire and control ever larger combinations of media infrastructure. Although the decision was vacated on appeal, its theories may reappear in other actions within the FCC's jurisdiction; they may herald a new era of attention to citizens' First Amendment interests in accessing and benefiting from regulated telecommunications facilities such as broadcast airwaves or cable networks. Part IV attempts to theorize this new vision of the First Amendment using four strands of constitutional and legal theory, i.e. formalist attention to text and precedent; purposivist and originalist emphasis on the principles and contexts underlying constitutional text; economic approaches to efficient or cost-avoiding interpretations of legal language; and civic-republican and egalitarian advocacy of citizen-empowering constitutional narratives. Except, perhaps, for the first strand, which applies ambiguously to FCC regulation of network infrastructure, the theories support the FCC's new emphasis on free speech.

II. THE RISE AND FALL OF MEDIA REGULATION: THE FCC RETHINKS THE FIRST AMENDMENT

A. The Statist Regulatory Period

In the earliest era of FCC regulation of the broadcast media, the commission adopted what could be described as a statist, ministry-of-information model. It imposed an uncompromising

11. See infra Part III.
13. See infra Part IV.
14. Professor Lili Levi of the University of Miami designates this period as the "melting pot" period in reference to her view that the Federal Radio Commission was seeking to turn radio, which promised to give every American "school of thought" a voice, into a "homogenizing and unifying creator of shared values." Lili Levi, The Four Eras of FCC Public Interest Regulation, 60 ADMIN. L. REV. 813, 829–30 (2008). I prefer to call it a "statist" rather than a "melting pot" period because I am unconvinced that racial or ethnic minorities had a meaningful degree of control over radio content or ownership, as a "melting pot" metaphor would suggest. Professor Levi similarly concedes that the FRC promoted assimilation into nationalist narratives, and made "allocation and assignment decisions that aligned the agency's interest with increasingly powerful and moneymed commercial broadcasters." Id. at 832–33.
censorship of broadcast programming which complied with Christian mores and American nationalist military objectives.\textsuperscript{15} By 1936, two-thirds of religious stations lost their broadcasting licenses, and eighty percent of educational stations had lost or sold their licenses.\textsuperscript{16} The Communications Act of 1934 even gave the power to the President to close radio stations based on a "threat of war."

During this first regulatory era, the Federal Radio Commission and its successor organization, the FCC, heavily favored commercial for-profit broadcasters over nonprofit and public-interested broadcasters,\textsuperscript{18} so that the labor movement obtained zero out of ninety clear radio channels.\textsuperscript{19} Many educational and religious broadcasters lost their licenses as "not in the public interest" under the Radio Act of 1927 due to the transition from loose oversight by the Department of Commerce under the Radio Act of 1912, to the bureaucratization of radio policy in a process led by broadcaster lobbies within the Federal Radio Commission ("FRC") and FCC.\textsuperscript{20} The FCC was also actively involved in supplying content and monitoring broadcasters for material harmful to national security, such as pro-fascist programs.\textsuperscript{21}

In the second era of its existence, from about 1945 to 1969, the FCC approached its responsibilities with a mindset based on democracy-promotion, participatory progressivism, and republican


\textsuperscript{16} See Paul Starr, \textit{The Creation of the Media} 352 (Basic Books 2005).

\textsuperscript{17} See Communications Act of 1934 § 706(c), 47 U.S.C. § 606(c) (2006) ("Upon proclamation by the President that there exists war or a threat of war, or a state of public peril or disaster or other national emergency, . . . the President . . . may cause the closing of any station for radio communication . . . ").

\textsuperscript{18} See Starr, supra note 16, at 352.


\textsuperscript{21} See Horten, supra note 15, at 63–83.
Participatory progressivism had a political tradition in the United States that dated back at least as far as the Interstate Commerce Act of 1887, which imposed nondiscrimination obligations on railroads. It also imposed a nondiscrimination obligation in communications that appeared in section 315(a) of the Communications Act of 1934, which stated until 1996 that:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

In the democracy-promotion era of the early 1960s and 1970s, the FCC interpreted this section of the Communications Act of 1934 as codifying the fairness doctrine.

B. The Democracy-Promotion Period

The fairness doctrine stemmed from concerns expressed to the FCC that broadcasters were using their FCC licenses to editorialize on matters of public concern, which was inconsistent with the public interest because it threatens an "overemphasis on the side of any


particular controversy which the licensee chooses to espouse.”26 As
the FCC summarized the doctrine in 1964: “The keystone of the
fairness doctrine and of the public interest is the right of the public
to be informed—to have presented to it the ‘conflicting views of
issues of public importance.’”27 A broadcast license is a privilege
that carries with it a public trust: “Every licensee who is fortunate
in obtaining a license is mandated to operate in the public interest
and has assumed the obligation of presenting important public
questions fairly and without bias.”28 The fairness doctrine
represented not only a duty to provide an opportunity for persons
holding views opposed to those of broadcasting licensees to access
the airwaves, but also—perhaps even more importantly—the duty
of a broadcast licensee to “devote a reasonable percentage of this
broadcast time to the coverage of public issues . . . .”29 When critics
of the fairness doctrine complain that it may suppress broadcast
coverage of controversial issues, they frequently ignore this latter
obligation because it is “impossible to believe that the [obligation to
cover public issues for a set percentage of time] could hamper
broadcast news and commentary in any way.”30

Statutes reflecting the fairness doctrine include the
Communications Act of 1934 and Telecommunications Act of 1996.31
The former created the FCC for the precise purpose of making
available, “so far as possible, to all the people of the United States a
rapid, efficient, Nation-wide, and world-wide wire and radio

(1949). Professor Levi refers to this period as reflecting a “Community
Representation Approach” because the FCC instructed licensees to conduct
surveys and focus groups to identify “community problems and needs to serve
with responsive programming.” Levi, supra note 14, at 834–36, 835 n.82, 836
n.85. In light of Professor Levi’s concession that the FCC continued to “use the
media as educative tools that would promote unity in a diverse community,” and
the emphasis on coverage of public issues and equal opportunities for both sides
of public debates, I prefer to identify the period as one in which the FCC was
interested in democratic dialogue rather than the equitable representation of
diverse communities. Id. at 840.

27. FCC Public Notice: Applicability of the Fairness Doctrine in the
Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964).


58 (1949).

30. Federal Communications Commission, Fairness Report: In re the
Handling of Public Issues Under the Fairness Doctrine and the Public Interest
Standards of the Communications Act, 48 F.C.C. 2d 1, 7 (1974).

communication service with adequate facilities at reasonable charges.\textsuperscript{32} The FCC's mandate included "centralizing authority" and exercising "additional authority with respect to interstate and foreign commerce in wire and radio communication."\textsuperscript{33} The 1934 Act defined broadcasters as "common carriers"\textsuperscript{34} and made it unlawful for common carriers to discriminate unduly or unreasonably against any particular person or class.\textsuperscript{35} Common carriers were intended to be liable in damages to any person so discriminated against.\textsuperscript{36} The 1996 Telecommunications Act provides, with exceptions for news programming, that: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. . . ."\textsuperscript{37} It also restates the obligation imposed by the 1934 Act, as amended in 1959, for broadcasters to show "newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, . . . in the public interest and [with] reasonable opportunity for the discussion of conflicting views on issues of public importance."\textsuperscript{38}

The fairness doctrine was codified in 1959 in an amendment to the 1934 Act.\textsuperscript{39} As endorsed by Congress, the doctrine required FCC licensees to "provide a reasonable opportunity for the

\begin{itemize}
\item \textsuperscript{32} Communications Act of 1934 § 1, 48 Stat. 1064, 1064 (1934) (emphasis added).
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id. § 3(h) (defining "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy").
\item \textsuperscript{35} Id. § 201(a) (recognizing the "duty" of "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor [sic]"); id. § 202(a) (making it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, . . . or services . . . , or to make or give any undue or unreasonable preference or advantage to any particular person . . . .").
\item \textsuperscript{36} Id. §§ 206–07.
\item \textsuperscript{37} 47 U.S.C. § 315(a) (2006).
\item \textsuperscript{38} Id.; see also Office of Commc'n of United Church of Christ v. Fed. Commc'n, 359 F.2d 994, 999 n.5 (D.C. Cir. 1966) (stating that this provision was intended in 1959 to give "Congressional approval" to "the Fairness Doctrine" in which the FCC "emphasized the 'right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter . . . .'" (citing 47 U.S.C. § 315(a) (1964))).
\item \textsuperscript{39} 73 Stat. 557 (1959).
\end{itemize}
discussion of conflicting views on issues of public importance."\(^{40}\) In practice, the fairness doctrine was an effort to monitor public complaints and resulted only rarely in regulation or remedy of unfair exploitation of federal broadcast license monopolies.\(^{41}\) In applying this doctrine, the FCC deferred to the good judgment of the licensee, based on the particular facts of his situation, with the agency's deference extending to "the type of programming and the amount and nature of time to be afforded."\(^{42}\) As the FCC declared in 1949:

> It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesman for each point of view.\(^{43}\)

Properly understood, the fairness doctrine was an effort to prevent broadcast station owners from misappropriating from the federal government an "unfettered power" to disseminate "only their own views on public issues," thereby infringing on the First Amendment rights of others.\(^{44}\)

From 1954 to 1968, the Warren Court made enormous strides in implementing freedom and democracy in the United States by resurrecting the First Amendment from near oblivion, condemning de jure racial segregation, and calling for "one person, one vote" elections.\(^{45}\) Although it is often noted that the statistical correlation

40. Id.
42. Banzhaf v. FCC, 405 F.2d 1082, 1086 (D.C. Cir. 1968).
between political party affiliation and voting record on the Supreme Court is not absolute, the Court deals in qualitative, and not quantitative, changes in the law. Near the forefront of changes was the transition from Associated Press v. United States\(^{46}\) and Red Lion v. F.C.C.\(^{47}\) to Miami Herald Publishing Co. v. Tornillo.\(^{48}\) The cleavage between the participatory ethos of the 1960s, embodied in the text of Red Lion, and the alienating disempowering tendency of the 1970s and 1980s, articulated in Tornillo, paralleled the trend towards U.S. democratization and economic equalization from 1945 to 1975, and towards elitism, ghettoization, and inequality from 1975 to 1992.\(^{49}\)

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The Supreme Court upheld the fairness doctrine against a First Amendment challenge in Red Lion in 1969. The case involved a request by an author to access the radio airwaves to respond to an attack against him by a member of the Christian Crusade and supporter of presidential candidate Barry Goldwater. The Court declared that the fairness doctrine played an essential role in preventing the FCC from distorting public debate by granting communications monopolies to broadcast licensees. Congress ordered the FCC not to exercise its authority in a way that would compromise "the right of free speech by means of radio communication," which was vital to ensure that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the . . . purposes of the First Amendment." The Court endorsed the FCC's citizen-oriented interpretation of the First Amendment:

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

C. The Period of Selective Deregulation

The movement to repeal the fairness doctrine began under President Richard M. Nixon, and culminated in 1987 under President Ronald Reagan. Under Nixon, the FCC turned down


51. Id. at 371–73.
52. Id. at 400–01.
53. Id. at 382 n.12.
54. Id. at 389–90.
55. Professor Levi calls this the "Market Period" in which policy turned
“deregulatory.” Levi, supra note 14, at 841. While agreeing with that characterization of the Reagan administration’s rhetoric, I emphasize the selectivity of the deregulation for reasons that should become clear below, but above all to avoid giving the impression that broadcasting became a free market where barriers to entry are low, government intervenes rarely, and program quality is at competitive levels. In a related vein, Professor Levi notes that “Conservatives [such as Reagan and Fowler] in favor of economic deregulation often . . . favored social regulation to promote family values.” Id. at 846. Professor Levi also identifies a fourth period of broadcast regulation during the 1990s and 2000s which she calls a “Targeted Return to Public Interest Regulation.” Insofar as she argues that this period “continued, and even expanded, deregulation in the media structure context” while limiting new regulations to “content regulation targeted the protection of children” rather than democracy-promotion, I include this period in my era of “selective deregulation.” Id. at 844. The 1980s were also dominated by concerns about regulating expressive content rather than distortion of debate. See In re Appl. of Zapis Commc’ns Corp. for Renewal of the License of Station WZAK, Cleveland, Ohio, 7 FCC Rcd. 3888 ¶ 4 (1992) (“Broadcast of indecent material is actionable if the broadcast occurs at a time when there is a reasonable risk that children may be in the audience. No terms are per se indecent, and words or phrases that may be patently offensive in one context may not rise to the level of actionable indecency in another context.” (footnote omitted)); In re Appl. of Jacor Broad. of Tampa Bay, Inc. for Renewal of the License of Station WFLA, Tampa, Fla., 7 FCC Rcd. 1826 ¶ 12 (1992) (“Indeed, the Commission has a statutory obligation to take regulatory action when it determines that a broadcast contains indecent material.” (citing 18 U.S.C. § 1464 (2006))); In re Appl. of Whale Commc’ns of Col., Inc. for Renewal of the License of FM Station KKMG, Pueblo, Colo., 6 FCC Rcd. 7548 ¶ 9 (1991) (suggesting that the FCC could regulate the “repetitive, deliberate, and patently offensive” use of expletives); Letter to Goodrich Broad., Inc., Licensee, Radio Station WVIC-FM, 6 FCC Rcd. 2178, 2178 (1991) (condemning a “broadcast [which] made explicit and repeated reference to a sexual organ in the context of soliciting mock headlines for an allegedly true incident—apparently reported in a tabloid newspaper—involving a man’s testicle becoming trapped in the drain of a hot tub.”); In re Liability of Guy Gannett Pub. Co. Licensee of Radio Station WZTA-FM, Miami, Fla. for a Forfeiture, 5 FCC Rcd. 7688, 7689 (1990) (concluding that licensee “compliance with the federal proscription on indecent broadcasts, cannot be determined by the popularity of particular programming among adults in a specific community; nor can such local popularity alter the risk from exposure to indecent programming incurred by children who may be in the audience”); Letter to Mr. Michael J. Faherty Executive Vice President-Radio (Notice of Apparent Liability Issued by FCC Mass Media Bureau), 6 FCC Rcd. 3704 (1989) (issuing forfeiture or fine of $10,000 for “titillating and pandering” content on radio); In re Pacifica Foundation, Inc., Licensee of Station WBAI (FM), New York, New York Pet. for Decl. Ruling Regarding Future Broadcast, 2 FCC Rcd. 3957 (1987) (declining petition seeking permission to broadcast indecent portions of James Joyce’s novel Ulysses); New Indecency Enforcement Standards to be Applied to All Broadcast, 2 FCC Rcd. 2726, 2727 (1987) (ruling that “broadcasts [that] consisted solely of sexual innuendo and double entendre, did not use the seven [dirty] words from the Pacifica case” were still indecent “in a number of instances” because they “dwell on sexual and excretory matters in a pandering and titillating fashion”); In re Primary Jurisdiction Referral of Claims Against Government Defendant Arising from the Inclusion In the NAB
petitions seeking to balance broadcast media coverage of public affairs, claiming that the First Amendment rights of broadcasters trumped the First Amendment rights of the public to objective news and public affairs coverage. Under Reagan, the FCC began the process by issuing reports celebrating corporate editorializing and media mergers. Mark Fowler, Reagan’s FCC Chairman, complained that the fairness doctrine had a “chilling effect” on corporate broadcasters, without mentioning the “chilling effect” of corporations on the journalists, public officials, academic researchers, book authors, and human rights activists who were denied access to the public airwaves to cover public issues or express views opposed by corporate broadcasters. Fowler ensured “a laissez-faire attitude at the commission toward fairness issues that, critics said, undercut broadcasters’ fears of government retribution implicit in the regulation.” He remarked: “The perception of broadcasters as community trustees should be replaced by a view of broadcasters as marketplace participants.” The FCC never issued an opinion enforcing the fairness doctrine under Chairman Fowler. After leaving the FCC, Chairman


57. See, e.g., In re Review of the Comm’n’s Regulations Governing Television Broad., 10 FCC Rcd. 3524 (1995) (celebrating editorializing by corporate-owned broadcast stations); In re Amendment of Section 73.3555 of the Comm’n’s Rules, the Broadcast Multiple Ownership Rules, 4 FCC Rcd. 1741 (1989) (celebrating political endorsements by corporate-owned broadcast stations); In re Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Comm’n’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C. 2d 17 (1985) (celebrating editorializing by broadcast stations and the creation of conglomerates of commonly-owned broadcast media outlets).


59. Id.


61. See Peter J. Boyer, Syracuse Group Appeals Fairness Doctrine Ruling,
Fowler served on the board of directors of a corporate broadcasting chain.  

The third era of FCC activity in media neutrality regulation could be characterized as a "dark age" of deregulation and conglomerate control. The FCC formally repealed the fairness doctrine in 1987, finding it inconsistent with the First Amendment rights of a corporate broadcaster. As one opinion issued early in President Reagan's second term stated:

In FCC v. League of Women Voters the Court has recently reaffirmed that the constitutional permissibility of the fairness doctrine is predicated upon a factual presumption that the doctrine has the effect of enhancing the coverage of controversial issues available to the viewing and listening public. Indeed, the Court stated that it would be obligated to reevaluate the constitutionality of the doctrine if the Commission demonstrated the falsity of this assumption. . . .

. . . By restricting the amount and type of controversial programming aired, a broadcaster minimizes the potentially substantial burdens . . . of the doctrine while remaining in compliance with the strict letter of its regulatory obligations. Therefore, . . . in net effect the fairness doctrine often discourages the presentation of controversial issue programming.

. . . . The evidence of record in this proceeding, however, reflects that broadcasters are convinced that these costs [of responding to fairness doctrine complaints] can in fact be a significant inhibiting factor in the presentation of controversial issues.


This opinion suggested a new weighting of inconvenience to broadcasters of complying with the Communications Act as being of greater importance than free debate on controversial issues.

The FCC predicted that the free market, by the mechanism of competition among broadcasters, would ensure the balanced presentation of controversial issues better than the fairness doctrine could.\textsuperscript{65} Cable television and print media would also compete with radio and television broadcasters to cover issues of public concern.\textsuperscript{66} Congress attempted to force the FCC to implement the fairness doctrine by law, but President Reagan vetoed the law.\textsuperscript{67}

Contrary to the FCC's predictions, the deregulation of broadcasting did not lead to more vigorous and balanced presentations of controversial issues. In other words, the results of the FCC's more than twenty-year experiment in unfettered corporate editorializing and control over news content were not beneficial to public debate. The percentage of the American public

\textsuperscript{65} See id. at 207–08 ("Given the significant development of both radio and television, we believe it is no longer necessary to utilize a mechanism of government imposed 'fairness' in order to insure appropriate coverage of controversial issues of public importance. As the above data amply demonstrate, there are a sufficient number of over-the-air television and radio voices to insure the presentation of diverse opinions on issues of public importance."); id. at 201 ("While [the FCC broadcast licensing] system may influence entry into the information services marketplace, a licensing scheme, in and of itself, does not provide a proper distinction for the purpose of assessing the impact of broadcasting as a diverse information voice."); id. at 203 ("At the present time, there are approximately 11 national radio networks and 90 regional radio networks."); id. at 204 ("As the above data demonstrate, there has been a 44.3 percent increase in the overall number of television stations since the Supreme Court's decision in Red Lion Broadcasting."); id. at 205 ("[I]n 1964 . . . only 59 percent of television households were capable of receiving 5 or more stations. Today, only 4 percent of the television households receive fewer than five signals."); id. at 206 ("[T]he overall [television] network audience share declined from 90 percent to 80 percent in 1983.").

\textsuperscript{66} See id. at 199 n.200 ("The record in this proceeding supports the conclusion that the information market relevant to diversity includes not only TV and radio outlets, but cable, other video media and numerous print media as well. In the Notice, we took account of the fact that these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire. That is, cable, newspapers, magazines and periodicals are substitutes in the provision of such information."); id. ("That the various media are in fact information substitutes in the marketplace of ideas is further reflected in our local cable and television, newspaper and broadcast, radio and television cross-ownership rules.").

that believed that the news media tended to favor one side of political debates surged from about fifty percent in 1985 to about seventy percent in 2005.68 Five media conglomerates gained control of most television broadcast facilities and imposed a stultifying homogenization on editorial content and endorsements of political candidates for public office.69 While one empirical study on the effects of corporate-ownership and advertiser sponsorship of newspapers had mixed results,70 most empirical studies found a stunning disparity of viewpoints on economic and foreign policy issues between persons allowed access to the media and the general public.71 Most of the same sources, especially government officials,
formed the basis of the incomplete, biased, and repetitive broadcast radio and television coverage of public affairs.  

See, e.g., Kathleen B. Jones, On Authority: Or, Why Women Are Not Entitled to Speak, in FEMINISM AND FOUCAULT 119–32 (Irene Diamond and Lee Quinby eds., Northeastern University Press 1988) (describing historical exclusion of women from public sphere on basis that political authority is assumed to exclude compassion, solidarity, or pain from its domain, and that women are assumed to fall subject to these affects more often); Eric Lotke et. al., The Progressive Majority: Why a Conservative America Is a Myth 1–3, 22–24, MEDIA MATTERS FOR AMERICA (June 2007), available at http://cloudfront.mediamatters.org/static/pdf/progressive_majority.pdf (documenting broadcast news media’s mistaken belief that majority of American public is politically, culturally, and socially conservative); Chon Noriega & Francisco Javier Iribarren, Hate Speech on Commercial Talk Radio: Preliminary Report on a Pilot Study, 22 UCLA CHICANO RESEARCH CENTER LATINO POLICY & ISSUES BRIEF 1 (Feb. 2009) (describing extensive defamation and dehumanization of Latinos on talk radio); S. Craig Watkins and Rana A. Emerson, Feminist Media Criticism and Feminist Media Practices, 571 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 151 (2000) (describing how media industry production practices exclude women, especially African-American women); If It's Sunday, It's Conservative: An Analysis of the Sunday Talk Show Guests on ABC, CBS, and NBC, 1997–2005, at 1, MEDIA MATTERS FOR AMERICA (Feb. 14, 2006), available at http://mediamatters.org/static/pdf/MMFA_Sunday_Show_Report.pdf (describing how broadcast political talk shows distort debate by allowing the same dozen or two dozen government officials and reporters to dominate discourse and exclude opposing points of view favoring international diplomacy or economic reform); The Structural Imbalance of Political Talk Radio, THE CENTER FOR AMERICAN PROGRESS AND FREE PRESS 1, 7 (2007), available at http://www.americanprogress.org/issues/2007/06/pdf/talk_radio.pdf (noting that although a majority of listeners to talk radio are liberal or moderate, as of 2007, out of the 257 news/talk stations owned by the top five commercial station owners, 91 percent of the total weekday talk radio programming was conservative, and only 9 percent was progressive); Carole Ashkinaze, A Matter of Opinion: Female Pundits Are Still Missing from the Media, MS. MAGAZINE, Summer 2005, available at http://www.msmagazine.com/summer2005/opinion.asp (describing how in 2005, ABC's political talk show had only twenty-two percent women as panelists or guests, and women made up only seventeen percent of opinion writers at The New York Times, and ten percent at The Washington Post); Jeff Cohen, Television's Political Spectrum, EXTRA! (July/Aug. 1990), http://www.fair.org/extra/best-of-extra/tv-spectrum.html (describing bias on network television); Steve Rendall and Tara Broughel, Amplifying Officials, Squelching Dissent: FAIR Study Finds Democracy Poorly
In the 1990s, a few corporations formed enormous chains of radio and television stations, imposing an artificial uniformity of viewpoint across the political and cultural spectrum. In 1996,
President Bill Clinton removed most limits on broadcast station ownership by signing the Telecommunications Act of 1996.\textsuperscript{74} The federal courts, staffed with deregulatory “law and economics” judges who were often linked to the University of Chicago or the Federalist Society, struck down the few vestiges of broadcast ownership regulation that remained as “arbitrary” interferences with the property rights of the corporate owners of the broadcast airwaves.\textsuperscript{75}

Thirty percent of Americans got their news from the radio by 2003.\textsuperscript{76} Empirical studies of radio commentary revealed that corporate-owned radio stations programmed far right-wing content, almost exclusively, even when broadcasting in very liberal and Democratic communities.\textsuperscript{77} Corporate chains acquired six to seven radio stations in each city, and imposed rules limiting criticism, for example, of President Bush or the Iraq war.\textsuperscript{78} In terms of access to radio stations, far right-wing, frequently racist,\textsuperscript{79} talk show hosts,
such as Rush Limbaugh (2008 audience: 14–20 million), Glenn Beck (6.5 million), or Michael Savage (8 million), far outstripped in audience access the leading Democratic host, Ed Schulz (3 million). This might be explained by market demand, except for the fact that corporate radio chains create such demand by disproportionately advertising and promoting right-wing talk shows. About forty percent of political moderates and of the American population as a whole consider talk radio stations to be programming politically unbalanced content; so do seventy-two percent of liberals, but fewer than fifteen percent of conservatives. Radio station owners spent hundreds of thousands of dollars each promoting Limbaugh. When Clear Channel acquired the Limbaugh show syndication rights in 1998, its founder and CEO expressed his intention to use his company’s ownership of thousands of billboards to promote his “clusters of radio stations . . . and programs to send everywhere.” By 2001 Clear Channel owned 700,000 outdoor billboards worldwide, and promoted Limbaugh on many of them.


85. See Boehlert, supra note 83; Robert L. Moore, Conservatives on Left, Liberals on Right, THE LEDGER (Lakeland, FL), June 11, 2002, at 38, available
Television fared little better. As a result of media mergers, five conglomerates of corporations came to control about seventy-five percent of prime-time television viewing, about the same percentage as before the rise of cable television in the 1970s and 1980s.86 The absolute number of television station owners plummeted by forty percent between 1995 and 2003, and the “number of commercial radio station owners” fell by about a third during that time.87

The decline in competitors was followed by a decline in competition to provide high-quality public affairs programming with enough airtime to voice opposing views or minority opinions. The average amount of time allotted to presidential candidates to make a point (or average “sound bite”) fell from forty-two seconds in 1968 to nine seconds in 1992, after the fairness doctrine’s repeal.88 The number of political news stories fell twenty percent from 1968 to 1988, while the length of the average story declined another twenty percent. The broadcast networks provided half as many minutes of average nightly news coverage of presidential politics in 1996 as in 1992.89 Local news programs devoted an average of thirty-six seconds to elections coverage in 2006, compared to ten minutes for advertising, seven minutes for sports, and 2.5 minutes for crimes.90 Two-thirds of the elections coverage that was provided did not focus on substantive issues of public policy.91

Empirical studies of television coverage of major wars and economic matters have found the coverage to be extremely skewed against antiwar or pro-economic reform viewpoints.92 Bias in war

87. Id.
91. See id.
92. See Brenda Dervin, Whose Effects Are They, Anyway? Or, How Can You Locate Effects in All This Fog, in MASS COMMUNICATION RESEARCH: THE ART OF ASKING QUESTIONS 380 (Cees J. Hamelink, Olga Linné, James Dermot Halloran eds., 1994); FARNsworth, supra note 71, at 73–75; MACDONALD, supra note 71, at 129; SOLOMON, supra
coverage typically involves giving mass media access to current or former military officials and civilian enthusiasts for war and military solutions to international problems, while denying access to antiwar voices. Similar problems exist in the economic field. After the fairness doctrine was repealed, a study of the ABC News program Nightline revealed that there were seven business representatives utilized as sources for every labor union representative that was allowed access to the television airwaves.

Despite near-universal support for Social Security, most sources that were permitted on television in the 1990s described the system as "broke," and constantly promoted privatization of the system as the answer. Over ninety percent of Americans, in relatively equal numbers whether Democratic or Republican in party affiliation, favored making labor and environmental standards part of free trade agreements such as the North American Free Trade Agreement (NAFTA). However, coverage of their differences with politicians such as President Bush who opposed such standards was so inadequate or misleading that eighty-four percent of Bush supporters in 2004 falsely believed that the President wanted to have such standards in trade agreements.

Environmental coverage is perhaps the easiest to quantify as


93. See DOUGLAS KELLNER, THE PERSIAN GULF TV WAR 80 (1992) (describing how antiwar politicians and scholars, as well as non-American voices, were almost completely excluded from television debate on 1991 Gulf War); JOHN MACARTHUR, SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE GULF WAR 109, 180, 220–33, 254 (1992) (describing how a handful of former government officials dominated television debate on 1991 Gulf War, and how actual combat footage was not aired); see also supra note 72 (citing Pozner and others).


96. See Steven Kull et al., Public Perceptions of the Foreign Policy Positions of the Presidential Candidates, in PROGRAM ON INTERNATIONAL POLICY ATTITUDES AND KNOWLEDGE NETWORKS 2 (Sept. 29, 2004).
biased. Most television news gives credence to the argument that there has not been any global warming or that it is all natural, yet these contentions have been rejected decisively by scientists.\textsuperscript{97} By 1997, most Americans believed that global warming had had no effects, and by 2008 nearly forty percent of Americans, and nearly sixty percent of Republicans, believed this claim.\textsuperscript{98}

On television, political content is subject to a 	extit{de facto} boycott, particularly when it relates to foreign affairs. All of the corporate broadcast networks air thirty-minute nightly news programs with virtually identical content, including a uniform twelve minutes of advertising and promotion of corporate images.\textsuperscript{99} Foreign news coverage on network television plummeted from forty-five of network airtime under the fairness doctrine, to 13.5 percent in 1995.\textsuperscript{100} Television exposed fewer than half of Americans to NAFTA, one of the important changes in American economic policy since World War II.\textsuperscript{101} A study published by the Columbia Journalism Review in 1997, a decade after the fairness doctrine's repeal, concluded that foreign news was in danger of being completely cleansed from the television airwaves.\textsuperscript{102} Professor Anthony Varona observes that “local public affairs and political programming on free broadcast television are generally scarce and altogether nonexistent on many stations.”\textsuperscript{103} Television network


\textsuperscript{100} See MATTHEW BAUM, SOFT NEWS GOES TO WAR: PUBLIC OPINION AND AMERICAN FOREIGN POLICY IN THE NEW MEDIA AGE 296 (Princeton Univ. Press 2003) (“[A] study by the Joan Shorenstein Center found that the percentage of network airtime devoted to foreign news fell from 45 percent in the 1970s to 13.5 percent in 1995.”).


\textsuperscript{103} Anthony Varona, Towards a Broadband Public Interest Standard, 61 ADMIN. L. REV. 1, 25 (2009).
news coverage declined by nearly half between 1987 and 2003, and much remaining coverage was “low effort horse race journalism.” Only a small minority of television time in 2008 was election-related, and three-fourths of that election news was not directed to the substance of public policy issues.

In recent years, studies have shown that local news covered local political issues only five percent of the time, devoting most of their broadcasts to sports, fires, storms, murders, and other sensationalistic phenomena. This pattern sometimes reinforces stereotypes of African-Americans and other minorities. Prime-time television programming has become nearly devoid of public affairs; instead, it is saturated with violence and mild titillation of the audience.

Television coverage of foreign news has continued to deteriorate in the past couple of years. A 2008 study found that newspapers or online news sites devoted roughly twice to three

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106. See Eric Chiappinelli, The Corporatization of Communication, 30 SEATTLE U. L. REV. 959, 971 (2007) (“A recent study by the Center for Media and Public Affairs shows that election coverage in my city during 2004 was significantly less than in the past, and that only about 5% of local news coverage dealt with local races and ballot issues.”); Jennifer Harper, Study Finds ‘Near Blackout’ of Local Public Issues on TV, WASH. TIMES, Oct. 28, 2003, available at http://www.highbeam.com/doc/lG1-109357225.html. A confidential internal FCC study found that consolidation of broadcast station ownership resulted in reduced local public affairs coverage. See John Dunbar, Lawyer Says FCC Ordered Study Destroyed, HOUSTON CHRONICLE, Sept. 15, 2006; see also Brennan Center for Justice, Fact Sheets on Media Democracy, FREE EXPRESSION POLICY PROJECT, http://www.fepproject.org/factsheets/mediademocracy.html (last updated Sept. 27, 2010) (“Six corporations own or have controlling interests in most of the American mass media today,” which have turned away from “public affairs and local programming.”).
107. See Marissa Lee, Study: Television News Often Perpetuates Racial Stereotypes, CHICAGO DEFENDER, Aug. 20, 2008 (“Watching local and network news reinforces negative stereotypes of African Americans, according to two recent studies published this spring . . . .”).
times as much attention to foreign news as radio and television news, despite the U.S.'s involvement in two wars, urgent warnings of a global recession, some $1.5 trillion of U.S. foreign debt owed to creditors in various foreign countries, and a U.S. trade deficit nearing $300 billion a year. In 2008, the networks devoted only six minutes to the war in Iraq out of 450 minutes scheduled for weekday news shows. Only about two of those minutes were actually reported from Iraq, and the war in Afghanistan received even less coverage, about three minutes per week. With Iraq as the primary case in point, the minimal foreign news remaining after the repeal of the fairness doctrine was carefully monitored by corporations to censor most images that could result in the public forming anti-war or "isolationist" opinions, such as dead bodies, destroyed buildings, or children starving due to war. The media attempts to ascribe their bias to market demand. But the vast

111. See id.
112. See MICHAEL MASSING, NOW THEY TELL US: THE AMERICAN PRESS AND IRAQ 21 (New York Review Books, 2004) ("The fighting [during the invasion of Iraq] was so intense that, according to Centcom, between two thousand and three thousand Iraqi soldiers died. Yet, on TV, I didn't see a single one of them. On MSNBC, the anchor announced that its live video feed was being put on five-second delay so that images deemed too 'disturbing' could be weeded out."); id. at 23 ("In the case of Iraq, the conflict Americans saw was highly sanitized, with laser-guided weapons slamming into their intended targets with great precision. We observed this from afar, usually in pictures taken from bombers thousands of feet above their target, or in images of black smoke rising hundreds of yards away."); id. ("Spared exposure to the victims of war, Americans had little idea of its human costs."); Rory O'Connor, War Coverage's Biggest Lie—Censoring the Horrors, MEDIACHANNEL.ORG (Jan. 27, 2004), http://www.commandernews.org/views/04/0127-09.htm ("What you don't see is the maiming of killed civilians. Instead we show you the highly spectacular, as in some grand video game. So you get the impression that war is a cost-free way of settling differences. This is terribly dangerous and fundamentally untrue."); id. ("Print journalist Robert Fisk amplifies. And what we want to do is to stop people from seeing these images—because if they saw them they would never, ever again support war. And we want a population that will—when we want!—support wars."); Angela Woodall, Survey: U.S. Media Censors Iraq Reporting, UPI PERSPECTIVES (Apr. 5, 2005), http://www.accessmylibrary.com/coms2/summary_0286-9073616_ITM ("The news media are self-censoring reports about Iraq because of concern for public reaction to graphic images . . . .").
majority of Americans have expressed a preference for neutral rather than pro-administration coverage of the wars in Afghanistan and Iraq, while the media has decisively chosen to act as a mouthpiece for politicians.

D. Was There an Alternative to Selective Deregulation Suppressing Democratic Dialogue?

The fairness doctrine might have played a role in equalizing access to radio and television facilities and broadcast spectrum by members of minority political, ethnic, racial, and religious groups. For example, in *Columbia Broadcasting System v. Democratic National Committee*, a group of citizens filed suit against a radio station for failing to provide airtime access to persons opposed to the Vietnam War, and for refusing to accept their antiwar issue advertisement as a remedy to the imbalance in coverage. The Supreme Court noted that because several Senators had been "sensitive to the problems involved in legislating "equal opportunities" with respect to the discussion of public issues," the Congress had imposed an obligation upon broadcasters "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." The Court denied the plaintiffs a remedy because the station had not refused advertisements on a discriminatory basis. It noted, however, that when the renewal of the broadcaster's license is due, "the broadcaster will be answerable if he fails to meet [the public's] legitimate needs." Likewise, in *Office of Communications of United Church of Christ v. FCC*, a coalition of African-American organizations in Jackson, Mississippi challenged an FCC license on the grounds of discrimination and exclusion of the local community, forty-five percent of which was African-American, from the airwaves. The

116. See id. at 97–100.
117. Id. at 106.
118. Id. at 108 n.3 (quoting 47 U. S. C. § 315(a) (2006)).
119. See id. at 114 n.11.
120. Id. at 125.
D.C. Circuit found that the organization had standing to challenge the license. In his opinion, then-Judge Burger characterized an FCC license as an exclusive right of access to part of the public domain, which is burdened by a virtual easement enforced by the FCC for public access, an easement needed to air conflicting views.

E. Conclusion

Out of the depths of the censorial statism of the Radio Act of 1927, the fairness doctrine emerged from the 1940s through the 1960s as a check on the FCC’s distortion of political debate conducted on radio and television. Properly understood, it represents a check on the power of government to restrict First Amendment-protected expression by prohibiting broadcasting by educational, political, or religious speakers not sponsored or affiliated with a federal licensee. Therefore, the deregulatory spirit of the 1980s and 1990s is very selective in nature and effect. It deregulates the content of broadcast licensees, permitting them to refuse access to the airwaves to the vast majority of political speakers, and to suppress political coverage to a tiny minority of airtime. At the same time, selective deregulation continues to restrict access to the science of broadcasting by permitting federal licensees to prevent members of the public from participating in political debate. This exclusion extends to political candidates, who find their sound bites confined to miniscule snippets of time in which political reasoning is impossible (forcing them to accept bribes to pay for advertisements). The fairness doctrine might have enhanced the quantity and diversity of political expression, but remains a path not taken.

III. THE RETURN OF DIVERSE MEDIA: THE FCC THEORIZES NET NEUTRALITY AS FREE SPEECH

A. Advocacy for Net Neutrality Prior to 2008

As the FCC was deregulating the broadcast networks in a way that ensured widespread corporate censorship, it was paradoxically constructing a free and uninhibited Internet through carefully targeted regulation of the cable, telephone, and broadband

122. See id. at 1006.
infrastructure providers. Unlike the broadcast airwaves, which lost First Amendment protection by being subjected to FCC licensing unrestrained by the fairness doctrine, the Internet had free speech safeguards:

In a society which relies more and more on electronic communications media as its primary conduit for expression, full support for First Amendment values requires extension of the common carrier principle to all of these new media.

. . . A communications common carrier, such as a telephone company is required to provide its services on a non-discriminatory basis. It has no liability for the content of any transmission. A telephone company does not concern itself with the content of a phone call. Neither can it arbitrarily deny service to anyone. The common carrier’s duties have evolved over hundreds of years in the common law and later statutory provisions. The rules governing their conduct can be roughly distilled in a few basic principles. Common carriers have a duty to:

- provide services in a non-discriminatory manner at a fair price
- interconnect with other carriers
- provide adequate services

. . . Given Congress’ plan to build the [Internet] with services from privately-owned carriers, a legislatively-imposed duty of common carriage is necessary to protect free expression effectively. As Professor Eli Noam, a former New York State Public Utility Commissioner, explains:

[C]ommon carriage is the practical analog to [the] First Amendment for electronic speech over privately-owned networks, where the First Amendment does not necessarily govern directly.124

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124. Mitchell Kapor, The NREN as Test-Bed for the National Public Network, IETF (Sept. 1991), http://www.apps.ietf.org/rfc/rfc1259.html; see also Mitchell Kapor & Jerry Berman, A Superhighway Through the Wasteland?, N.Y. TIMES, Nov. 24, 1993, at Op-Ed Page, available at http://web.archive.org/web/19990117101711/www.eff.org/pub/GII_NII/ni_kapor_berman_eff_nyt.article (“Like today’s phone companies, the companies controlling the superhighway must be required to carry other programmers’ content, just as phone companies must provide service to anyone who is willing to pay for it. We must guarantee that anyone who, say, wants to start an
The FCC's Computer Inquiries of the 1970s and 1980s subjected telephone companies to must-carry and nondiscrimination obligations in their capacity as conduits for computer-mediated speech and communication.125 The FCC distinguished between telephone networks, which had to offer interoperability and interconnectivity to Internet companies and applications,126 and the alternative news network or a forum for political discussion is given an outlet to do so.""); Mitchell Kapor, Where Is the Digital Highway Really Heading?, WIRED 1.3 (1993), http://www.wired.com/wired/archive/1.03/kapor.on.nii_pr.html ("In its fundamental architecture and, increasingly, in its policies, the Internet is an ideal example of an open network. It is an interactive medium based on two-way communications, where people can fluidly shift from position of listener to that of speaker, from role of consumer to that of provider."); id. ("[B]y virtue of being common carriers, telcos are required to be open in access, use, and content.").

125. See Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Respondents, at 12, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Svcs., 545 U.S. 967 (2005), (Nos. 04-277 and 04-281) ("Because the FCC and state governments regulated telephone providers as common carriers, the phone companies could not leverage their control over dialup lines into one over Internet service or ISPs. As a result, thousands of ISPs, empowered to connect to their subscribers over regulated phone lines, sprang up to fulfill the public demand for various flavors of Internet access." (citation omitted)); Robert Cannon, The Legacy of the Federal Communications Commission's Computer Inquiries, 55 FED. COMM'NS L.J. 167 (2003), available at http://law.indiana.edu/fcl/pubs/v55/no2/cannon.pdf; Francis Bar et al., Defending the Internet Revolution in the Broadband Era: When Doing Nothing Is Doing Harm 1 (E-conomy Working Paper No. 12, Aug. 1999) (arguing that growth of ISPs was made possible by FCC policies that "prevented telephone companies from dictating the architecture of data networks," and "forced open access to networks whose monopoly owners tried to keep closed"); Kapor, Where Is the Digital Highway Really Heading?, supra note 124 ("[B]y virtue of being common carriers, telcos are required to be open in access, use, and content."); United States General Accounting Office, Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers, USIAA, at 24 (2000), http://www.usiia.org/news/gao.pdf ("[T]he common carrier status of telephone companies, which requires that they provide nondiscriminatory service at just and reasonable rates, worked to give ISPs easy access to consumers through the telephone network."); id. at 22 ("Consumers' choice of companies providing transport to the Internet over the telephone network has been facilitated . . . by the common carrier regulation of these companies.").

126. See Brand X, 545 U.S. at 973–1002; see also id. at 1000 ("[W]hen local telephone companies began to offer Internet access through DSL technology in addition to telephone service, the Commission applied its Computer II facilities-based classification to them and required them to make the telephone lines used to transmit DSL service available to competing ISPs on nondiscriminatory, common-carrier terms." (citing In re Amend. of Sections 64.702 of the Comm'n's Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384, 474–75, ¶¶ 229, 231 (1980); In re Deployment of Wireline Services Offering Advanced Telecomm. Capability, 13 FCC Rcd. 24012, 24030–31 (1998)); In re Deployment of Wireline Services Offering Advanced Telecomm. Capability, 13 FCC Rcd.
Internet firms themselves, which largely did not have to interconnect with anyone. The reasoning was that unlike the telephone companies, the Internet firms themselves did not enjoy exclusive access to any telecommunications infrastructure and required no federal or state licenses to operate.\textsuperscript{127}

These policy decisions ensured the rapid development and diversification of the Internet as a means of communication. Former FCC Chairman Reed Hundt has argued that due to the efforts of the FCC and Congress to mandate more telephone industry openness, there were soon 6,000 Internet service providers (ISPs).\textsuperscript{128} The number of Internet users in the United States rose

\textsuperscript{127}See BrandX, 545 U.S. at 973–1002. The FCC made a similar distinction in the 1970s between data services that travel over communications networks and communication services that utilize data and computers, the former requiring fewer regulations because they were not dominated by local monopolies. See Robert Cannon, The Legacy of the Federal Communications Commission’s Computer Inquiries, 55 FED. COMM. L.J. 167, 173 (2003) (“The pure data processing market was viewed as an innovative, competitive market with low barriers to entry and little chance of monopolization . . . . The pure communications market, on the other hand, was provisioned by an incumbent monopoly. This monopoly almost always was AT&T but there were a few other players such as GTE and a large handful of small, mainly rural, incumbent carriers. In any given market, these players exercised control through their regulated monopoly.”); see also In re Regulatory and Policy Problems Presented by the Interdependence of Computer & Comm’n Services and Facilities, 28 F.C.C. 2d 267, 270–71 (1971), aff’d in part sub nom, GTE Service Corp. v. Fed. Comm’n Comm’n, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 F.C.C. 2d 293 (1973) (Computer I) (FCC limited telephone monopolies’ entry into data processing services so that they would not “favor their own data processing activities by discriminatory services, cross-subsidization, improper pricing of common carrier services, and related anticompetitive practices and activities.”).

\textsuperscript{128}See REED HUNDT, YOU SAY YOU WANT A REVOLUTION: A STORY OF INFORMATION AGE POLITICS 193 (Yale Univ. Press, 2000); Reinhardt Krause, Former FCC Chief Hundt on Telecom Outlook, INVESTOR’S BUSINESS DAILY, Apr. 4, 2000; Karen Charman, Recasting the Web: Information Commons to Cash Cow, FAIR (2007), http://www.fair.org/extra/0207/open-access.html.
from very few in 1989, to sixty-three million in 1999, to more than 200 million in 2009.\textsuperscript{129} Although it is difficult to segregate bloggers by nationality, the number of blogs skyrocketed from fewer than a million in 2000, to thirty million in 2005, to more than 100 million or even 500 million today.\textsuperscript{130}

The Internet’s designers envisioned an information ecosystem more content- and application-neutral than proprietary networks or communications systems such as AT&T’s telephone network or the broadcast network NBC. The design principle that crystallizes this commitment to neutrality is commonly referred to as the end-to-end principle. It basically says that innovation and filtering should occur at the ends or the edges of the Internet, rather than in the connections or central hub (i.e., the AT&T or NBC networks). Vinton Cerf and Robert Kahn first suggested the principle, and explained how an “internetwork protocol” could facilitate the sharing of information and computer resources between different networks operating on distinct protocols.\textsuperscript{131} Professor Jerome Saltzer of the computer science department at the Massachusetts Institute of Technology more fully articulated the principle, and became a key player in the development of the Internet.\textsuperscript{132}


Internet was meant to operate as a "dumb network" with "dumb pipes," moving data along without, in the words of a federal statute, "selection of the material by the service provider," or the "selection of the recipients of the material except as an automatic response to the request of another person."

In the aftermath of 9/11, the Internet proved itself capable of fulfilling the high hopes that Mitch Kapor, Tim Berners-Lee, and Jon Postel had for it. As a result of having more diverse and cross-referenced inputs, the Internet is frequently more reliable than the print or broadcast media. Web-based "extremist enclaves" like Common Dreams or Democracy Now warned profusely that Iraq was being falsely blamed for the conspiracy to attack the United States on 9/11, which in fact had roots in Pakistan and Saudi Arabia. They noted further, and correctly, that Iraq's weapons subject to U.N. resolutions had been destroyed starting in 1991 by many U.N. inspectors, and there was little evidence of ongoing production. Wikipedia contributors also attempted to warn in 2002 and 2003 that the Iraq war would be a foreign policy and humanitarian disaster.


136. See infra notes 137–42 and accompanying text.


138. See, e.g., Views Archive, supra note 137.

139. See, e.g., Governmental Positions on the Iraq War Prior to the 2003 Invasion of Iraq, WIKIPEDIA (Apr. 21, 2003), http://en.wikipedia.org/w/index.php?title=Governmental_positions_on_the_Iraq_War_prior_to_the_2003_invasion_of_Iraq&oldid=854580 ("Richard Butler, who led the UN inspection teams in Iraq until 1998, accused the United States of promoting 'shocking double standards' in considering unilateral military action against Iraq. He said, 'The spectacle of the United States, armed with its weapons of mass destruction, acting without Security Council authority to invade a country in the heartland of Arabia and, if necessary, use its weapons of mass destruction to win that battle, is something that will so deeply violate any notion of fairness in this world that I strongly suspect it could set loose forces that we would deeply live to regret.'"); Iraq Disarmament Crisis, WIKIPEDIA (Mar. 12, 2003),
The financial crisis of 2008 was also predicted more often by Internet users than by many writers for newspapers or television. Wikipedia contributors warned in 2003 about billions of dollars' worth of financial derivatives going unregulated and threatening financial disaster.140 Other Internet-based extremists warned as early as 1995 of an Internet bubble,141 and as early as 2003 of a housing bubble.142

The decentralized, open, innovation-rich Internet seemed in
the late 1990s to be at risk of increasing corporate control and management. A book published in 1999 suggested that AT&T was unwilling to allow an unfettered Internet to develop into a competitor to its voice or television services. AT&T had recently acquired Tele-Communications, Inc., the cable provider for San Francisco that would control that city's high-speed Internet access lines. AT&T spent $100 billion buying up potential competitors in the cable and broadband industry between 1997 and 2000 alone. In late 1998, America Online ("AOL") and Time Warner announced the largest merger in history. Questioned in Congress about its pending merger, AOL refused to commit to allow other ISPs to reach consumers subscribing to the merged company's services.

By 2004, it had become clear that the effort to deregulate the corporations that were acquiring ever-increasing control over the Internet was in high gear. By acquiring their competitors in the broadband industry, large corporations threatened to undermine the "dumb pipe" model of the Internet, replacing it with a corporate-filtered Internet. In 2002, the FCC approved Comcast's $51 billion acquisition of AT&T's cable and broadband assets, forming an Internet "giant" with unparalleled power over the network.

148. See Lemley & Lessig, supra note 132, at 928.
149. See Peter J. Hower, Comcast's $51 Billion Takeover of AT&T Broadband Gets Key FCC Approval, BOSTON GLOBE, Nov 14, 2002, available at
company promptly raised the price of high-speed Internet access in places like St. Paul, Minnesota by $11, to $58 per month (or $61 if a modem was leased) unless customers subscribed to the basic cable service that started at $11 per month.\(^\text{150}\) That same year, the FCC announced that it was releasing cable broadband services from the “common carrier” obligations that guaranteed an interconnected, interoperable Internet.\(^\text{151}\) The FCC declared its intention to do the same with digital subscriber line ("DSL") service.\(^\text{152}\) It had previously “distinguished between the common carrier offering of basic transmission service, which provides a communications path for the movement of information, and the offering of enhanced services, which . . . [consist] primarily of data processing services.”\(^\text{153}\) In 2004, the Supreme Court declined to recognize an obligation on the part of telecommunications network licensees to provide nondiscriminatory access to their competitors for purposes of interconnection.\(^\text{154}\) The decision was a blow to efforts to roll back

\[\text{http://www.accessmylibrary.com/coms2/summary_0286-8929361_ITM;}
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\[\text{Christopher Stern, FCC Clears Comcast's AT&T Deal; Acquisition Creates Cable-Internet Giant, WASH. POST, Nov. 14, 2002, available at}
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\[\text{http://www.highbeam.com/doc/1P2-393374.html.}
\]
\[\text{150. See Steve Alexander, AT&T Broadband Raises Net-only Price, STAR}
\]
\[\text{TRIBUNE (MINNEAPOLIS, MN), Jan. 16, 2003, available at}
\]
\[\text{http://www.highbeam.com/doc/1G1-96530228.html.}
\]
\[\text{151. See In re Inquiry Concerning High-Speed Access to the Internet Over}
\]
\[\text{Cable and Other Facilities, 17 FCC Rcd. 4798 (2002) (concluding that cable}
\]
\[\text{modem service is an “interstate information service” and not a cable service}
\]
\[\text{and beginning to explore whether or not cable modem service should be regulated by}
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\[\text{law); see also Reza Dibadj, Toward Meaningful Cable Competition: Getting}
\]
\[\text{Beyond the Monopoly Morass, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 245 (2003)}
\]
\[\text{(examining how the March 2002 FCC ruling that cable modem service is an}
\]
\[\text{“information service” leaves cable operators largely unregulated and not subject}
\]
\[\text{to open access requirements).}
\]
\[\text{152. See In re Appropriate Framework for Broadband Access to the Internet}
\]
\]
\[\text{“in the case where an entity combines transmission over its own facilities with}
\]
\[\text{its offering of wireline Internet access service, the classification of that input is}
\]
\[\text{telecommunications, and not a telecommunications service.”); see also Nirali}
\]
\[\text{Patel, Comment: FCC Broadband Policy: More Power for the Bell Monopolies, 55}
\]
\[\text{AD. L. REV. 393 (2003) (discussing the implications of the FCC's classification in}
\]
\[\text{achieving regulatory parity in the industry); Daniel F. Spulber & Christopher S.}
\]
\[\text{Yoo, Access to Networks: Economic and Constitutional Connections, 88}
\]
\[\text{CORNELL L. REV. 885 (2003) (exploring the modern shift in regulating}
\]
\[\text{network industries, high-speed broadband service providers).}
\]
\[\text{153. In re Policy & Rules Concerning the Interstate, Interexchange}
\]
\[\text{Marketplace, 16 FCC Rcd. 7418, 7419–20 (2001).}
\]
\[\text{154. See Verizon Commc’ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398,}
\]
\[\text{410–11 (2004) (“We have never recognized such a doctrine . . . and we find no}
\]
\[\text{need either to recognize it or to repudiate it here.”).}
\]

the increasingly rigid policy of telephone companies to refuse to offer broadband service without tying it to obsolete local telephone service.\footnote{155} In 2005, all of these developments seemed to come to a head. In January, sources revealed to the press that AT&T and SBC were in talks to merge, a previously “unthinkable” step towards recreating the “sprawling AT&T telephone monopoly” broken up in the 1980s.\footnote{156} The FCC reported that most U.S. households had access to only one cable provider.\footnote{157} Comcast was on its way to being the local cable provider (one commentator says “monopoly”) in about four out of five of America’s largest media markets.\footnote{158} In April, Comcast and Time Warner announced their acquisition of Adelphia Communications, which had 5.3 million subscribers, for $17.6 billion in cash and stock.\footnote{159} Also in April, a Comcast subscriber sued Comcast for releasing her Internet usage data to the Recording Industry Association of America, causing her to have to pay a $4,500 settlement.\footnote{160} In June, the Supreme Court upheld the FCC’s decision in 2002 to deregulate cable broadband.\footnote{161} In


161. \textit{See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Serv.}, 545 U.S. 967, 973–75 (2005) (holding that the FCC lawfully interpreted the Communications Act and Administrative Procedure Act and that cable companies that sell broadband are exempt from mandatory common carrier regulation).
August, the FCC relieved AT&T and other telephone-based broadband networks from many interconnection and nondiscrimination obligations.162

The FCC finally responded to a rising tide of consumer and industry demands for reinstituting basic nondiscrimination obligations on broadband providers. In August 2005, the FCC announced a policy statement designed to preserve the Internet as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."163 The FCC adopted four net neutrality principles designed to guarantee that: (1) "consumers are entitled to access lawful Internet content of their choice"; (2) "consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement"; (3) "consumers are entitled to connect their choice of legal devices that do not harm the network"; and (4) "consumers are entitled to competition among network providers, application and service providers, and content providers."164 The FCC noted that the principles it adopted were not rules, and that they were "subject to [the requirements of] reasonable network management."165

Despite the FCC's new principles of net neutrality, activists continued to urge legislation in the area. Telecom mergers filled the news in late 2005. In October, the FCC approved Verizon's acquisition of MCI, which gave one company control over much of the Internet backbone system and thus the power potentially to block traffic from competitors deemed a threat,166 like public broadband networks or innovative commercial alternatives like FON or Google.167 As the FCC was considering the Verizon/MCI...
merger, The Wall Street Journal reported that corporate owners of broadband infrastructure were purchasing software designed to “block . . . Internet applications such as phone calls, video and photo downloads.” BitTorrent, Skype, and YouTube were among the likely targets of this “crackdown” on the Internet. In November, the FCC voted to approve the AT&T/SBC merger. News reports followed about plans by AT&T and Comcast to charge Internet access fees and disallow access to popular applications and content, contributing to heightened public concerns. As one commentator described all these developments in early 2006: “[E]ver-fewer...
broadband pipe providers, [empowered by] legislation designed to give them practically dictatorial powers over what is and isn't allowed on the Web, [could] kill a lot of the Internet entrepreneurial fervor that's been bolstering a piece of America's . . . economy of late.¹⁷²

In 2006, concerns within the Internet industry and the public about their likely effects, gave rise to continued net neutrality activism. Google hired a key architect of the Internet's interoperable, nonproprietary structure to lobby Congress for net neutrality laws.¹⁷³ Jeffrey Citron, Chairman and CEO of Vonage Holdings Corporation, the largest Internet telephone company in the United States, testified that Vonage could cut consumers' phone bills in half and provide innovative new choices to Internet users, but was increasingly being blocked by network providers who also sold landline telephone service.¹⁷⁴ Representing 180 companies, the COMPTEL trade association warned that the Internet requires common carrier regulation of telephone and Internet backbone companies in particular to thrive, and that the ongoing efforts of broadband companies to limit the upstream bandwidth and broadband modems available was restricting competition and innovation.¹⁷⁵ Other testimony before Congress in 2006 cautioned that effective Department of Justice and FCC oversight was needed to prevent AT&T's acquisition of BellSouth from locking up much of the FCC-regulated wireless spectrum that could be used to develop an alternative wireless broadband system.¹⁷⁶ The chairman of the antitrust subcommittee of the Senate Judiciary Committee warned

¹⁷⁴ See id. at 19–20 (statement of Jeffrey Citron, Chairman and Chief Executive Officer, Vonage Holdings Corp.).
¹⁷⁵ See id. at 25–31 (statement of Earl Comstock, President and Chief Executive Officer, CompTel).
that AT&T's consolidation of spectrum licenses could inhibit the development of the "Wi-Max" alternative to cable and DSL service, because BellSouth bought much of the Wi-Max spectrum in 1997 AT&T had acquired other bands of it along with SBC's assets.177

Such efforts won important concessions from the broadband infrastructure industry. The President of the United States Telecom Association promised that his member companies would not "block, impair, or degrade content" that was lawful and did not harm the network.178 Similarly, the President of the National Cable & Telecommunications Association argued that there were no identified cases of discrimination against Internet content within his industry.179

Congress addressed the prospect of merged, deregulated series of broadband super-networks by attempting to draft its own net neutrality rules for network providers. The House Judiciary Committee voted twenty to thirteen to pass the Internet Freedom and Nondiscrimination Act of 2006, which would make it a violation of the Clayton Act, subject to private lawsuits for three times the economic damage caused, for broadband providers to discriminate against lawful content, impair other providers' ability to interconnect, or offer enhanced quality of service to their own information with the effect of prejudicing competitors' information of a particular type.180 The committee noted that a diverse array of advocates for regulatory action by the FCC and/or Congress included Google, Intel, Microsoft, the Financial Services Roundtable, the American Association of Retired Persons, Gun Owners of America, Christian Coalition, National Religious Broadcasters, and others.181 The Senate Commerce Committee


179. Id. at 4 (testimony of Kyle McSlarrow, President & CEO, National Cable & Telecommunications Ass'n).


passed the Advanced Telecommunications and Opportunity Reform Act (ATORA) of 2006, which would have given the FCC the power to fine and enjoin efforts by broadband providers to prohibit Internet content because of the lawful views expressed therein, or to restrict any non-harmful voice application, software, search engine, or legal device of a subscriber's choosing; or to tie different services together.\textsuperscript{182} This Act would have directed the FCC to report annually to Congress on developments in Internet access markets, including relationships between broadband service providers and online companies like Google and eBay, and how these trends "impact the free flow of information over the public Internet and the consumer experience using the public Internet."\textsuperscript{183} If the FCC discovered "significant problems," it would need to recommend steps to help users better "access lawful content and run Internet applications and services over the public Internet subject to the bandwidth purchased and the needs of law enforcement agencies."\textsuperscript{184}

**B. The FCC's Opinion in the Comcast Internet Content Blocking Case**

In 2004, a new Internet protocol became famous by making it possible to download and view videos of the Indian Ocean tsunami disaster from many different perspectives.\textsuperscript{185} The protocol, called BitTorrent, breaks large files into smaller pieces and incorporates error-checking information so that it is possible to retrieve a single file from numerous different computers, and even at several different times.\textsuperscript{186} It also attempts to force downloaders to upload pieces for others as they download further pieces.\textsuperscript{187} Lacking a

\begin{itemize}
  \item \textsuperscript{183} S. 2686 § 901(a), available at http://commerce.senate.gov/pdf/06telcom.pdf.
  \item \textsuperscript{184} See S. 2686.
  \item \textsuperscript{185} See Jonathan Krim, High-Tech Tension Over Illegal Uses, WASH. POST, Feb. 22, 2005, at E01.
  \item \textsuperscript{187} See Taylor, supra note 186. The developer of the protocol, Bram Cohen, borrowed the "tit for tat" concept from game theory to prevent free-riding by punishing non-uploaders (or "leechers") with slower or no downloads. See Kevin Werbach, The Implications of Video Peer-to-Peer on Network Usage, in PEER-TO-
search engine, BitTorrent requires trackers to connect users and files, and several trackers were established for such purposes as multimedia file sharing and open-source software development.\textsuperscript{188} BitTorrent began to be used in diverse contexts, including distribution of independent film, video blogs, and high-quality NASA images.\textsuperscript{189}

On November 1, 2007, the FCC received a complaint from two leading consumer groups, joined by several groups focused on freedom of expression, and faculty on the cyberlaw programs of Harvard, Yale, and Stanford law schools.\textsuperscript{190} That same month, BitTorrent-based online video site Vuze, Inc. filed a petition to establish a must-carry rule for broadband networks.\textsuperscript{191} The FCC requested public comments, and received more than 6,500 of them.\textsuperscript{192}

On August 1, 2008, the FCC concluded that it had jurisdiction to enforce its net neutrality principles against cable and DSL companies.\textsuperscript{193} It found that Comcast's practice of interfering with

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\textsuperscript{191} See Free Press, 23 FCC Rcd. at 13030.

\textsuperscript{192} See id. at 13033.

\textsuperscript{193} The FCC relied extensively on the Communications Decency Act, 47 U.S.C. § 230 (2006), which Comcast characterized as mere prefatory language to the immunization of Internet service providers from tort liability for their users' speech, but which the FCC read as a mandate "to promote the continued development of the Internet." Free Press, 23 FCC Rcd. at 13034–38. The Act defines the FCC's jurisdiction over wire and wireless communications to include "all instrumentalities, facilities, [and] apparatus" incidental to such
peer-to-peer protocols such as BitTorrent was unreasonable and discriminatory due to the effects on media and video game companies that use the protocol, as well as multiple consumers. It declined to find the practice to be a type of "reasonable network management," noting that it swept up homes consuming little bandwidth, failed to address the bandwidth-intensive use of other protocols, and was discriminatory against a protocol.

The FCC articulated a new theory of the First Amendment in its Comcast order. Since the 1980s, the FCC had adopted what could be called a Chicago School theory of the First Amendment in abandoning the congressionally-mandated fairness doctrine. The FCC argued that despite extensive licensing of television broadcast networks by federal bureaucrats—and extraordinary barriers to entry confronting new networks such as Fox, UPN, or the WB—the First Amendment could best be promoted by competition among cable, broadcast television, and radio. The broadcasters, formerly a regulated public trust enjoying privileged access to the public airwaves and corridors of political power, became participants in the marketplace of ideas.

In Free Press, however, the FCC returned to a First Amendment theory that characterized the fairness doctrine era of the 1950s and 1960s. The FCC cited the Associated Press antitrust case from 1945—a lodestar of advocates for limiting corporate control over public debate—for the idea that saving the open character of the Internet from restrictions on the content and software available furthers First Amendment values, and helps ensure a diverse and vigorous public debate. The FCC evoked the language of Mitch Kapor and other Internet pioneers:

communications. It also provides that the FCC may "make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).

195. See id. at 13054–58.
197. See Free Press, 23 FCC Rcd. at 13040, 13053 n.203.
Historically, "the innovation and explosive growth of the Internet [has been] directly linked to its particular architectural design." Thus, "variances from those standard protocols and practices damages the Internet as a whole," including the ability of entrepreneurs to enter the market with new Internet services. Contravention of these standard protocols and practices through discriminatory conduct thus erects barriers to entry that would not otherwise exist. Entrepreneurs are no longer able to design new services and technologies around known protocols and standards, but must spend considerable time and resources in an effort to accommodate Comcast's particular network management practices—a task made all the more difficult by the company's obfuscation regarding its actual practices. By exercising authority over this complaint, we are able to ensure that Comcast's actions do not inappropriately hinder entry by "entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services." In addition, by facilitating such entry, we also promote the Act's policies favoring "a diversity of media voices" and "technological advancement."198

Invoking the Associated Press case in particular, the FCC stated that the First Amendment ensures "the widest possible dissemination of information from diverse and antagonistic sources," rather than corporate interference with citizens' communications and speech.199

On appeal, the D.C. Circuit ruled that the FCC lacked the jurisdiction to issue the Comcast order, although it did not address the First Amendment issue.200 The court held that several statutory delegations of authority to the FCC to monitor and improve competition—including competition in providing "advanced telecommunications capability," efficient public telecommunications networks, and wire and radio communication—did not constitute subject-matter jurisdiction for the FCC to regulate Comcast's attempts to interfere with the proper operation of the Internet.201

The First Amendment conflict between owners of

198. Id. at 13040 (citations omitted).
199. Id. at 13053 n.203.
200. See Comcast Corp. v. FCC, 600 F.3d 642, 645 (D.C. Cir. 2010) ("We begin—and end—with Comcast's jurisdictional challenge.").
201. See id. at 648, 651–52, 658–60.
telecommunications equipment and Internet users will not be resolved by the D.C. Circuit's opinion. The D.C. Circuit itself stated that it was primarily relying on the FCC's own prior binding order in 1998, which stated that the Telecommunications Act of 1996 was not an independent grant of authority to the FCC to remove barriers to reasonably-priced and advanced telecommunications infrastructure. The court indicated that the FCC could overrule that prior order as long as it did not do so silently. The same court has previously held that the Telecommunications Act of 1996 grants the FCC "significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband . . . ." The Supreme Court, moreover, only rejected a challenge to the FCC's deregulatory orders of the early 2000's on the grounds that "the Commission remains free to impose special regulatory duties on [cable Internet providers] under its Title I ancillary jurisdiction." Three dissenting justices added that: "Under its undefined and sparingly used 'ancillary' powers, the Commission might conclude that it can order cable companies to 'unbundle' the telecommunications component of cable-modem service." Comcast itself invited these conclusions by reassuring

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202. See id. at 658 ("We begin with section 706 of the Telecommunications Act of 1996, which provides that '[t]he Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.'" (quoting 47 U.S.C. § 1302(a) (2006))); id. ("As the Commission points out, section 706 does contain a direct mandate—the Commission 'shall encourage . . . .' In an earlier, still-binding order, however, the Commission ruled that section 706 'does not constitute an independent grant of authority.'" (quoting In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, 13 FCC Rcd. 24012, 24047, ¶ 77 (1998))).

203. See id. at 659 ("Because the Commission has never questioned, let alone overruled, that understanding of section 706, and because agencies 'may not . . . depart from a prior policy sub silentio,' the Commission remains bound by its earlier conclusion that section 706 grants no regulatory authority." (quoting FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009))).

204. AD HOC Telecomms. Users Comm. v. FCC, 572 F.3d 903, 906-07 (D.C. Cir. 2009). See also Comcast, 600 F.3d at 659.

205. The order at issue was primarily in In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802-03 ¶ 9 (2002), but the Court also addressed the order in In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 17 FCC Rcd. 3019, 3030, ¶ 20 (2002).


207. Id. at 1014 (Scalia, J., joined by Ginsburg, J., and Souter, J., dissenting).
the Supreme Court that it should uphold the FCC's early 2000s deregulatory orders because "the FCC retained Chevron discretion in classifying cable modem service,"^208 so that "the Supreme Court would be bound under Chevron to defer to the [agency] rule."^209 Subsequently, Comcast reassured a lower court that was hearing a private case against the company that "[a]ny inquiry into whether Comcast's [peer-to-peer] management is unlawful falls squarely within the FCC's subject matter jurisdiction."^210

The Internet industry, members of Congress, and academic experts on telecommunications law do not view Comcast as precluding the FCC from exercising the constitutional and statutory authority to preserve the Internet against private corporations' efforts to use state or federal licenses or powers to control Internet content.^211 The Chairman of the Democratic Policy Committee of the United States Senate, Senator Byron Dorgan, commented on the floor of Congress that:

The FCC, under former Chairman Powell, moved the Internet from a telephone service to an information service, and that is what the lawsuit was about. Comcast brought a lawsuit and said under Title I of the Communications Act, as an information service, the FCC does not have the authority with respect to Internet freedom as I call it, to impose net neutrality rules. The


^209. Brief for Cable-Industry Petitioners at 34, National Cable and Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) (Nos. 04-277 & 04-281) (quoting Satellite Broad. & Commun's. Ass'n v. Oman, 17 F.3d 344, 348 (11th Cir. 1994)). Comcast was technically not a party to this brief, but it is a member company of the National Cable and Telecommunications Association, which was a party. See Press Release, Nat'l Cable Telecommunications Ass'n, Comcast's Brian Roberts Elected Chairman of NCTA Board: Other NCTA Board Members Elected; Executive Committee Named (Apr. 11, 2005), available at http://web.archive.org/web/20060322001325/www.ncta.com/press/press.cfm?PRId=595&showArticles=ok.


^211. For a description of how cable and telephone companies used state and local licenses to secure control over telecommunications infrastructure over which Internet content travels, see Travis, supra note 130, at 1569 nn.176–91 and accompanying text.
circuit court said the FCC does not have that authority under Title I. That gets very technical and very legal.

... I want regulators to regulate effectively to make sure the market remains open and free and fair. That is the job of a regulator. That is the job of the FCC.

We are going to have a big debate about this in the Congress. But first and foremost, I hope the Federal Communications Commission takes action under its own authority because it has plenty of authority to respond to this decision. It has authority under Title II of the Communications Act, and it has other authorities it can use.\(^\text{212}\)

The Open Internet Coalition has endorsed efforts by the FCC to reach a common-sense clarification of its authority to promote open and widely accessible high-speed Internet service.\(^\text{213}\) Its members include Amazon, eBay, Facebook, Google, Netflix, Sony Electronics, Tivo, and Twitter.\(^\text{214}\) Prior to the D.C. Circuit’s opinion, a coalition of Internet industry leaders such as Jeff Bezos of Amazon, Eric Schmidt of Google, Craig Newmark of Craigslist, and Mark Zuckerberg of Facebook wrote to the FCC to express their view that: “For most of the Internet’s history, FCC rules have ensured that consumers have been able to choose the content and services they want over their Internet connections.”\(^\text{215}\) Academic experts have reached similar conclusions.\(^\text{216}\)

Prior to the D.C. Circuit’s opinion in Comcast, the FCC announced its view that it has jurisdiction to enact a National Broadband Plan, which would include rules guaranteeing to Internet users their choice of lawful content, applications, and devices to the extent consistent with reasonable network management; the FCC invited comment from industry and the

\(\text{212}\) 156 CONG. REC. S2275-03, S2287 (Apr. 14, 2010).


\(\text{215}\) 155 CONG. REC. S10614-01, S10618-19 (Oct. 21, 2009).

A prescient dissenting commissioner objected to the proposed rules on the basis that the FCC lacked the jurisdiction necessary to implement them. Neither this dissenting commissioner nor the D.C. Circuit, however, has confronted the legislative history and purposes that motivated Congress to enact the various provisions of the Telecommunications Act of 1996 and National Recovery Act of 2009. Significantly, these statutes are viewed as sources of the FCC’s authority to protect and promote an open, efficient Internet. Specifically, the D.C. Circuit ignored the fact that Congress wrote the Telecommunications Act to mandate that telecommunications carriers interconnect with one another in a way that maximizes consumer choice, using an explicit reference to broadband Internet with the words “high speed, switched, broadband telecommunications capability.” In this regard, “Congress did not treat advanced services differently from other telecommunications services,” and “did not limit the regulation of telecommunications services to those services that rely on the local loop.” More fully, Congress declared that the FCC “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” with “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” It defined advanced telecommunications capability to include “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” Thus prior to Comcast, the D.C. Circuit itself rejected the notion that Congress had intended Internet service to go unregulated by declaring it an “information service” in the same category as electronic publishing or e-mail that required few licenses to operate.

218. See id. ¶ 98 (statement of Commissioner Robert M. McDowell concurring in part and dissenting in part).
219. AT&T Corp. v. City of Portland, 216 F.3d 871, 879 (9th Cir. 2000).
223. See Am. Council of Educ. v. FCC, 451 F.3d 226, 228 (D.C. Cir. 2006) (Internet access was not an “information service” but a “telecommunications service” subject to “an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation” as FCC’s “reasonable policy
The 1996 Act clearly makes telecommunications services subject to nondiscrimination and interconnection requirements, and defines a telecommunications service as the “offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.” It defines an “information service” as making information available by such means as “electronic publishing,” but specifically excludes from this definition “any use of any such capability for the . . . operation of a telecommunications system or the management of a telecommunications service.”

Cable companies are not engaged in “electronic publishing” in their capacity as broadband providers, which is why they claim they are entitled to a safe harbor against the defamation and copyright liability that would ordinarily confront a publisher. Although they make information available, when they go beyond providing a capacity for acquiring or storing information to transmitting information from user to user by wire or radio, they are providing a telecommunications service. Information services like electronic publishing do not transmit communications along diverse protocols on behalf of other information producers or users, without examination or selection of the contents thereof. Electronic publishing typically involves editing, such as when “disseminating news articles, offering literary material, and providing services similar to the Lexis/Nexis and Westlaw databases.”

choice[s]” (quoting Chevron U.S.A., Inc. v. NRDC, Inc. 467 U.S. 837, 843–45 (1984)).

225. Id. § 153(20).
228. See BellSouth Corp. v. FCC, 144 F.3d 58, 60 (D.C. Cir. 1998); see also Nat'l Cable & Telecommms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 994 (2005) (noting that in 1980s, the FCC distinguished between telecommunications services and “enhanced services,” the latter of which “included database services in which a customer used telecommunications to access information, such as Dow Jones News and Lexis, as well as ‘value added networks,’ which lease wires from common carriers and provide transmission as well as protocol-processing service over those wires”). “Following this traditional distinction, the Commission in the Universal Service Report classified ISPs that leased rather than owned their transmission facilities as pure information-service providers.” Id.
legislative history of the Telecommunications Act specifically describes the Internet as a telecommunications service.\footnote{See S. Rep. No. 104-23, at 18 (1995) (stating that “switching capabilities” used by modern “information services” are “telecommunications service[s]”); S. Rep. No. 1822, at 431 (1994) (“MCI and other long distance carriers have invested billions of dollars in digital fiber optic transmission networks. These networks are already being put to work to supply modern infrastructure services, such as MCI’s new SONET digital highway, which today is providing the fastest and most powerful of the university, government and commercial networks collectively known as the Internet.”); CONG. REC. H2230 (Aug. 2, 1995) (statement of Rep. Lofgren) (“Finally, I have included language within the manager’s amendment to address a burgeoning problem in the fast advancing telecommunications markets. Much to the dismay of concerned parents both softcore and hardcore pornography is freely available on the Internet.”); ROBERT E. EMERITZ, THE TELECOMMUNICATIONS ACT OF 1996: LAW & LEGISLATIVE HISTORY, at SR-50 (1996) (similar); Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1139 (9th Cir. 2003), rev’d, 545 U.S. 967 (2005).}

The FCC’s National Broadband Plan suggests that agency oversight may help coordinate universal accessibility of the Internet, a goal very nearly achieved already in some other countries. Large gaps persist in the infrastructure of decentralized, citizen-to-citizen high-speed Internet communication in this country. Forty percent more households have broadband access in the Netherlands or Scandinavia as in the United States, and nearly twice as many households have it in South Korea.\footnote{See BERKMAN CENTER FOR INTERNET AND SOCIETY, NEXT GENERATION CONNECTIVITY: A REVIEW OF BROADBAND INTERNET TRANSITIONS AND POLICY FROM AROUND THE WORLD 32 (2009).} More than a third of Americans do not have broadband at home, as well as forty-one percent of African Americans and nearly half of Hispanics.\footnote{See FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 167 (2010).} On sovereign Native American lands, broadband penetration may be only five to ten percent, as little as a tenth of the national rate.\footnote{See id. at 24, 163.} Most Americans without access know that the Internet is valuable for education and that children should learn how to use it.\footnote{See id. at 169.} Nearly two-thirds of jobs require use of the Internet to perform at expected levels.\footnote{See id. at 265.} Over half of teachers describe the Internet access in their classrooms as too slow or unreliable to use consistently.\footnote{See id. at 225.} A minority of American teachers can access their
students' academic records to tailor instruction to their needs.\textsuperscript{236} South Korea and Finland, with some of the highest broadband access rates, also have some of the highest science and mathematics test scores.\textsuperscript{237}

Broadband performance in the United States is spotty, averaging only about half the advertised speeds.\textsuperscript{238} Mobile broadband speeds may be closer to a third of what is advertised, barely warranting the designation as high-speed Internet access.\textsuperscript{239} Just as with electricity, transportation and health care, universal access has never been achieved by the market alone.\textsuperscript{240}

C. First Amendment Challenges to the FCC’s New Internet Neutrality Mandate

The FCC’s order on the \textit{Free Press} petition provoked a collision between First Amendment interests. On the side of regulation mandating net neutrality is the First Amendment interest of the public in sending and receiving countercultural, oppositional and underground speech and communications, and using new applications and Internet protocols along the way.\textsuperscript{241} On the side of the status quo prior to the order is the asserted interest of Comcast and its investors and employees in communicating messages they favor through “their” equipment, and their asserted freedom not to carry speech or applications that they dislike or with which they disagree.\textsuperscript{242} The latter side combines two inconsistent positions: that of an editor and publisher of a subset of all possible Internet communications that has a First Amendment right to be free of forced-carry obligations, and that of a conduit for data which benefits from a series of common-law and statutory safe harbors that immunize it from defamation and privacy-tort liability as the “speaker” of the Internet.\textsuperscript{243}

Comcast challenges the FCC’s action as in excess of its

\begin{itemize}
  \item \textsuperscript{236} See id. at 234.
  \item \textsuperscript{237} See FCC \textit{supra} note 231, at 225.
  \item \textsuperscript{238} See id. at 21.
  \item \textsuperscript{239} See id. at 22.
  \item \textsuperscript{240} See id. at 3 (“Treasury bonds and land grants underwrote the railroad, the Rural Electrification Act brought electricity to farms and the federal government funded 90% of the cost of the interstate highways”) (footnotes omitted).
  \item \textsuperscript{241} See \textit{In re} Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028, 13040, 13053 n.203 (2008).
  \item \textsuperscript{242} See id. at 13053 n.203.
\end{itemize}
jurisdiction, rather than as a violation of the cable network's First Amendment rights.\textsuperscript{244} It emphasizes the absence of any law or regulation prohibiting its conduct, pointing out that the FCC based its decision on enforcing what its Chairman announced as an unenforceable policy statement rather than a series of rules issued in compliance with the Administrative Procedure Act, 5 U.S.C. § 551 \textit{et seq}.\textsuperscript{245} It further claims that there is no harm to consumer choice of content and applications, because it only slows certain protocols to prevent other consumers from experiencing a degraded Internet connection.\textsuperscript{246} It also claims the right to filter out infringing audio and video Net content on behalf of other media conglomerates such as NBC Universal.\textsuperscript{247}

A related public relations campaign did, however, emphasize Comcast's free speech rights. The "Hands Off the Internet" movement argued that the government should stay out of micromanaging Internet companies' relationships with their customers: "the Internet has flourished because government has not tried to regulate it."\textsuperscript{248} The movement's statement listed a series of companies and organizations sponsoring the press release, but did not list Comcast. Only an investigation of the movement's Members page revealed to this author that one member was called NetCompetition.org, which includes AT&T, Comcast, and Time Warner Cable as members.\textsuperscript{249}

\textsuperscript{244} See Opening Brief for Petitioner Comcast Corporation at 31, Comcast Corp. v. FCC, No. 08-1291 (D.C. Cir. Pet'n for review filed Sept. 4, 2008) (arguing that FCC lacked "statutory or regulatory mandate that the agency could elect to implement either by general rules or case-by-case decisionmaking").

\textsuperscript{245} See id. at 17, 21–27, 36.

\textsuperscript{246} See id. at 24 ("Accordingly, Internet service providers ('ISPs') such as Comcast universally manage their networks to ensure that high-volume usage by a minority of customers does not harm others' Internet experiences.").

\textsuperscript{247} See id. at 54–55 ("Finally, the Order is arbitrary and capricious because the agency failed to give meaningful consideration to the need for ISPs to employ reasonable network management practices in order to prevent the transmission of copyright-infringing audio and video content.").


\textsuperscript{249} See also Hands Off Coalition: House Vote a Victory for 'Bipartisan Common Sense,' THE FREE LIBRARY (June 9, 2006), http://webcache.googleusercontent.com/search?q=cache:akpq6jiP1DGgJ:www.thefreelibrary.com/%27Hands%2BOff%27%2BCoalition%253A%2BHouse%2BVote%252Ba%2BVictory%2Bfor%2BHouse%27Bipartisan%2BCommon...-a0146803545.
D. Conclusion

The Internet depends upon the neutrality of network providers to fulfill its vision of uninhibited debate characterized by an unprecedented openness to members of the public. Corporate and technological developments within the cable and telephone industries threaten to rein in debate by limiting the applications, content, and protocols that Internet users may access. The FCC issued a strong opinion endorsing a theory of the First Amendment that would preserve the Internet's openness by allowing the FCC to protect Internet users from discriminatory or unreasonable cable and telephone industry practices. Industry leaders, however, describe this protection of the Internet's diversity as a violation of their First Amendment right to edit the World Wide Web. The result is a looming confrontation between the FCC and the First Amendment.

IV. CONSTITUTIONALLY GROUNDING THE FCC'S NEW THEORY OF THE FIRST AMENDMENT

The FCC has articulated various theories to justify broadcast and Internet neutrality. In Free Press, it adopted a purposive theory of the First Amendment. In response to the claim that its net neutrality adjudication conflicted with Comcast's First Amendment right to freedom from legislation or regulations abridging its freedom of speech, the FCC argued that net neutrality regulations "promote the dynamic benefits of an open and accessible Internet." It further argued that protecting speakers from interference with their Internet applications and communications does not dictate the content of Internet communications in violation of "First Amendment values" or prevent Comcast or other companies from communicating with their customers or other persons or entities.250 It has also relied upon the identification by Congress of a "substantial . . . First Amendment interest in promoting a diversity of views provided through multiple technology media."251 Finally, it cited Supreme Court case law for the idea that


the First Amendment supports regulating corporate restrictions on the ability of individual citizens to enjoy "the widest possible dissemination of information from diverse and antagonistic sources."252

In explaining its regulation of broadcast television to the courts and the public, however, the FCC has wavered between formalistic and economic approaches to the First Amendment. As noted above, in the late 1980s, the FCC decided that developments in the economics of radio and television made the fairness doctrine unnecessary and underscored a formal conflict with the First Amendment.253 In a manual distributed to the public describing the obligation of broadcast licensees to operate in the public interest in exchange for rights over the public airwaves, it says:

The FCC allocates (that is, designates a portion of the broadcast spectrum to) new broadcast stations . . . . As noted above, whenever we review an application—whether to build a new station, modify or renew a license or sell a station—we must determine if its grant would serve the public interest . . . . [W]e expect station licensees to be aware of the important problems and issues facing their local communities and to foster public understanding by presenting programming that relates to those local issues. As discussed in this Manual, however, broadcasters—not the FCC or any other government agency—are responsible for selecting the material that they air. By operation of the First Amendment to the U.S. Constitution, and because the Communications Act expressly prohibits the Commission from censoring broadcast matter, our role in overseeing program content is very limited.254

The author of a report released by the FCC's Media Bureau Staff in 2005 went even further. The report amounted to a legal

252. Id. at 13053 n.203.
253. See In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 227–46 (1985); GEOFFREY STONE, LOUIS SEIDMAN, CASS SUNSTEIN, MARK TUSHNET & PAMELA KARLAN, THE FIRST AMENDMENT 506 (Aspen, 2003) ("In 1987, the FCC repealed the fairness doctrine, asserting that [it] was unconstitutional because it 'chilled' the first amendment rights of broadcasters.").
brief against the agency’s own regulation of broadcast licensees, arguing that broadcast licenses should not have to operate in the public interest, that any requirement that they do is basically unenforceable, and that even if it was enforced, broadcasters could switch to relatively unregulated media, taking consumers with them.255

Somewhat surprisingly, the “First Amendment values” approach to the First Amendment in Free Press has been absent from most recent FCC forays into radio and television regulation. With a strange and often arbitrary exception of “indecent” material,256—i.e. mostly adult content—the FCC regards “the maintenance of control over programming as a most fundamental obligation of the [broadcast] licensee.”257 The FCC “today imposes very few affirmative programming obligations on broadcasters . . . .”258 Yet the purposive theory underlying the Free Press decision by


256. The FCC drew a distinction between “the most objectionable, most offensive language,” most of which was sexual in nature, and objectionable or offensive messages such as representations of Nazis or the Ku Klux Klan, or of schoolhouse massacres, or of the torture and murder of women and children for entertainment value in “horror” or “slash” movies and television shows. See FCC v. Fox Television Stations, Inc., 129 S. Ct 1800, 1808, 1812–13 (2009). The FCC reasoned that a sexual reference such as “the F-Word” has a “power to insult and offend [that] derives from its sexual meaning.” Id. (citing In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd. 13299, 13323 (2006)). Yet racist or sexist content also insults and offends, without FCC regulation. See Center for American Progress & Free Press, supra note 72. The FCC has also basically admitted that its own distinctions between sexual “expletives” and sexual innuendo of the type common on television shows like Friends or movies like American Pie are artificial and nonsensical. See In re Complaints Regarding Various Television Broadcasts, 21 FCC Rcd. 13299, 13308 ¶23 (2006); In re Industry Guidance On Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8000–01, ¶¶ 3–5 (2001); see also Mike Hudson & Chad Graham, Censorship: The Big Chill, THE ADVOCATE, May 11, 2004, at 53.


the FCC, according to many courts and scholars, would support an even greater FCC role in ensuring content and viewpoint diversity in the context of broadcast licenses than in the context of cable modems.259 As the FCC itself has stated, "broadcasting has traditionally ‘received the most limited First Amendment protection.’"260 This is because the broadcast airwaves are a "scarce and valuable national resource" that give rise to "unique considerations" requiring a balancing of interests between children, their parents, political candidates, business, and law enforcement.261


259. See, e.g., Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637–39 (1994) ("The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters . . . . Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here." (citations omitted)); FCC v. Pacifica Found., 438 U.S. 726, 731 n.2 (1978) ("[T]here is a scarcity of spectrum space, the use of which the government must therefore license in the public interest."); FCC v. Nat’l Citizens Comm. for Broad., 436 U.S. 775, 780 (1978) ("In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power."); id. at 795–96 (due to First Amendment and public policy interest in diverse speech, holding that FCC had "acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399 (1969) (broadcast spectrum is a public trust "of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress"); CENTER FOR AMERICAN PROGRESS & FREE PRESS, THE STRUCTURAL IMBALANCE OF POLITICAL TALK RADIO 7–9 (2007) (since Telecommunications Act of 1996, media conglomerates have acquired hundreds of FCC radio broadcast licenses with few or no strings attached, enabling them to override local ethnic and political diversity); William Van Alstyne, The Mobius Strip of the First Amendment: Perspectives on Red Lion, 29 S.C. L. REV. 539, 562 (1978) (arguing that allocating broadcast licenses to corporations narrows the field of broadcasters according to ability to pay rather than viewpoint diversity, and eliminates the voices of those unable to submit a matching bid); Alex Markels, Low Power to the Peep, MOTHER JONES MAG., July/Aug. 1999, at 69 (recounting how FCC licenses for big businesses censor free speech on radio).

260. Brief for the FCC and United States, supra note 257, at 59 (quoting Reno v. ACLU, 521 U.S. 844, 866 (1997)).

261. Id. at 53 (quoting FCC v. League of Women Voters of Calif., 468 U.S.
In this Part, I attempt to analyze the case for broadcast and Internet neutrality, drawing on four of the most commonly utilized types of constitutional theories. Beginning with formalist constitutional theory, I demonstrate the difficulties encountered by those who might desire to appeal to the "neutral" text of the First Amendment, independently of the intentions of its drafters and ratifiers, or of the economic or political context of the present day. Turning to purposive or originalist theories, I detail three potential purposive theories of the First Amendment, and describe the contradictory and unrealistically rigid implications of two of those theories as applied to the constitutionality of broadcast and Internet regulation. The two impossibly anachronistic theories would either deny Congress any power to regulate speech or the press, or limit that power to the contours of the common law of speech and the press in 1789. The third variant of purposive theory, stressing the purposes of the First Amendment to promote individual liberty and/or the public's ability to access diverse sources of information and debate, is the only useful variant in this context, and ultimately supports the FCC's Free Press decision, as well as the Supreme Court's decision in Red Lion. Next, I argue that trying to resolve conflicts among First Amendment interests by economic analysis introduces a promising degree of clarity and structure to the debate, and, depending on one's assumptions, provides further support for Red Lion and Free Press. Finally, I describe the differing implications of substantive political theories, ultimately concluding that none of them significantly undermines Red Lion or Free Press, but rather that these theories tend to reinforce them.

A. Formalism

One way to analyze regulatory forced access to telecommunications media is to reject it on the grounds that it conflicts with the First Amendment's literal text. In the context of the First Amendment, a few justices have attempted to introduce greater certainty, and fewer opportunities for partisanship and ad

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364, 376 (1984)).
262. See, e.g., Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 254 ("[T]he implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is government coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.").
hoc decision making, by adhering closely to text.\textsuperscript{263} Litigants seeking to overturn laws often appeal to the phrase, “Congress shall make no law.”\textsuperscript{264}

Formalism is an attempt to deduce the outcomes of controversial cases from “neutral” appeals to constitutional or statutory text.\textsuperscript{265} The authority of text acts as a series of shackles on the domineering, self-aggrandizing, or rapacious instincts of

\textsuperscript{263} Cf. \textit{Pacifica Found.}, 438 U. S. at 775 (Brennan, J., dissenting) (“It is quite evident that I find the Court’s attempt to unsthitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case dangerous as well as lamentable . . . . It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.”); see also \textsc{Alexander M. Bickel}, \textit{The Morality of Consent} 63 (1977); \textsc{Everette E. Dennis}, \textit{Justice Hugo Black and the First Amendment: “‘No Law’ Means No Law}” 160 (1978); Johnny H. Killian, George A. Costello et al., \textit{The Constitution of the United States of America: Analysis and Interpretation}, Cong. Research Serv. (2000), http://caselaw.lp.findlaw.com/data/constitution/amendment01/10.html#7 (“During much of the twentieth century, the opposition to the [First Amendment] balancing test was led by Justices Black and Douglas, who espoused what may be called an ‘absolutist’ position, denying the government any power to abridge speech.”).

\textsuperscript{264} See, e.g., \textit{New York Times Co. v. United States}, 403 U.S. 713, 717-18 (1971) (Supreme Court rejected government’s idea that “no law” means other than “no law” in area of national security); Brief for Appellant at 1, \textit{Citizens United v. Fed. Election Com’n}, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 61467, at *1 (invoking these words in seeking to overturn “a statute that imposes sweeping restrictions on core political speech”); Brief for Appellant at 16, \textit{United States v. Wilcox}, 66 M.J. 442 (2008) (No. 05-0159), 2007 WL 2988379, at *16 (“no law” means “no exceptions” and no “preferred classes” of speakers or religious practitioners); \textit{cf. Turner Broad.}, 512 U.S. at 653 (“Appellants maintain that the must-carry provisions trigger strict scrutiny because they compel cable operators to transmit speech not of their choosing. Relying principally on \textit{Miami Herald Publishing Co. v. Tornillo}, 418 U.S. 241 . . . , appellants say this intrusion on the editorial control of cable operators amounts to forced speech which, if not \textit{per se} invalid, can be justified only if narrowly tailored to a compelling government interest.”).

\textsuperscript{265} See, e.g., \textsc{Frederick Schauer}, \textit{Formalism}, 97 \textsc{Yale L. J.} 509, 510 (1988) (“Formalism is the way in which rules achieve their ‘ruleness’ precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.”); \textsc{Michael Robertson}, \textit{The Impossibility of Textualism and the Pervasiveness of Rewriting in Law}, 22 \textsc{Can. J.L. & Juris.} 381, 382 (2009) (“Formalists . . . believe that they have good reasons to restrict the material that should be considered in arriving at an understanding of a rule, or a poem, or a piece of scripture. A tight circle is drawn around a limited body of material, and the reader is told not to go outside this circle to consider wider contextual matters, such as the biographical details and psychological makeup of the author, or the author’s intention in producing the text, or more broadly the animating spirit of the text as opposed to its letter.”).
Arguments from authority, in this case the authority of constitutional text and prior cases, are as common in law as they are discredited in science and philosophy. This is partially the result of the inherent characteristics of law, which purports to emphasize regularity, predictability, consistency, equity, and universality. But it is partially the result of a certain ideophobia among lawyers and judges, or their fear of overturning long-standing habits of thought, especially based on partisan political grounds.

It is notoriously difficult to explain or justify First Amendment case law using the text of the First Amendment. Several ambiguous terms call for creative policymaking by judges. The
First Amendment protects the “freedom” of “speech” and “the press” from being “abridg[ed]” by “Congress.” Using the dictionaries commonly employed by the Supreme Court when it engages in textual or formalist analysis of the Constitution, the operation of radio and television stations, or of cable networks, might not constitute “speech” or “the press” at all. The problem is analogous to the lack of enumerated powers for Congress to raise and maintain an Air Force, or grant copyrights in recorded music or Web sites.

Although it is fairly simple to argue that television or the Internet constitutes “speech” or even “the press” because they contain words and meanings, a more difficult challenge is posed vague and abstract language of principles," creating “constitutional silences and open spaces" that do not expressly cover “every eventuality”).

271. U.S. CONST. amend. I.


273. The answer depends on whether one considers the Internet a mechanism for printing “books” or “using language.” See SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (1756), available at http://books.google.com/books?id=DgcUAAAAQAAJ (definition of “press” is an “instrument by which books are printed,” and “speech” is “power of expressing thoughts by vocal words,” “talking,” “language,” “anything spoken,” or “the liberty to speak.”); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773), available at http://books.google.com/books?id=CxATAAAAYAAJ (similar definitions); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1797), available at http://books.google.com/books?id=x-YIAAAQAAJ (defining “press” as “instrument by which books are printed,” and “speech” in terms nearly identical to those used in Johnson’s dictionary); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 637, 776 (1826) (defining “press” as a “machine for printing, a printing-press,” or the “art or business of printing and publishing,” and “speech” in terms nearly identical to those used in Johnson’s dictionary).

274. Cf. A. Michael Froomkin, Why the Air Force Is Not Unconstitutional, DISCOURSE.NET (Nov. 17, 2005), http://www.discourse.net/archives/2005/11/why_the_air_force_is_not_unconstitutional.html (describing problem with including U.S. Air Force in constitutional terms “Army” and “Navy,” despite fact that no aircraft existed in time of Framers); White-Smith Music Pub. Co. v. Apollo Co., 139 F. 427, 430 (S.D.N.Y. 1905) (“The meaning of the word ‘writings’ as employed in the Constitution, . . . include[s] ‘all forms of writing, printing, engraving, etching, etc. by which the ideas in the mind of the author are given visible expression’. . . . The words of the statute have reference to the tangible object that appeals to the sense of sight, and that which is susceptible of being reproduced by printing, copying, publishing, etc.”), aff’d, 147 F. 226 (2d Cir. 1906), aff’d, 209 U.S. 1 (1908).

by the phrase "no law abridging the freedom of speech . . . or of the press." Most justices of the Supreme Court have rejected a literal or formalistic reading of this phrase, which would construe it to mean that any speech or publication must be permitted by law, and that tolerance of speech must be maximized no matter the cost or consequences for society.276 Besides ad hoc balancing, referred to by the Court as “categorical” or “definitional” balancing, there are two ways of implementing the original intentions or purposes behind the First Amendment: permitting no law relating to speech other than those that do not abridge the freedom of speech as it existed under the common law in 1791, and limiting laws to those that do not abridge the freedom of speech in a more abstract sense that depends on the value of free speech.

In the telecommunications context, a literal reading of the First Amendment would be difficult if not impossible to enforce. The reason is that prohibiting all federal interference with “speech” read broadly to include all audio and video communication of ideas would throw the licensing of television and radio frequencies, and authority over telephone and cable mergers, and other industry practices, back to the states, or even into a completely unregulated cacophony.277 Although the states could regulate broadcasters in their respective jurisdictions, as they do cable and telephone networks to this day, the transmissions interfere with each other across state lines.

Likewise, an interpretation of the First Amendment that would protect the full range of free speech enjoyed under the common law at the time of the amendment’s ratification in 1791 would create a


277. Cf. Red Lion, 395 U.S. at 387–88 ("[T]he reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.").
significant degree of confusion and conflict by eliminating the federal role in broadcasting, not to mention much of the Internet owned or controlled by private entities.\textsuperscript{278} The pre-publication licensing of speech violated the freedom of speech at common law.\textsuperscript{279}

Given the practical advantages of broadcast spectrum licensing, and its analogue cable television right-of-way regulation by states and municipalities, an important question arises. The question is whether auctioning off broadcast licenses and cable rights-of-way based on willingness to pay—with little to no oversight of the resulting content or public access with the sole exceptions of prohibiting profanity, obscenity, or graphic sex—is more formally respectful of the "freedom of speech" than a similar auction with continuing oversight for balanced presentation of public debates. A similar question confronts advocates of maintaining a status quo that would censor profanity, obscenity, or graphic sex from many Web pages and user-generated content platforms, but provide no protections for Internet speech or democratizing applications against discrimination or bans. In what sense is the extensive censorship of sexual expression by the FCC,\textsuperscript{280} without the fairness doctrine or clear net neutrality principles in place, more formally in line with the First

\textsuperscript{278} See, e.g., Travis, supra note 130, at 1574–83.
\textsuperscript{280} See, e.g., 18 U.S.C. §§ 1462–64; 47 U.S.C. §§ 503, 559–61; Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995); Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988); In re Clear Channel Broadcasting Licensees, Inc., 19 FCC Rcd. 6773 (2004); Broadcast Decency Enforcement Act of 2004: Hearings on H.R. 3717 Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce, 108\textsuperscript{th} Cong. 87 (2004) (Statement of Kevin Martin, Commissioner, FCC); FCC, Regulation of Obscenity, Indecency, and Profanity, FCC (Jan. 14, 2010, 10:25 AM), http://www.fcc.gov/eb/oip/Welcome.html (“It is a violation of federal law to air obscene programming at any time. It is also a violation of federal law to broadcast indecent or profane programming during certain hours.”); Frequently Asked Questions—Enforcement Process, FCC (Jan. 14, 2010, 10:25 AM), http://www.fcc.gov/eb/oip/FAQ.html#TheLaw (“The FCC looks at three primary factors when analyzing broadcast material: (1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock.”); id. (“During 2004, the FCC imposed monetary sanctions for indecency violations up to $1,183,000, for an aggregate annual total of $3,658,000. In addition, some entities chose to settle claims against them and made voluntary payments to the U.S. Treasury, totaling $7,928,080 in 2004.”).
Amendment? Defenders of such a regime must invoke the purposes and common-law context of the First Amendment, which transcend the jurisprudential framework provided by formalism.

Another proposed construction of the phrase "freedom of speech . . . or of the press" would parrot the common-law framework articulated by William Blackstone and adopted by numerous federal and state courts in the nineteenth century. This construction would relegate the First Amendment to a codification of the legislative settlement of the British censorship debates of the seventeenth and eighteenth centuries to the effect that prior restraints or pre-publication licensing requirements for speech abridge its freedom, while subsequent punishments for treason, blasphemy, obscenity, libel, or other torts or crimes do not. The Supreme Court has declined to adopt this purportedly plain meaning of the phrase "freedom of speech," in the course of striking down numerous forms of post-publication civil and criminal penalties on speech. Most justices have authored or joined opinions defending pragmatic regulation of speech according to majority tastes, for example not to be disturbed by "loud" speech outside homes or displays of sexuality on television.

Neither is a formally clear answer to the constitutionality of net neutrality regulation lurking in Supreme Court cases, or even in the more numerous decisions of the lower courts. The Court famously upheld the fairness doctrine in Red Lion, but that ruling's precedential value has been undermined, it is said, by the passage

281. See, e.g., In re Fries, 9 F. Cas. 826, 839–41 (C.C.D. Pa. 1799) (No. 5,126) ("The definition of ['freedom of the press'] is, in my opinion, no where more happily or justly expressed than by the great author of the commentaries on the laws of England, . . . [whose] views of the subject could scarcely be unknown to those who framed the amendments to the constitution . . . . His explanation is as follows: 'The liberty of the press is indeed essential to the nature of a free state. And this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.'" (quoting 4 WILLIAM BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND *151 (1765–69))).


of time. During the four decades of social and legal change since *Red Lion*, several cases have prioritized the liberty interests of corporations and rich individuals who spend lots of money to distort public debate in their favor, while downplaying the interests of the public in protecting its freedom and democracy by making available all ideas, facts, and viewpoints essential to the operation of enlightened, participatory government. There seems to be no limiting principle that would dictate whether the Court would have to stick to *Red Lion’s* doctrine, which articulates that the First Amendment allows the FCC to restrain the power of those enjoying special access to telecommunications resources as a result of federal statutes and regulations, or rule that the First Amendment is violated by most or all laws requiring balance, neutrality, or public access. The Court might apply strict scrutiny to the fairness doctrine or FCC net neutrality principles because both are justified in reference to the content of the regulated communications; however, the “compelling governmental interest” and “least restrictive means” tests are highly subjective. But the Court

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286. See, e.g., *Davis*, 554 U.S. 724; *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974); CBS v. Democratic Nat’l Comm., 412 U.S. 94 (1973); Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 199–203 (2007) (arguing that *Miami Herald v. Tornillo* “established [that] broadcast access reforms constituted a limited, medium-specific exception to the prevailing First Amendment concern for media owners’ expressive autonomy . . . . After initially contemplating the free speech value of access interests, the Court categorically denies any First Amendment right of access to channels of communication while providing a strong right of autonomy for owners of communicative infrastructure.”).


288. See, e.g., Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1137 (2005) (describing First Amendment decisionmaking as an “intuitive inquiry [that] can easily be influenced by factors that judges ought not consider, such as the ideology of the speaker or the perceived merits of the political movement to which he belongs”); see also Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, FIRST AMENDMENT L. REV. (forthcoming) (draft at 33–34) available at
might also, depending on its composition and the number of recusals,\textsuperscript{289} decline to employ strict scrutiny under \textit{Red Lion}.

B. \textit{Principled Constitutional Theory}

Another prominent family of theories of the First Amendment attempts to divine the meaning of freedom of speech by reference to the purposes and origins of the phrase. These theories are divided as to whether they privilege the intentions of the drafters and ratifiers of the First Amendment, the origins of its constituent phrases in the late eighteenth century, the purposes it has served in American history, and often as to what those purposes are or were.

Scholars have divided themselves into two broad camps when they attempt to articulate the principles that motivated the First Amendment's adoption. The libertarian or autonomy theorist tends to emphasize that freedom of speech and the press restrains government from engaging in intrusive management of individuals' minds, thereby degrading the human spirit.\textsuperscript{290} The democratic or

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1425138 ("In Reno v. ACLU, the Supreme Court considered the Internet . . . worthy of substantial protection from government regulation even when government presents a compelling reason for intervening, e.g., protecting children from the potential harm resulting from access to obscene or indecent material. . . . These cases offer clear precedent mandating close scrutiny of content-based regulations with government bearing a substantial burden of demonstrating that content-affecting regulations are narrowly drawn and do not unduly restrict lawful access to content by adults."); cf. Roberta Rosenthal Kwall, \textit{Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul}, 81 \textit{NOTRE DAME L. REV.} 1945, 1990 (2006) ("For example, an unbounded right of integrity that would enable authors to prevent all perceived mutilations, unwarranted criticisms, and objectionable contextual uses could be seen as content-based and thus would raise serious First Amendment concerns. Nonetheless, appropriately tailored moral rights protections that do not proscribe speech and are enacted for a legitimate purpose other than discriminating on the basis of the message conveyed are not content-based."); id at 1989 ("Strict scrutiny requires that the government action be justified by a compelling state interest and achieved through the least restrictive alternative.").

\textsuperscript{289} See Jeffrey Segal, Lee Epstein, Charles Cameron, and Harold Spaeth, \textit{Ideological Values and the Votes of U.S. Supreme Court Justices Revisited}, 57 \textit{J. POL.} 812 (1995) (exploring correlates between ideological composition of Supreme Court and outcomes of decided cases); Abimbola A. Olowofoyeku, \textit{Regulating Supreme Court Recusals}, SING. J. LEGAL STUD., July 2006, at 60, 67, 81 (exploring the intriguing possibility that a litigant could sway the outcome of a Supreme Court case by filing a motion to recuse a sitting justice in a United States District Court, and discussing several scenarios where recusals might have occurred, but did not).

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collective theorist would argue that these freedoms protect the electoral process, and public debates about issues of concern to the entire nation, from being distorted.\textsuperscript{291} Either or both camps could and often do rely on endorsements of absolute or near-absolute protection for freedom of speech in the writings of the framers of the First Amendment.\textsuperscript{292}

The purposes underlying the First Amendment have dictated the outcomes of several prominent cases, if judicial opinions are to be taken at face value.\textsuperscript{293} For several reasons, these principles, no matter which line of thought is followed, tend to support media neutrality laws. For one thing, broadcast and Internet neutrality may be necessary, as described above, to prevent large conglomerates from distorting public discourse according to their ideologies or preferences. For another, they enhance the individual liberty interest in speaking and writing freely by preventing the government from acting in league with corporations to block politically disfavored or culturally unpopular viewpoints from enjoying access to the public. A third reason, which follows from the first two, is that they may contribute to the completeness and sophistication of public policy debates, which might otherwise be systematically one-sided.

First, federal or state licensing of telecommunications providers, as shown in Part III above, tends to distort public debate in the absence of neutrality regulation, in direct conflict with the central purpose of the First Amendment. In \textit{New York Times v.}

\begin{itemize}
\item \textsuperscript{292} See, e.g., DAVID LANGE & JEFFERSON POWELL, \textit{No Law: Intellectual Property in the Image of an Absolute First Amendment} 198 (Stanford Univ. Press, 2008) (James Madison wrote that judges will "resist every encroachment upon rights expressly stipulated for in the Constitution"); \textit{see also} Barenblatt v. United States, 360 U.S. 109, 143–44 (1959) (Black, J., dissenting) (citing "the injunction to Court and Congress made by Madison when he introduced the Bill of Rights. 'If [the Bill of Rights] is] incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.'" (quoting 1 Annals of Cong. 457 (Joseph Gales ed., 1789))); James Madison, \textit{Report on the Alien and Sedition Act}, in JAMES MADISON: WRITINGS 608, 649 (Jack N. Rakove ed., 1999) (1800) (First Amendment "was intended as a positive and absolute reservation of [press freedom]").
\item \textsuperscript{293} See, e.g., Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16–18 (1947).
\end{itemize}
Sullivan, the Supreme Court invoked James Madison, one of the principal framers of the Bill of Rights, as declaring that the “right of free public discussion of the stewardship of public officials was . . . a fundamental principle of the American form of government.” The opinion quoted Madison as reasoning: “If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.” Moreover, the Court noted that Thomas Jefferson, whose correspondence with Madison helped shape the Bill of Rights, “deny[ed] the power of Congress ‘to control the freedom of the press.’”

Second, the fairness doctrine and net neutrality advance the liberty interests of individual speakers by precluding the government from enlisting private monopolies to deny unpopular or minority viewpoints from accessing the airwaves, or the underground wires. The statesmen of the early republic frequently emphasized the importance of protecting a citizen’s liberty of speaking from state interference. Jefferson, for example, thought that government should never claim authority over “the operations of the mind.” He wrote that “free correspondence between citizen and citizen” is a “natural right” that government should not abridge. Madison defended the First Amendment in similar terms, maintaining that a citizen should be entitled to make “unrestrained animadversions” about official acts perpetrated in his or her name.

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295. Id. (quoting 4 Annals of Cong. 934 (1794)).
296. Id. at 276 (quoting 1804 Letter to Abigail Adams, quoted in Dennis v. United States, 341 U.S. 494, 522 n.4 (1951) (Frankfurter, J., concurring)).
298. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 285 (Merrill D. Peterson ed., 1984) (1789). See also THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., 1982) (1789), available at http://presspubs.uchicago.edu/founders/documents/amend1_religions40.html (“The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods . . .”).
300. Madison, supra note 292, at 647–48. See also Tony Freyer, Hugo L. Black and the Warren Court in Retrospect, in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 97 (Mark Tushnet ed., 1995) (Justice “Black accepted Locke’s theory in part because he believed that Jefferson had incorporated it into the Declaration of Independence . . . . The judge was bound
Third, neutrality regulation helps ensure that all good ideas are heard, and that the national community understands all important matters.\textsuperscript{301} Madison recognized that the value of the right to vote “depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.”\textsuperscript{302} He realized that: “Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge gives.”\textsuperscript{303} Similarly, Jefferson thought it critical that “every man should receive those [public news] papers & be capable of reading them.”\textsuperscript{304}

by what Black believed was the fundamental intent of the framers of the Bill of Rights. The First Amendment, Madison declared, placed freedom of expression ‘beyond the reach’ of Congress.”).

301. See, e.g., John Adams, A Dissertation on the Canon and Feudal Law, in 3 THE WORKS OF JOHN ADAMS 455–57 (Boston: Charles C. Little and James Brown, 1850–1856) (early rulers of United States decided “that the art of printing should be encouraged, and that it should be easy and cheap and safe for any person to communicate his thoughts to the public”); Thomas Jefferson, Letter to Isaac MacPherson, in THE COMPLETE JEFFERSON 1015 (Saul K. Padover ed., 1943) (1813) (“That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansive over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement, or exclusive appropriation.”; Thomas Jefferson, Letter to Alexander Donald, in 6 THE WRITINGS OF THOMAS JEFFERSON 425 (Lipscomb and Bergh eds., 1903-04) (1788), available at http://etext.lib.virginia.edu/jefferson/quotations/jeffcont.htm (arguing that freedom of the press is beneficial to the individual because it helps to “fortify the habit of testing everything by reason,” and that a prohibition on censorship is a “fetter[ against doing evil which no honest government should decline”); see also Branzburg v. Hayes, 408 U.S. 665, 723 (1972) (Douglas, J., dissenting) (“A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge gives.” (quoting James Madison, Letter to W.T. Barry, in 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910) (1822))).


303. Madison, supra note 301, at 103.

304. Thomas Jefferson, Letter to Edward Carrington, Jan. 16, 1787, in LITERARY CLASSICS OF THE UNITED STATES (1984). The full thought is somewhat more complex, and bears quoting for context:

The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution.
The counterargument to the view that access to complete and diverse sources of knowledge and opinion was the motivating purpose of the First Amendment is that the interest in individual liberty from restraints must prevail, whether justified by governmental animosity or neutrality. Owners of FCC licenses and wireline telecommunications infrastructure built on public rights-of-way argue that preventing monopolies from emerging in broadcast or Internet access markets is a suppression of free speech, or at least a burden upon it that is not justified by the public interest.\textsuperscript{305} Such pipeline companies selectively pretend to be the authors of the Internet content that the Supreme Court has declared to be "a vast platform" for communications to and from millions of readers.\textsuperscript{306} Under this argument, regulations erected against corporate censorship violate the larger telecommunications conglomerates' First Amendment interests under \textit{Tornillo}, even when the regulations seek to restrain the conglomerates' own content-based censorship or efforts to prevent competitors' growth.\textsuperscript{307}

Such appeals by telecommunications corporations to an autonomy-based conception of the First Amendment are

\textsuperscript{305} To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, & to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers & be capable of reading them. I am convinced that those societies (as the Indians) which live without government enjoy in their general mass an infinitely greater degree of happiness than those who live under the European governments.

\textit{Id.}


307. See \textit{id.} at 57–58 (citing \textit{Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo}, 418 U.S. 241 (1974)); see also Reply Comments of AT&T, \textit{supra} note 305, at 39 ("any effort by the Judiciary to decide which means of communication are to be preferred for the particular kind of message and speaker would raise questions as to the courts' own lawful authority") (quoting \textit{Citizens United v. FCC}, 130 S. Ct. 876, 890 (2010)).
unpersuasive. First, newspapers like the Miami Herald, at issue in the Tornillo case's review of a right-of-reply law, do not require licenses from the FCC to broadcast over the public airwaves, or rights-of-way from cities, counties, and states that may not be duplicated by many later-arriving "speakers." Therefore, the rationale of Red Lion that the most effective media for speech should not be divvied up in a completely unregulated fashion to unaccountable private interests is applicable, rather than that of Tornillo that the power of a new newspaper to reach the public is limited only by journalistic integrity and economic success.\(^{308}\) Second, broadcasters and broadband Internet companies typically proclaim themselves to be innocent conduits for the speech of other writers, producers, directors, and performers, rather than the fully-responsible and creatively-superintending editors and publishers of such speech.\(^{309}\) By contrast, newspapers routinely incur liability for

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\(^{308}\) Compare Red Lion Broad. Co. v. FCC, 395 U.S. 367, 387–91 (1969) (FCC license empowers broadcasters to "monopolize a [broadcast] frequency to the exclusion of his fellow citizens"); with Tornillo, 418 U.S. at 256–58 (newspapers limited only by economic factors). See also Brief Amicus Curiae of the American Civil Liberties Union and the Brennan Center for Justice at New York University School of Law in Support of Respondents at 8, Nat’l Cable & Telecommuns. Ass’n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005) (Nos. 04-277 & 04-281) (“Until 1992, the law permitted localities to award exclusive cable franchises, and many did. Today’s large cable companies owe their dominance in the market to the earlier government-granted monopoly.” (citation omitted)); David Gabel, Competition in a Network Industry: The Telephone Industry, 1894–1910, 54 J. Econ. Hist. 543, 568–69 (Sept. 1994) (“Local telephone exchanges are ‘bottlenecks’ under classical antitrust theory. The control of these franchises provides AT&T with the incentive and opportunity to protect, maintain, and extend its monopoly in telecommunications services overall.” (citation omitted)); Patricia Worthy, Racial Minorities and the Quest to Narrow the Digital Divide: Redefining the Concept of “Universal Service,” 26 Hastings Comm. & Ent. L.J. 1, 10 n.27 (2003) (historically, telephone companies like AT&T received geographically-delimited “exclusive franchise[s]” in return for promising “universal service”).

the words and expressions of their writers.310 Newspapers might justifiably incur the benefits as well as the burdens of treatment as speakers, editors, and publishers of their articles, while broadband providers do not.311 Third, although broadband providers attempt to analogize themselves to cable television systems that offer a tailor-made set of channels to their subscribers,312 broadband Internet companies have repeatedly reassured Congress that they will not pick and choose among Internet users.313 It is therefore wrong to privilege broadband service as an exercise in corporate autonomy.

Even when invoked, the binding authority of underlying principles is often weak. Thus, in Harper & Row Publishers v. Nation Enterprises and Eldred v. Ashcroft, the Supreme Court disregarded numerous appeals in the merits and amici briefs to the purposes that motivated the First Amendment’s adoption,314 in

(“The [Digital Millennium Copyright Act] contains an express disclaimer of any intent to require [Internet service providers] to monitor (let alone police) any user-to-user communications . . . “).


311. See 47 U.S.C. § 230 (2006) (provider of an interactive computer service shall not be treated as publisher of its users’ speech); Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2009) (describing extensive immunities of suit provided by Congress to Internet service providers, who as a result are not speakers or publishers of content generated by their users); Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (similar); Doe v. GTE Corp., 347 F.3d 655, 661 (7th Cir. 2003) (similar); Green v. America Online, 318 F.3d 465, 471 (3d Cir. 2003) (similar); Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (similar).

312. See, e.g., Reply Comments of AT&T, supra note 305, at 42 (“[T]he Supreme Court has made clear that, ‘by exercising editorial discretion over which stations or programs to include in their repertoire,’ Turner I, 512 U.S. at 636, cable operators, along with cable programmers, are engaged in the business of communicat[ing] messages on a wide variety of topics and in a wide variety of formats.”) Id. That same principle applies to decisions by Internet service providers about what content to offer.

313. See Travis, supra note 130, at 1578 n.209 (collecting statements to Congress on this point by representatives of cable and DSL industries); Kyle McSlarrow, Remarks Before the Media Institute, NCTA (Dec. 9, 2009), http://www.ncta.com/PublicationType/Speech/Net-Neutrality-First-Amendment-Rhetoric-in-Search-of-the-Constitution.aspx (“[A]lmost every net neutrality proposal would seek to control how an ISP affects the delivery of Internet content or applications as it reaches its customers . . . . All ISPs have stated repeatedly that they will not block their customers from accessing any lawful content or application on the Internet.”).

favor of analyzing the text and intentions of the Copyright Clause of Article I, and several congressional copyright enactments of the early United States.315 Under these cases, authors and librarians suffer under byzantine regulations of their creative and editorial discretion in quoting and publishing expressive works.316 Similarly, cases like San Francisco Arts & Athletics v. U.S. Olympic Committee317 and Coca-Cola Co. v. Purdy318 have made short shrift of “insignificant" or weak First Amendment interests where the efficient flow of commerce and trade was at stake.319 As Robert C.
Post argues, the Supreme Court has often elevated institutional efficiency and propriety in commercial, educational, and governmental domains over both the human liberty interest and the collective truth- or democracy-related interests in freedom of speech. With individual citizens and natural persons subject to such extensive micromanagement of their speech and conduct in the public sphere, it would be unjust if media corporations were to enjoy greater protections in their attempts to "publish" a censored Internet, particularly when the neutrality and openness of the Internet is declared to be vital by its founders, industry leaders, and legions of its users.

Thus, however instructive it may be in the abstract, principled theory may be indeterminate in practice. It merely moves the field of ambiguity and contradictions from the layer of literal text to that of underlying purposes. These become even more confusing when, as in Eldred, the intentions and origins underlying multiple constitutional provisions and federal statutes are invoked. The confusion can only be increased by considering the desires projected by the public onto constitutional text and congressional practice over more than two centuries.

trademarks in his Internet domain names due to likely commercial harm).

C. Economic and Antitrust Theory

One way of explaining the apparent shift in the FCC's interpretation of the First Amendment is to focus on differences in the economic context of the firms it regulates. In the context of broadcast media, the FCC argued successfully in the 1980s and 1990s that the time for broadcast neutrality regulations had come and gone due to the increased competition. The agency's evidence included the proliferation of radio and television frequencies (including AM, FM, VHF, and UHF), cable channels, and satellite television. By contrast, the FCC justified adopting enforceable net neutrality regulations by citing potential decreases in competition due to mergers and acquisitions in the broadband Internet access market. Moreover, the FCC has distinguished broadcast and Internet neutrality on the basis that unlike television channels, which may disclose their biases openly, broadband consumers who are unable either to use certain applications or access certain content may not blame the broadband Internet company but the application or Web site itself, causing competitive harm in the marketplace.\(^{321}\) It argued that harm to competition inflicted by Internet discrimination is heightened by information asymmetries between providers and consumers.\(^{322}\) Providers may keep Internet users in the dark about protocol blocking techniques or confidential deals with other firms or even government officials.

Economic analysis may support broadcast and net neutrality regulation for reasons analogous to those described above in connection with principled constitutional analysis. First, neutrality regulation prevents markets from being distorted, a particular risk when companies enjoy monopoly power due to exclusive rights bestowed by governments, network effects, and/or restrictive contracts. Second, it guarantees to innovative individuals and companies a minimum ability to access essential and/or government-financed infrastructure such as television stations or the high-speed Internet. Third, it serves as a means of filling gaps in existing markets that may result from the failure of market participants to satisfy consumer demand by improving quality, expanding options, and cutting prices.

On the other hand, some scholars argue that broadcast or


\(^{322}\) *See id.*
network neutrality is either economically unnecessary, harmful, or even both. A line of case law and scholarship maintains that federal regulation is suppressive of speech, considering increasing private competition and the chilling effect of imposing a right of access or a nondiscrimination principle.\textsuperscript{323}

Within economic analysis of law, the problem of discriminatory suppression of potential competitors or upstart ways of competing is analyzed as a refusal to deal, monopoly leveraging, exclusive dealing, tying, a price squeeze, denial of access to essential facilities, and other related doctrines.\textsuperscript{324} The primary economic justification for broadcast and net neutrality, as with many antitrust doctrines, is preventing the monopolization of new technologies by dominant firms that would inhibit the growth of new marketplaces of ideas.\textsuperscript{325}


\textsuperscript{325} See, e.g., Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388, 390 (1969) (concluding that FCC regulation of broadcaster bias is necessary "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or of a private licensee"); In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028, 13024 ¶ 13 ("[In 2005, we] stated our understanding of our 'duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age.' Thus, the Commission committed to incorporating [net neutrality] principles . . . 'into its ongoing policymaking activities.'").
Monopoly leveraging occurs when large market shares, or other sources of power that exclude competitors or raise prices (such as restrictive contracts or government-backed preferential rights to valuable assets), empower a firm to harm competition, destroy or degrade the profitability of competitors, and raise prices in the long run. Thus, in the 1950s and the 1960s, the FCC concluded that broadcasters have "enforceable public obligations" not to engage in arbitrary self-dealing using exclusive communications licenses issued by the federal government. One of the most observable trends since the decline of the fairness doctrine is increasing discrimination against independent television production firms, due to the leveraging of broadcasting frequency monopolies into increasing control over programming content.

326. See, e.g., Louis Kaplow, Extension of Monopoly Power Through Leverage, 85 COLUM. L. REV. 515, 515 (1984) ("The debate over the ability of firms to use restrictive practices to leverage their monopoly power from one market to another has continued throughout the history of the antitrust laws . . . ."); id. ("The [monopoly] leverage hypothesis underlies a substantial portion of the antitrust attack on many other restrictive practices, ranging from vertical mergers and reciprocal dealing arrangements to many tactics scrutinized under Section 2 of the Sherman Act.").

327. Office of Commc'n of the United Church of Christ v. Federal Commc'ns Comm'n, 359 F.2d 994, 1003 (D.C. Cir. 1966). The court stated, more fully, that:

A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.


328. See, e.g., U.S. DEPT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES 18 (1992), available at http://www.justice.gov/atr/public/guidelines/hmg.pdf ("Other things being equal, market concentration affects the likelihood that one firm, or a small group of
tells us that the more providers there are of a service, the better its quality and the lower its price will tend to be.\textsuperscript{329} Federal and state antitrust laws reflect this principle of microeconomics by seeking to maximize consumer choice and price competition.\textsuperscript{330}
Independently of the Telecommunications Act of 1996 and the FCC, antitrust law prohibits pacts between competitors in restraint of trade, as well as "unilateral" anticompetitive acts imposed on customers by a party enjoying market power due to exclusive statutory rights, regulatory licenses, or network effects.\textsuperscript{331} The Sherman Antitrust Act of 1890 provides civil and criminal remedies for contracts, combinations, or conspiracies in restraint of interstate commerce, as well as for monopolization or attempts and conspiracies to monopolize any part of interstate commerce.\textsuperscript{332} The Telecommunications Act of 1996 further specifies that: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable," so any charge or practice that is unreasonable is illegal.\textsuperscript{333}

Empirical research into the effectiveness of telecommunications regulation by the FCC has passed through two phases over the past decade. In the first phase, scholars concluded that the proportion of broadcast programming that is "informational" in nature would tend to increase after the demise of FCC neutrality regulation because corporate broadcasters would not be deterred from controversial talk-radio formats.\textsuperscript{334} Several limitations of these early empirical studies made them an incomplete answer to the question of whether federal regulation could improve media competition and performance. Perhaps the most obvious deficiency is that the study assumed that more "talk"

\textsuperscript{331} See, e.g., Robin Cooper Feldman, Patent and Antitrust: Differing Shades of Meaning, 13 VA. J.L. & TECH. 5 (2008); Hovenkamp & Hovenkamp, supra note 329; Marina Lao Reclaiming a Role for Intent Evidence in Monopolization Analysis, 54 AM. U. L. REV. 151 (2004); David McGowan, Evolving Antitrust Treatment of Dominant Firms: Between Logic and Experience: Error Costs and United States v. Microsoft Corp., 20 BERKELEY TECH. L.J. 1185 (2005). A "network effect" is an increase in the marginal demand for a product attributable to the existing demand for a product, so that a product's value increases with the number or predominance of users, creating a tendency towards monopoly by one firm serving all users with a product that is very valuable due to its sheer ubiquity. See, e.g., Mark A. Lemley & David McGowan, Legal Implications of Network Economic Effects, 86 CALIF. L. REV. 479, 484 (1998); A. Douglas Melamed, Network Industries and Antitrust, 23 HARV. J.L. & PUB. POLY 147, 148 (1999).


\textsuperscript{333} 47 U.S.C. § 201(b) (2006).

equals more “public debate.” Therefore, completely biased or false “news” concerning, for example, Iraq's alleged weapons of mass destruction, or the destiny of house prices to always increase, would benefit the public under this methodology. This assumption equates the ravings of a “shock jock” with an erudite lecture or debate. The “shock jock” genre has, of course, grown tremendously since the late 1980s in terms of the percentage of radio stations adopting it. The Howard Stern show in New York went national, and was presumably counted as an AM “talk” format covered in the fairness doctrine study. Another problem is that the study could not measure the impact of programming genres that were never adopted at all, only the relative contributions of those that were. Moreover, the study did not assess the economic and social externalities inflicted by false advertising, one-sided political speech, or biased coverage of issues.

The second phase of empirical research into media regulation has been more empirically-grounded and content-based. The Pew Research Center for the People and the Press conducted opinion polls finding that the percentage of the American people complaining of biased news media coverage of political issues increased from about fifty percent in 1985, before the fairness doctrine’s repeal, to about seventy percent in 2005. The Chicago Council on Foreign Relations documented this trend issue by issue, concluding that militarism, advocacy of free trade, and criticism of

335. See Hazlett & Sosa, supra note 334, at 295, 301.
336. See id. at 292 (“[W]e aggregate formats into five broad categories: music, information, religious, foreign language/ethnic, and mixed.”).
339. See id. at 292–301.
foreign humanitarian or economic development assistance were far more likely among pundits with access to the mass media, than among the general public. The Program on International Policy Attitudes and Knowledge discovered that in the lead-up to the 2004 elections, a majority of Americans falsely believed that Iraq, rather than Saudi Arabia and Pakistan, was behind al Qaeda and 9/11, and fifty-seven percent of Bush voters in 2004 falsely believed that Iraq's weapons of mass destruction had been discovered after the invasion. A Roper poll in 2006 revealed that eighty-five percent of U.S. troops in Iraq believed that al Qaeda was some form of branch, agency, or ally of the Iraqi government toppled in the 2003 war. In the lead-up to the 2008 election, most Americans once again accepted false claims of possession of weapons of mass destruction.


343. See Program on International Policy Attitudes & Knowledge Networks, Americans and Iraq on the Eve of the Presidential Election, PROGRAM ON INTERNATIONAL POLICY ATTITUDES, at 7 (Oct. 28, 2004), http://www.pipa.org/OnlineReports/Iraq/IraqPresElect_Oct04/IraqPresElect_Oct 04_rpt.pdf ("Respondents were told, ‘As you may know, Charles Duelfer, the chief weapons inspector selected by the Bush administration to investigate whether Iraq had weapons of mass destruction, has just presented his final report to Congress’ and were asked what he concluded . . . ’); id. (noting that thirty-nine percent of respondents wrongly believed that the Duelfer and the Iraq Survey Group found actual weapons of mass destruction or a major program to make them); id. (noting that fifty-seven percent of Bush supporters wrongly believed that Duelfer and the Iraq Survey Group found weapons of mass destruction or a major program to make them); PIPA/Knowledge Networks, Three in Four Say If Iraq Did Not Have WMD or Support al Qaeda, US Should Not Have Gone to War, PROGRAM ON INTERNATIONAL POLICY ATTITUDES (Oct. 28, 2004), http://www.pipa.org/OnlineReports/Iraq/IraqPresElect_Oct04/IraqPresElect_Oct 04_pr.pdf ("Despite the widely-publicized conclusions of the Duelfer report, 49% of Americans continue to believe Iraq had actual WMD (27%) or a major WMD program (22%), and 52% believe that Iraq was providing substantial support to al Qaeda.").

destruction by a rival of the American government, in this case "Iran's nukes," a constant theme in the broadcast media and common title of broadcast and cable news segments.\textsuperscript{345} This may be due to the disproportionate media access by a handful of interventionist and militarist pundits at think tanks funded by oil companies or foreign regimes, who inevitably call for war.\textsuperscript{346} Similarly, a tiny minority of scientists who deny the existence of global warming trends, and the melting of the polar ice caps, enjoy dramatically greater access to the media than other scholars.\textsuperscript{347} A study in the Columbia Journalism Review in 1997 documented a movement towards privileging strategists and pundits over foreign correspondents with real experience interviewing witnesses to history being made.\textsuperscript{348}

One mechanism by which uniformity of content is imposed is by vertical integration of content and distribution within broadcast networks. The economic concentration in the production of prime time television programming nearly tripled from 1989 to 2002 according to one measure used by the Justice Department in antitrust cases.\textsuperscript{349} During the debate over the CBS-Viacom merger, a "widely expressed public concern about [the merger] is that inevitable self-dealing between the CBS network and Viacom's production studios will tend to foreclose independent television

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\textsuperscript{346} See supra notes 72 and 114.

\textsuperscript{347} See Maxwell T. Boykoff, Lost in Translation? United States Television News Coverage of Anthropogenic Climate Change, 1995-2004, 86 CLIMATIC CHANGE 1 (2008). The mass media portray global warming as a minority view or as evenly balanced in terms of the evidence with the absence of global warming, whereas few scientists would agree. See Naomi Oreskes, Beyond the Ivory Tower: The Scientific Consensus on Climate Change, 306 SCIENCE 1686 (2004) (reporting that among peer-reviewed scientific papers, 928 seemed to accept that global warming existed and was linked to greenhouse gas emissions, either explicitly or implicitly); see also Jules Boykoff & Maxwell Boykoff, JOURNALISTIC BALANCE AS GLOBAL WARMING BIAS, EXTRA! (Nov./Dec. 2004), http://www.fair.org/index.php?page=1978 (fifty-three percent of mass media articles express doubt about scientific consensus).


\textsuperscript{349} See Marc Cooper, Domination of the Video Product Space, in THE CASE AGAINST MEDIA CONSOLIDATION: EVIDENCE ON CONCENTRATION, LOCALISM AND DIVERSITY 361, 363 (Marc Cooper ed., 2007).
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producers from access to what remains one of the few most viable
distribution networks for television programming."\textsuperscript{350}
Indepen\textsuperscript{dently-produced television declined from eighty-five percent
of network programs in the mid-1990s to less than twenty-five
percent in the mid-2000s.\textsuperscript{351}

Thus, empirical research in the decade since Hazlett’s and
Sosa’s 1997 study has found that regulation of broadcast licensees is
necessary to prevent distortion of the marketplace of ideas in the
direction of artificial uniformity. This more recent research
provides a better answer to the question of whether the fairness
doctrine “chills” or encourages the development of a healthy
marketplace of ideas. It does so by discriminating between different
types of content, between mindless “shock jock” drivel and accurate
information needed by voters to select candidates; for example, it
studies content by asking the public whether the coverage they are
being provided is balanced or biased, or whether they believe
obvious lies. Due to the rise of more advanced polling, it is no
longer credible to equate all news- or talk-related formats with
more vigorous democratic dialogue, regardless of the amount of
inane chatter or deceptive claims. Thus, the Hazlett and Sosa study
is, at best, evidence of more “talk,” rather than more freedom, equal
access to regulated airwaves, or informed voters.

Second, neutrality regulation may safeguard the freedom to
innovate in a dynamic economy. The FCC argued in the Comcast
order that disfavoring specific Internet protocols or practices
“‘damages the Internet as a whole,’ including the ability of
entrepreneurs to enter the market with new Internet services.”\textsuperscript{352}
The agency cited testimony from one of the architects of the
Internet that “[t]he Internet’s open, neutral architecture has proven
to be an enormous engine for market innovation, economic growth,
social discourse, and the free flow of ideas.”\textsuperscript{353} Analogously, one of

\textsuperscript{350} David Waterman, CBS-Viacom and the Effects of Media Mergers: An
\textsuperscript{351} See Independent Production Companies, in Encyclopedia of
\textsuperscript{352} In re Formal Complaint of Free Press and Public Knowledge Against
Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC
\textsuperscript{353} Id. at 13040 n.94 (citing Net Neutrality: Hearing Before the S. Comm. on
Vice President and Chief Internet Evangelist, Google, Inc.), available at
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:30115.pdf [hereinafter
Cerf Statement]).
the objectives of the fairness doctrine was to compel the opening up of the broadcast airwaves to persons and organizations desiring to develop formats and content relating to "coverage of public issues," and "broadcast news and commentary."\footnote{354} Two schools of thought are currently at loggerheads over whether net neutrality regulation in particular will accelerate or impair innovation and economic growth. America's leading technology and Internet companies, such as Amazon, eBay, Google, Intel, Microsoft, Vonage, and Yahoo! have argued that net neutrality is needed to protect innovation from the power of infrastructure companies to favor their own Internet services, and to pick winners and losers by charging higher fees or providing degraded service to the "losers."\footnote{355} Telephone and cable companies that currently run most of residential broadband networks disagree. They argue that it is forced sharing of networks and mandatory neutrality schemes that threaten to disrupt new business models relating to super-high-speed access lanes, reduced spam and congestion, and the recoupment of the costs of installing fiber-optic and wireless networks.\footnote{356}

\footnote{354} In re The Handling of Public Issues Under the Fairness Doctrine, 48 F.C.C. 2d 1, 1–7 (1974).


In antitrust terms, non-neutrality represents a bundling of content or applications/formats with access to the underlying network, whether it is a television station, residential cable, or telephone network. The danger of such bundling is that it will force consumers to accept a bundled product they do not want or that does not satisfy their needs with a bundling product that they cannot cheaply or easily do without, like a scarce broadcast frequency or high-speed internet connection.357 Most advanced economies have governments that compel the unbundling of local telephone networks from broadband access service because of the danger of monopoly leveraging, reduced output, and unnecessarily high prices.358

Empirical research to date has revealed substantial evidence in favor of the technology and Internet companies' position that neutrality regulation may enhance innovation. This research indicates that the exploitation of local broadband monopolies and duopolies in the United States is reducing the output of broadband access and related services, and increasing the prices of such services.359 The average speed of a broadband connection in Japan,
which adopted neutrality regulation, is over ninety megabits per second, compared to only nine in the United States. Broadband access by households is around a third higher in Japan. The average price of broadband service is two to three times as high in the United States as in France or Japan, with a fifty megabit per second line costing less than $25 per month in Japan. By 2005, a

http://www.internetworldstats.com/am/US_High_Speed_Internet2008.pdf); John B. Horrigan, Broadband Adoption and Use in America 27–31 (FCC OBI Working Paper Series No. 1, 2010), available at, http://www.pewinternet.org/Commentary/2010/February/FCC-Broadband-Adoption-and-Use-in-America.aspx [hereinafter Horrigan, Broadband Adoption] (noting that “[fifty-one] percent of all non-adopters [of the Internet] said monthly cost was a barrier, although fewer said it was the primary reason they lack service,” and that about eight percent of Americans are priced out of broadband service at prices of over $10 or $20 per month); John Horrigan, Home Broadband Adoption 2009, PEW INTERNET, at 22–23, 26–27 (June 17, 2009), http://pewinternet.org/-/media/Files/Reports/2009/Home-Broadband-Adoption-2009.pdf [hereinafter Horrigan, Home Broadband] (reporting that thirty percent of American broadband subscribers surveyed either had only one provider in their area or was not aware of the other provider(s), and that those with only one provider pay over fifteen percent more for it monthly than those with two or more choices, with nearly everyone paying over $32 per month); Hearing on Net Neutrality and Free Speech on the Internet Before the House of Representatives, Committee on the Judiciary, Task Force on Competition Policy and Antitrust Laws, 110th Cong. 7 (2008) (statement of Susan S. Crawford, Visiting Associate Professor, Yale Law School), available at http://judiciary.house.gov/hearings/pdf/Crawford080311.pdf (“[W]e have regional duopolies (usually one cable provider and one telco) providing Internet access to 98% of the country.”).


362. See Andy Vuong, Comcast Answers the Need for Speed, DENVER POST (CO), Sept. 20, 2009, at K01; Srisamorn Phoosuphanusorn, Slow Lane on the Superhighway, BANGKOK POST (Thailand), Sept. 4, 2009; DSL Subscription Fees Fall in 2008, According to Point Topic, LATIN AMERICA TELECOM, Dec. 1, 2008; OECD, Average Broadband Monthly Subscription Price, By Country, USD PPP,
French Internet company was offering a package of high-speed Internet access, telephone service, and multi-channel television for an astounding $32.50.\textsuperscript{363} Most Americans pay $38 to $44 per month just for broadband Internet access.\textsuperscript{364} While the issue of net neutrality is separable from the encouragement of competition by allowing broadband companies to enjoy forced access to the telephone networks, the trend of broadband accessibility, speeds, and prices in France and Japan confirms other evidence that neutrality laws improve broadband service.

Third and lastly, neutrality regulation has a vital role to play in ensuring that all relevant information relating to important economic and political transactions is widely disseminated. Within the technology and Internet industries, it is widely believed that enforceable provisions banning discrimination by broadband providers against Internet companies are needed to prevent them from squashing potential competition in video programming (YouTube or NetFlix), text and images (Google, bloggers, or Flickr), online investing (AmeriTrade), or telephony (Skype).\textsuperscript{365} Although

\textsuperscript{363} See Multiple Play: Pricing and Policy Trends, ORG. FOR ECON. CO-OPERATION AND DEVELOPMENT (Oct. 2009), http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html.

\textsuperscript{364} See Horrigan, Home Broadband, supra note 359, at 22–27. Dr. Horrigan reports that fourteen percent of Americans believe they have only one broadband provider in their area, and these Americans pay an average of $44.70 per month. \textit{Id.} Another fourteen percent of Americans believe they have two providers; these Americans pay an average of $42.80 per month. \textit{Id.} Then there are the nineteen percent who believe they have three providers; they pay about $38.10 per month on average. \textit{See id.} About a third of Americans do not subscribe to broadband; many of them live in rural areas that are likely to be served by one or two providers at most. \textit{See Horrigan, Broadband Adoption, supra note 359, at 5, 7, 21, 39.}

Internet discrimination might be profitable for infrastructure companies, it would threaten the existence of the upstart and initially undercapitalized firms that make new options like these possible.\textsuperscript{366} The antitrust and telecommunications laws aim to accelerate the pace of technological advances by stamping out market power over essential infrastructure such as oil pipelines, gas lines, electrical wires, telephone networks, or computer operating systems.\textsuperscript{367} Permitting Internet discrimination frustrates these objectives. As the House Judiciary Committee declared in a report on proposed legislation, broadband infrastructure companies have

\textit{and the Internet}, 110th Cong. (2008) (statement of Ben Scott, Policy Director, Free Press) (describing Skype as a peer-to-peer voice conversation program at risk from Comcast’s policy of blocking peer-to-peer applications); Cerf Statement, supra note 353 (describing Google’s concerns about Internet discrimination); Erika Morphy, \textit{House Committee Shoots Down Net Neutrality Clause}, E-COMMERCE TIMES (Apr. 27, 2006), http://www.ecommercetimes.com/story/50219.html?wlc=1253664286 (according to a consultant to Flickr, the photo sharing service, called it “a high-bandwidth offering—just the sort of Internet service that could be impacted by a lack of net neutrality.”).


market power that they have used to undermine competition, restrain trade, and impair consumers' access to various forms of content or services delivered over the Internet.\textsuperscript{368}

\textbf{D. Political Theory}

The bodies of philosophical theory that are most relevant to media neutrality debates are theories of justice, in particular corrective and distributive justice, and civic republicanism as a variant of virtue ethics. Only corrective justice provides arguable grounds for opposing neutrality regulation, which tends to advance distributive justice, equality, and civic engagement.

Theories of corrective justice are familiar from contract law as well as other areas. Aristotle states the fundamental premise of corrective justice as providing remedies or rectification for injuries or wrongs.\textsuperscript{369} Immanuel Kant argued that right and justice demand the recognition of private property and the prohibition of theft, while to reorder society on empirical grounds designed to maximize happiness would be to subordinate free beings to objects and thereby degrade them.\textsuperscript{370} He argued that corrective justice must be done at any cost, saying for example that if a society was to flee a city or dissolve, its last murderer lying in prison should still be executed before migrating to satisfy justice, despite the useless folly of such an act.\textsuperscript{371}

Corrective justice is relevant to media neutrality debates because it provides several potential ways of balancing the interests of the owners and the consumers of media. For one thing, all current holders of broadcast licenses agreed to broadcast in the public interest, so if the public interest supports regulation, they may not be heard to complain of injustice.\textsuperscript{372} As noted above, several major broadband providers and the relevant trade associations have invited FCC oversight over their industry in seeking to fend off suits under antitrust or other laws.\textsuperscript{373} Moreover,
societies have recognized that an injustice may occur if unlimited freedom of contract is allowed to allocate benefits and burdens in dealings when one party to the deal enjoys special access to state power, strategic choke points in the economy, or informational advantages (as in fraud or nondisclosure of material facts). Corrective justice does not endorse fraud or taking advantage of others on the basis of an unlimited obligation to contract freely. Individual entrepreneurs such as lawyers and even hairdressers,

application of federal antitrust law to broadband DSL service because regulations “can be developed by legislative branches and administrative agencies with superior factfinding ability, greater industry expertise, existing capacity for ongoing oversight and refinement, and the public accountability that is an important companion to such economic policy”; Comcast Corp. v. FCC, 600 F.3d 642, 647–48 (2010) (“In language the [FCC] now emphasizes, Comcast [argued in a prior civil action that]: ‘Any inquiry into whether Comcast’s [peer-to-peer] management is unlawful falls squarely within the FCC’s subject matter jurisdiction.’”).


375. See, e.g., 15 U.S.C. § 1 (2006) (providing that contracts that unreasonably restrain trade or create a combination that will do so are unlawful); Cal. Civ. Code § 1689(b) (2005) (“A party to a contract may rescind the contract in the following cases: (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.”); Consumer Protection Act, 1987, S.I. 1987/43 (U.K.), available at http://www.opsi.gov.uk/acts/acts1987/pdf/ukpga_19870043_en.pdf (restricting sellers from misleadingly advertising prices, among other things); Unfair Terms in Consumer Contracts Regulations, 1999, SI 1999/2083 (U.K.), available at http://www.opsi.gov.uk/si/si1999/19992083.htm (restricting a variety of misleading or unfair contracting practices); Behrend v. Comcast Corp., No. Civ. A. 03-6604, 2007 WL 1300725, at *13 (E.D. Pa. May 2, 2007), later proceedings at 532 F.Supp.2d 735 and 245 F.R.D. 195 (E.D. Pa. 2007) (contracts between broadband providers to split up monopoly territories were potentially unlawful under 15 U.S.C. §§ 1, 2); Aval v. Earthlink, Inc., 134 Cal. App. 4th 544, 557 (2005) (noting that contract terms extracted due to unequal bargaining power or lack of disclosure may be void); Kent D. Stucky, Internet and Online Law 1–29 (2003) (similar).
with far less power than large-scale broadband networks, have to contend with detailed regulations ensuring a high level of service.\textsuperscript{376}

Theories of distributive justice are often broken down into several schools of thought, including libertarianism, egalitarianism, and conservatism. The legislative history of the principal edifices of American antitrust and telecommunications law reflects a theory of modernist, egalitarian progressivism.\textsuperscript{377} The Telecommunications Act of 1996 expressly declared a federal policy of universal access to telecommunication services without discrimination on account of race or location.\textsuperscript{378} Although their view of regulation is more mixed, even libertarian and conservative theories of distributive justice do not necessarily countenance unlimited discrimination and control.

Media neutrality regulation promotes such equal access by guaranteeing consumers minimum access when corporations wish to deny it. Thus, it provided African-Americans, suffering from one-sided coverage of disputes over the legality of anti-miscegenation and segregation laws, with their only chance of securing compelled access to pro-segregation media outlets in local markets.\textsuperscript{379}


\textsuperscript{380} See, e.g., TV9, Inc. v. FCC, 495 F.2d 929, 937 n.28 (D.C. Cir. 1977) (noting that “Blacks did not participate in the ownership or management of any mass communications media in the Orlando [Florida] area,” and that the United States Commission on Civil Rights found in 1971 that “fewer than one percent of FCC-licensed radio stations in the U.S. were owned by minorities,” and that out of “more than 1,000 television stations, none is owned by minorities”); Office of Communication of United Church of Christ v. FCC, 465 F.2d 519, 521
Net neutrality has helped companies like Rowdy Orbit IPTV and others overcome barriers to minority-produced media content. Tiered pricing based on speed or data caps should be able to address the concern held by African-American organizations that net neutrality will cause poor users to have to cross-subsidize wealthy down loaders. Other reasonable network management policies that may prevent music lovers or high-definition television viewers from demanding all the bandwidth on a "neutral" network would also be tools to reduce spam, spyware, viruses, and denial of service attacks.

Finally, civic republicanism, as a theory of maximizing individual or collective virtue by promoting reflective, stable identities, provides further support for regulating communications. The relevance of unbiased information to individual development is clear from a maxim of Epictetus: "Only the educated are free." The vision of an engaged American public that underlies the Constitution and Bill of Rights likewise depends upon access to all

(D.C. Cir. 1972) (describing petition to deny renewal of FCC television license on grounds that station ignored perspectives of African-Americans); Office of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 997-98 (D.C. Cir. 1966) (noting that FCC-licensed broadcaster "deliberately cut off a network program about race relations problems on which the General Counsel of the NAACP [appeared] . . . [and] had presented a program urging the maintenance of racial segregation and had refused requests for time to present the opposing viewpoint," but that FCC renewed its license anyway); see also Brief Amicus Curiae of National Black Media Coalition et al., CBS Inc. v. FCC, 453 U.S. 367 (1981) (arguing that "the public benefits from access to diverse viewpoints, not just those supplied by concentrated media interests," and that "[h]owever well intentioned and nonpartisan the networks (and other broadcasters) might be, their power to determine what candidates may speak to the American public and when cannot be insulated from review.").


relevant information and sources of opinion as necessary guidance in operating the levers of the Republic.

Other scholars have described at length the relevance of this civic republican emphasis on informed, active citizenship to the problem of how to regulate television and/or the Internet.\textsuperscript{385} International human rights law also implements this vision in binding legal provisions.\textsuperscript{386}

Ignorance and deliberate deception propagated by the broadcast media in particular frustrate the informed exercise of citizenship. While most mainstream legal scholarship erects a bugbear of political minorities utilizing the Internet to barricade themselves with virtual walls into "extremist enclaves,"\textsuperscript{387} a far greater problem is the inculcation by telecommunications media of false beliefs in the majority. Regulators reading the nation's leading financial newspapers, magazines, and academic journals

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\item \textsuperscript{385} See, e.g., Balkin, \textit{supra} note 270; Bracha & Pasquale, \textit{supra} note 9, at 1171–1207; Pasquale, \textit{supra} note 9.

\item \textsuperscript{386} See, e.g., International Covenant on Civil and Political Rights art. 19, ¶ 2, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."); American Convention on Human Rights art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) ("Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium . . . ."); European Convention for the Protection of Human Rights and Fundamental Freedoms and Nine Protocols art. 10, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) ("Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."); Universal Declaration of Human Rights, G.A. Res. 217(A) (III), U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."); GRAHAM DUTFIELD & UMA SUTHERSANEN, \textit{GLOBAL INTELLECTUAL PROPERTY LAW} 294–96 (2008) (discussing this right).

\item \textsuperscript{387} See, e.g., CASS SUNSTEIN, \textit{REPUBLIC.COM} 3–54, 192–210, 238 (paperback ed., Princeton Univ. Press, 2002) (discussing the notion that new technology allows users to seek out only the information that they wish to view and noting that this may only reinforce and strengthen existing viewpoints); Mark S. Nadel, \textit{Customized News Services and Extremist Enclaves in Republic.com}, 54 STAN. L. REV. 831 (2002) (discussing Sunstein's idea that technology allows extremists to find enclaves that support and encourage their radical viewpoints).
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could hardly help but read paeans and hagiographies of CEOs and private equity fund managers later exposed as reckless, deceptive, and, more often, both.  

A renowned expert about how financial deregulation led to the present banking crisis declared “that in the bubble years, everyone becomes a cheerleader, including the media,” which failed to ask “tough questions.” Instead, media outlets plastered the “Masters of the Universe” on the covers of newspapers, magazines, and television news clips, without inquiring whether these CEOs, hedge-fund managers, or equity firms were earning unnatural returns by “taking so much risk they’[d] be bankrupt two years down the line.” Such media reports frequently ignored basic facts about Goldman Sachs and Citigroup grossly misleading investors and the public, housing price inflation far exceeding historical averages, often unregulated derivatives ballooning into an unstable multi-trillion-dollar market, consumers going bankrupt at record rates, and wages and benefits stagnating or decreasing for many Americans.

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390. Id.

391. See, e.g., Associated Press, E-mail Trail Details Wall Street Conflicts, USA TODAY (Apr. 28, 2003), http://www.usatoday.com/money/industries/brokerage/2003-04-28-settlement-emails_x.htm (discussing the existence of conflicts of interest among employees at firms); Thomas A. Fogarty and Edward Iwata, Links Between Reports, Banking Fees Cited, USA TODAY (Apr. 29, 2003), available at http://www.usatoday.com/money/industries/brokerage/2003-04-28-banks3_x.htm (discussing the various financial institutions’ settlements with the regulators as it relates to their stock analyses).


395. See Sue Kirchhoff, Increase to Minimum Wage Fails in Senate, USA
Meanwhile, the broadcast media subjected the public to such misleading mantras as “fundamentals of our economy are strong”\textsuperscript{396} or “house prices never go down.”\textsuperscript{397} Such misperceptions contributed to millions of Americans, most lacking a basic familiarity with financial documents,\textsuperscript{398} entering into mortgages that they could not repay, triggering a financial crisis that bankrupted Wall Street and potentially several entire countries.\textsuperscript{399} The result will be an estimated thirteen million foreclosures of home mortgages,\textsuperscript{400} and the diversion of $12 trillion of federal funds

\textsuperscript{396} See, e.g., NBC Today Show: Profile: President Bush to Give Speech Today Outlining Ideas to Spur the Economy; Henry Paulson, Treasury Secretary, and CNBC's Maria Bartiromo Discuss the Economy (NBC television broadcast Jan. 18, 2008) (Treasury Secretary Henry Paulson stated: “The long-term fundamentals of our economy are strong . . . Well, our economy—the long-term fundamentals are very strong in our economy, so we've got strong long-term fundamentals.”); NBC Today Show: Interview: Maria Bartiromo, CNBC, Says Wall Street Doing Well because Asia and Europe’s Economies Booming (NBC television broadcast July 18, 2007) (attributing “rapid growth” in share prices to “is the fundamentals. I mean, the economy is doing well in the US, but even more important, the global economy is doing very well.”).

\textsuperscript{397} See, e.g., Face The Nation (CBS television broadcast Aug. 21, 2005) (“I don’t think we’re likely to see a large nominal price collapse, that is largely falling house prices, but I think we’ll see much lower rates of growth in house prices after 2005.”).

\textsuperscript{398} In a 2006 poll about half of homeowners “said they didn’t know much about the mortgage options that were available when they bought their homes.” Holden Lewis, \textit{Mortgage Borrowers Know That They Don't Know Much}, \textit{Bankrate} (Jan. 19, 2006), http://www.bankrate.com/brm/news/mortgages/20060119a1.asp. A third of homeowners polled in 2007 didn’t know what kind of mortgage (fixed rate, adjustable rate, etc.) they had. See Press Release, Bankrate, 34% of Homeowners Don’t Know the Type of Mortgage They Have (Mar 26, 2007), available at http://investor.bankrate.com/releasedetail.cfm?ReleaseID=236049. Two-thirds of Americans may not have been able to calculate how much interest they paid monthly on their credit cards. See \textit{SUSAN JACOBY, THE AGE OF AMERICAN UNREASON} 309 (2008).

\textsuperscript{399} See Simon Evans et al., \textit{Which Country Will Slither Down the Slippery Slope Next?}, \textit{INDEPENDENT} (LONDON), Oct. 19, 2008, at 80 (discussing the effect of the U.S. banking crisis on a host of countries, including Estonia, Ukraine, Argentina, Hungary, Russia, Brazil, South Korea, Indonesia, India, Spain, and China).

\textsuperscript{400} See Hubble Smith, \textit{Housing Market: Prime Loan Borrowers May Be Poised to Face Home Foreclosures}, \textit{LAS VEGAS REV. J.} (Aug 9, 2009), http://www.lvrj.com/business/52828477.html (noting expert predictions that an increase in number of foreclosures was looming).
from health care, education, and other human needs into corporate bailouts and the extension of low-interest credit to U.S. banks.\textsuperscript{401}

There is likely a link between public ignorance or misconceptions on the one hand and biased or selective media coverage on the other. Many regulators, ordinary investors, and captains of industry were caught off-guard by the global financial crisis of 2008. Alan Greenspan expressed “shocked disbelief" when “the self-interest of lending institutions [failed] to protect shareholder's equity" from bad loans and losses from undue financial speculation.\textsuperscript{402} Former Securities and Exchange Commission Chairman Christopher Cox similarly complained that the “global financial crisis has exposed many of the weaknesses and holes in our regulatory system that are far greater and more consequential than was previously understood,” including “the $55 trillion national market in credit default swaps, which lacks oversight and transparency."\textsuperscript{403} Over the past decade, various reports have stated that between two-thirds and nine-tenths of Americans get their news, or in other words, receive most of the information they have about their government and the various officials who control it, from television. Television’s one-sided programming has produced a toxic cocktail of false perceptions on the part of the public.

V. CONCLUSION

Empirical research into the denial of public access and open debate within the broadcast media has exposed the failure of the FCC’s deregulatory moves, including the repeal of the fairness


doctrine. Anecdotal evidence and comparative research concerning the willingness of broadband Internet corporations to distort the availability of Internet connectivity and applications present an even more foreboding prospect. Public and industry pressure to avert discrimination and the degradation of applications resulted in the FCC beating Congress to the punch in re-regulating Internet infrastructure providers. The FCC’s activist stance prompted it to articulate a theory of the First Amendment that it had all but abandoned in deregulating the broadcast space, namely that unlimited corporate control over a mechanism for mass communication is incompatible with equal access to speech and debate. This theory has support in the purposes and original context of the First Amendment, as well as in the economics of communications infrastructure and the political theory of democracies.