

# ARTICLES

## TOWARD A BROADBAND PUBLIC INTEREST STANDARD

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### TABLE OF CONTENTS

Introduction .....	3
I. The Broadcast Public Interest Standard.....	11
A. Statutory and Regulatory Foundations .....	11
B. Defining “Public Interest” in Broadcasting .....	12
1. 1930s Through 1960s—Proactive Regulation “to Promote and Realize the Vast Potentialities” of Broadcasting .....	14
a. Attempts at Specific Requirements: The “Blue Book” and the 1960 Programming Statement .....	16
b. More Specification, the Fairness Doctrine, and Noncommercial Broadcasting .....	18
c. <i>Red Lion Broadcasting Co. v. FCC</i> : The Public’s First Amendment Rights as Paramount.....	19
2. 1970s and 1980s—The Taming of <i>Red Lion</i> by the Invisible Hand.....	20

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3. 1990s to Today: Continued Deregulation and a Modest Revival of Public Interest Regulation ( <i>Red Lion</i> Roars Again) .....	21
a. The Broadcast Public Interest Standard Survives (Tattered, but Still Alive) .....	23
C. Why Did the Broadcast Public Interest Standard Fall Short? .....	26
II. The Internet as Marketplace of Ideas .....	28
A. Autonomy and the Internet .....	30
B. Speech and Democracy Online .....	34
1. Online Citizen Activism .....	39
a. The Democratization of Information and the Demise of Unidirectional Monoculture .....	39
b. Direct Democracy 2.0? .....	43
2. <i>E Pluribus Pluribus</i> —Whither Deliberative Democracy Online? .....	46
a. Access .....	46
i. Availability .....	49
ii. Cost .....	50
iii. Why Is Broadband Important? .....	51
C. Private Censorship .....	53
1. Censorship on Social Networking and News Media Websites .....	54
2. Censorship in the Blogosphere .....	56
3. Censorship by Broadband Providers .....	57
4. The New Scarcity: Scarce Audience, Abundant “Spectrum” .....	58
5. Valuable Dissent Can Be Impolite .....	61
D. Online Exposure Diversity—The Diminishing Returns of Digital Autonomy .....	62
1. The Importance—and Scarcity—of Heterogeneous Exchange Online .....	63
2. Beyond Gatekeepers, Beyond Fences—Finding Truth in the Data Smog .....	67
E. Localism and Community Building Online .....	72
1. Are Online Communities Undermining Local Communities on Terra Firma? .....	74
III. Operationalizing a Broadband Public Interest Standard .....	77
A. Intensified Federal Efforts in Support of Broadband Universality .....	78
1. Assessing the Challenge .....	78
a. Existing Federal Efforts to Proliferate Internet Access—Lack of Prioritization .....	80
b. Mixed Results in Educational Connectivity Initiatives—Many Children Left Behind and Offline .....	82

c.	What Else Is at Stake—Advantages of Household Internet Access Beyond Democratic Engagement .....	84
2.	Increasing Direct Federal Subsidies for Broadband Deployment.....	87
3.	Financial, Technical, and Legislative Support for Municipal Broadband and Public–Private Initiatives to Build Out Broadband .....	91
a.	Cable Modem and DSL Duopoly.....	92
b.	Municipal Broadband Networks as an Emerging (but Underfunded) Third Option .....	93
c.	Cable and Telephone Company Efforts to Thwart Public Networks .....	96
4.	Supporting Demand-Side Digital Literacy Programs .....	100
5.	More Federal Research Support, Better Data Collection, and Better Spectrum Management .....	102
B.	Content: Cultivating Digital Democracy .....	104
1.	Building Online Town Squares—Support for Public Fora on Local and State Government Websites.....	104
a.	Causes of the Shortage of Public Deliberation Spaces Online .....	106
b.	Parameters for Online Public Fora .....	108
2.	Linking Public Broadcasting with Public Broadband—A New Corporation for Public <i>Broadband</i> ? .....	110
3.	Network Neutrality .....	114
a.	Net Neutrality and Democracy Online .....	118
IV.	Old Wine in a New (Digital) Bottle? How a Broadband Public Interest Standard Would Be More Effective than Its Broadcast Progenitor .....	121
A.	Avoiding Content Regulation Quagmires .....	121
B.	Subsidies as a Constitutional Alternative to Regulation.....	124
C.	Bridging Autonomy with Civic Republicanism .....	128
	Conclusion .....	133

## INTRODUCTION

The emergence of the Internet as a prominent communications medium was welcomed with excited declarations of the new technology's power to transform democracy and society. It was exalted as “the most transforming technological event since the capture of fire”<sup>1</sup> and “the most participatory form of mass speech yet developed.”<sup>2</sup> More recently, observers credited it with ushering in “the most profound change since the advent of literacy”

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1. Forum, *What Are We Doing Online?*, HARPER'S MAG., Aug. 1995, at 35, 36 (quoting John Perry Barlow).

2. *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

and “a new renaissance.”<sup>3</sup> Not since the dawn of broadcasting has a new technology generated such hopeful predictions. Radio was touted as a “new miracle,”<sup>4</sup> and television was the “great radiance in the sky,”<sup>5</sup> expected to catalyze political engagement and enrich American democracy if put to good use. Like broadcasting before it, the Internet was expected to deliver a renewed and vibrant democratic culture to the nation.<sup>6</sup>

The United States government played an instrumental role in the early development of both broadcasting and the Internet—incubating early forms of both technologies, partly for purposes of national defense, and then privatizing much of the control of each medium.<sup>7</sup> Although broadcasting and the Internet were exalted as essential—new instruments for enhancing democratic engagement and enriching the marketplace of ideas—the government took two very different approaches in orienting itself to broadcasting and to the Internet, approaches rooted in divergent free speech traditions.

In devising a licensing and regulatory regime for broadcasting, Congress and the early Federal Communications Commission (FCC or Commission) appealed to a communitarian, civic republican, and ultimately instrumentalist conception of the First Amendment that values public deliberation as the highest form of democratic engagement.<sup>8</sup> The purpose of broadcasting regulation was to generate programming that elevates American democracy and cultivates localized civic engagement. But the

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3. Tim O'Reilly, *Luminaries Look to the Future Web*, BBC NEWS, Apr. 30, 2008, <http://news.bbc.co.uk/2/hi/technology/7373717.stm>.

4. ROBERT W. DESMOND, *THE INFORMATION PROCESS: WORLD NEWS REPORTING TO THE TWENTIETH CENTURY* 370 (1978).

5. LAWRENCE K. GROSSMAN, *THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE* 167 (1995) (quoting Edward R. Murrow); see also *id.* at 166 (“Radio was to serve as a massive force for political enlightenment in our democratic society.”); RICHARD DAVIS, *THE WEB OF POLITICS: THE INTERNET’S IMPACT ON THE AMERICAN POLITICAL SYSTEM* 29 (1999) (quoting broadcasting pioneer David Sarnoff as touting television as a “torch of hope in a troubled world”). A local broadcaster extolled that “the most outstanding of the contributions that television can be expected to make to further democracy . . . will be its unique usefulness as a means of public information.” *Id.* (citing JEFF KISSELOFF, *THE BOX: AN ORAL HISTORY OF TELEVISION, 1920–1961*, at 171 (1995)).

6. GROSSMAN, *supra* note 5, at 166–69; see also DAVIS, *supra* note 5, at 27–32, and MARK LLOYD, *PROLOGUE TO A FARCE* 107–10 (2006) (describing the democratic aspirations undergirding the broadcast regulatory regime).

7. See PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* 333–38 (2004); Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1, 10–12 (2004).

8. See Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1394–95 (2004); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1204–06 (1993); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 100–01 (1994).

commercial marketplace was not certain to provide such a forum.<sup>9</sup> Although the cadre of broadcast licensees was to be comprised almost entirely of private entities, their licenses came with affirmative duties to operate stations “as if owned by the public.”<sup>10</sup> Congress charged the FCC with regulating broadcasting in the furtherance of “the public interest, convenience, and necessity,”<sup>11</sup> delegating to the agency itself the task of defining what those terms meant as the broadcast industry matured.

The FCC has struggled to articulate a durable and coherent set of public interest requirements since its creation. Recognizing, and perhaps even cowed by, the power of broadcasting to assume an unprecedented centrality in American political and cultural life, the agency set out to ensure that broadcast licensees used the public spectrum to create a universally accessible electronic free marketplace of ideas—ideas that would inform, enlighten, and engage citizens; foster political debate; strengthen local communities; and generally deliver a more vibrant and deliberative democracy.<sup>12</sup> Broadcast policy assigned to the government a proactive role in ensuring that broadcasters not merely satisfy the audience’s tastes for

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9. See CHARTING THE DIGITAL BROADCASTING FUTURE: FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS 21 (1998) [hereinafter DIGITAL BROADCASTING FUTURE], available at <http://govinfo.library.unt.edu/piac/piacreport.pdf>. Empaneled by President William J. Clinton to recommend how the broadcast public interest obligations should evolve with the migration of broadcasters to the new lucrative digital format, the Advisory Committee, also known as the “Gore Commission,” concluded that from its inception “broadcast regulation in the public interest has sought to meet certain basic needs of American politics and culture, over and above what the marketplace may or may not provide.” *Id.*; see also Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U. L. REV. 613, 619 (2004) (noting that the broadcast public interest standard “has been used to serve the needs of American citizens and to cultivate many localized public forums with diverse viewpoints facilitating citizen participation in our democracy”).

10. Schaeffer Radio Co., F.R.C. No. 5228 (June 5, 1930) (unpublished), <http://www.fcc.gov/fcc-bin/assemble?docno=3012011>, reprinted in part in John W. Willis, *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 J. FED. COMM. B. ASS’N 5, 14 (1950) (citation omitted).

11. Communications Act of 1934, Pub. L. No. 73-416, § 312(b), 48 Stat. 1064, 1087 (codified as amended at 47 U.S.C. §§ 151–613 (2000)). The 1934 Communications Act alternates the phrase “public interest, convenience, and necessity” with “public convenience, interest, or necessity” throughout subchapter III. *E.g.*, 47 U.S.C. §§ 302a(a), 307(a) (2000).

12. See *supra* note 9; see also LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 63 (1991) (positing that the “American system of broadcast regulation has been built on two phenomena: a fear of the power of television and radio to control the content of public discussion, and a concomitant belief in the inability of the market to adequately control that power”); R. Randall Rainey, *The Public’s Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 271 (1993) (describing objectives of broadcast regulation as promoting “the dissemination of information pertinent to democratic decisionmaking” while “prevent[ing] the political abuse of the broadcast license” and “diminish[ing] some of the . . . less desirable effects of the commercial mediation of mass electronic communications”).

programming but proactively elevate those tastes by presenting audience members with politically and culturally enlightening and enriching fare. Broadcasters were to expose viewers and listeners to programming that was more democratically and culturally enriching than what they otherwise demanded.<sup>13</sup> Although the FCC has vacillated in its specific requirements, the consistent overarching goals of the broadcast public interest standard have been the enhancement of civic life, democratic engagement, and citizen self-expression by means of the provision of universally available, locally oriented, and topically diverse programming from a multiplicity of commercial and noncommercial sources.<sup>14</sup>

As expected, broadcasting assumed a central importance in American political and cultural life.<sup>15</sup> Even in households with Internet access, broadcasting—and especially television—continues to serve as a point of common focus.<sup>16</sup> While broadcasting’s potential for ubiquity and dominance in the nation’s information ecology was fulfilled, the hopes that it would serve as a vehicle for democratic and political engagement, exchange, and education have yet to be realized. The broadcast medium, both by technological design and commercial imperative, has proved to be a flawed instrument for democratic enrichment with a structure incapable of supporting the electronic free marketplace of ideas regulatory optimists had envisioned.<sup>17</sup> The broadcast public interest standard itself has fallen far short of compensating the American public for the licensees’ use of lucrative and scarce public spectrum. Plagued by an array of vexing definitional, constitutional, commercial, and regulatory challenges, the broadcast public interest standard has become what former FCC

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13. See Goodman, *supra* note 8, at 1404–15 (describing the importance of “common exposure” and “public elevation” in media and especially broadcast policy); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 501 (2000) (“There is a large difference between the public interest and what interests the public.”).

14. See *infra* Part I.B.

15. In 1968, reportedly distressed by the details exposed by CBS News anchor Walter Cronkite about the American military’s troubles in Vietnam, President Lyndon Johnson was quoted as saying, “If I’ve lost Walter . . . I’ve lost middle America.” BARBARA W. TUCHMAN, *THE MARCH OF FOLLY: FROM TROY TO VIETNAM* 352 (1984). A quarter-century later, social critic Camille Paglia wrote, “Television is America’s kingmaker.” CAMILLE PAGLIA, *Television and the Clintons*, in *VAMPS & TRAMPS* 172, 172 (1994). Paglia also famously posited, more generally, that “Television is America.” CAMILLE PAGLIA, *Sontag, Bloody Sontag*, in *VAMPS & TRAMPS*, *supra*, at 344, 346.

16. See PEW RESEARCH CENTER, *AUDIENCE SEGMENTS IN A CHANGING NEWS ENVIRONMENT: KEY NEWS AUDIENCES NOW BLEND ONLINE AND TRADITIONAL SOURCES* 7, 49 (2008), <http://people-press.org/reports/pdf/444.pdf> (reporting results showing that television “remains the most widely used source” for news, with 52% of those surveyed regularly receiving news from local television stations); see also LLOYD, *PROLOGUE TO A FARCE*, *supra* note 6, at 217 (discussing how broadcasting has remained prominent in the complex modern media landscape).

17. See *infra* Parts I.B.3 & I.C.

Commissioner and law professor Glen O. Robinson calls “vague to the point of vacuousness.”<sup>18</sup>

The Internet’s regulatory provenance is different from that of broadcasting. Whereas the broadcast public interest standard was rooted in a vision of the First Amendment assigning to government a proactive role in cultivating a democracy-enriching free marketplace of ideas, the Internet emerged into an era of deregulation and the exaltation of the commercial marketplace as the arbiter of the public interest. Although the Internet was born of massive government research subsidies and common carrier regulation, the government’s orientation toward it evolved into one that is anti-interventionist, embodying an autonomy-based vision of the First Amendment—one that views the proper role of government in the digital speech market as absent.<sup>19</sup> The role of government in relation to the Internet now is largely a reactive one. In 1996, Congress announced that it would be the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>20</sup> With the exception of mostly unsuccessful attempts to curb access to pornographic online content,<sup>21</sup> modest programs to subsidize Internet access in schools and libraries,<sup>22</sup> and incidental regulations on telephony-like broadband services (such as Voice over Internet Protocol (VoIP)),<sup>23</sup> the federal government has since maintained a nonregulatory orientation toward the Internet.

Although broadcasting remains a dominant medium in the nation’s information ecology, the Internet has begun to rival its centrality and

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18. Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 3, 14 (Max D. Paglin ed., 1989); see also R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 8–9 (1959) (arguing that the public interest standard “lacks any definite meaning” and “the many inconsistencies in decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation”).

19. See *infra* Part II.A; see also Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 785 (1987) (describing the autonomy-rooted view of the First Amendment “as though a zone of noninterference were placed around each individual, and the state [alone] were prohibited from crossing the boundary”).

20. Telecommunications Act of 1996, 47 U.S.C. § 230(b)(2) (2000).

21. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (striking down as violative of the First Amendment the Child Online Protection Act (COPA), which criminalized knowing posting, for commercial purposes, of content “harmful to minors”); *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (upholding authority of the United States to withhold E-Rate Internet access subsidies to public schools and libraries that refused to install web filtration software on library computers); *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down anti-indecency provisions of the Communications Decency Act).

22. See *infra* Part III.A.1.

23. See *infra* note 157.

dominance.<sup>24</sup> Today broadcasters, as digital content producers themselves, are only one source of content in the broadband realm.<sup>25</sup> It is the Internet, and not broadcasting, that today is considered the technology that is revolutionizing politics, democratic engagement, and society as a whole.<sup>26</sup> Moreover, the migration of attention from broadcasting to the Internet is accelerating with the aging of the populace. In July 2008, the *New York Times* reported that the average age of the American broadcast television viewer today is fifty,<sup>27</sup> whereas the Internet has become “a leading source of campaign news for young people.”<sup>28</sup>

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24. For example, this year approximately 194 million Americans (two-thirds of the nation's population) are online and the online population is expected to grow to 217 million (71%) by 2012. Lisa E. Phillips, *U.S. Online Population*, EMARKETER, Feb. 2008, [http://www.emarketer.com/report.aspx?code=emarketer\\_2000486](http://www.emarketer.com/report.aspx?code=emarketer_2000486). It is expected that by the end of 2008, online advertising revenue will overtake radio advertising revenue and that by 2011, the Internet will supplant the newspaper industry as the top recipient of advertising revenue. *Id.*; see also CENTER FOR DIGITAL DEMOCRACY, CHANGING DIGITAL MEDIA BEHAVIORS, THE GROWTH OF INTERACTIVE SERVICES AND TRADITIONAL MEDIA IN TRANSITION: A CRITICAL WINDOW OF OPPORTUNITY FOR THE PUBLIC INTEREST (2008), available at <http://www.democraticmedia.org/files/newmediapubinterest.pdf>.

25. See Tom Shales, *Transmission: Impossible*, WASH. POST, Sept. 21, 2008, at M1 (observing that “[w]e don’t watch television; instead, we access program material through content providers” so that “TV now seeps into our lives” through a myriad of digital devices not identified as television sets).

26. See *infra* Parts II.A, II.B & II.B.1; see also *Internet Now Major Source of Campaign News*, PEW RESEARCH CENTER, Oct. 31, 2008, <http://pewresearch.org/pubs/1017/internet-now-major-source-of-campaign-news> (noting that while “[t]elevision remains the dominant source” of campaign news, the percentage of Americans “who say they get most of their campaign news from the internet has tripled since October 2004 (from 10% then to 33% now)”).

27. Virginia Heffernan, *Prime Times*, N.Y. TIMES MAG., July 27, 2008, at 22.

28. PEW INTERNET & AM. LIFE PROJECT, PEW RESEARCH CENTER, SOCIAL NETWORKING AND ONLINE VIDEOS TAKE OFF: INTERNET’S BROADER ROLE IN CAMPAIGN 2008, at 1 (2008), <http://people-press.org/reports/pdf/384.pdf>; see also *id.* at 1 (documenting how the Internet, and especially social networking and online video services available through broadband, is playing an increasingly dominant role in the provision of political content for eighteen- to twenty-nine-year-olds while the influence of broadcasting is weakening); PEW RESEARCH CENTER, AUDIENCE SEGMENTS IN A CHANGING NEWS ENVIRONMENT: KEY NEWS AUDIENCES NOW BLEND ONLINE AND TRADITIONAL SOURCES 2 (2008), <http://people-press.org/reports/pdf/444.pdf> (noting that the youngest of the surveyed users (median age of thirty-five) “rely primarily on the Internet for news” and are nearly twice as likely to view online news clips than watch nightly news broadcasts). According to Pew Research Center, “At a time when a declining number of young people rely on television for most of their news about the [presidential] campaign, a sizable minority are going online to watch videos of campaign debates, speeches and commercials.” *Id.* at 2; see also Alex Mindlin, *Preferring the Web Over Watching TV*, N.Y. TIMES, Aug. 25, 2008, at C3 (reporting results of a study conducted by DoubleClick Performics and concluding that “the computer is a bigger draw than the TV set for the youngest teenagers”); AARON SMITH & LEE RAINIE, PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND THE 2008 ELECTION, at ii, v (2008), [http://www.pewinternet.org/pdfs/PIP\\_2008\\_election.pdf](http://www.pewinternet.org/pdfs/PIP_2008_election.pdf) (reporting that 46% of surveyed Americans are using digital media to engage in the 2008 elections, while adults under thirty are most dependent on the Internet “to get or share information about the candidates and the campaign”).



Much of the public affairs programming that had been traditionally available on broadcast media has migrated to online and pay-television platforms. For example, during the presidential primary in 2007 and 2008, many of the political cognoscenti and regular citizens with broadband Internet access, pay-television access, or both, complained that they were growing tired of the plethora of candidate debates.<sup>29</sup> However, the great majority of those debates—roughly three-quarters—were not available at all to households solely dependent on free broadcast television.<sup>30</sup> Broadcast coverage of public affairs and governance matters also is scarce, whereas such material is abundantly available via pay-cable and broadband subscriptions.<sup>31</sup>

Citizens with high-speed broadband Internet access live in a fundamentally richer, more diverse, and more interactive information environment than those dependent primarily on broadcasting for political, informational, and other democratic content.<sup>32</sup> Broadband households can (1) access an abundance of information concerning government and politics; (2) build upon that information by means of commentary in personalized blogs, vlogs, or postings to others' websites; (3) pose questions and challenges to elected officials or candidates for office; (4) disseminate new ideas and calls to action; and (5) form novel, online communities of interest—all with little effort and virtually no expense beyond the cost of the broadband subscription.<sup>33</sup>

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29. See, e.g., David Yepsen, Op-Ed., *Stop the Madness! Change Rules of Election Game—by 2016*, DES MOINES REG., Sept. 23, 2007, at 1 (complaining that “we are awash in presidential debates”); Allan Loudon, *Is Anyone Listening? When Are There Too Many Debates?*, DEBATESCOOP, Oct. 19, 2007, <http://www.debatescoop.org/story/2007/10/19/202519/02>.

30. Of the forty-eight Democratic and Republican party primary debates, only thirteen debates were broadcast on free over-the-air television stations, and an additional two were broadcast only in New Hampshire. See Memorandum of Karolina Lyznik Summarizing Presidential Debate Television Coverage Research (July 21, 2008) (on file with author); see also Peter Brown, *Too Many Debates, Too Little Impact*, REALCLEARPOLITICS.COM, Aug. 6, 2007, [http://www.realclearpolitics.com/articles/2007/08/too\\_many\\_debates\\_too\\_little\\_im.html](http://www.realclearpolitics.com/articles/2007/08/too_many_debates_too_little_im.html) (bemoaning the proliferation of debates and acknowledging that “[t]he myriad debates are being aired on cable news channels”). In addition, whereas the free television networks traditionally offered gavel-to-gavel coverage of the presidential nominating conventions, the broadcast coverage of the 2004 and 2008 presidential nominating conventions were at an all-time low, with each of the major networks devoting only one hour of airtime per night for each of the party nominating conventions. See David Zurawik, *Networks Rethink Conventions*, BALT. SUN, Aug. 25, 2008, at 11 (stating that the major broadcast networks offered “an hour a night starting at 10 [p.m. E.D.T.] Monday through Thursday during both conventions”); Joanne Ostrow, *Party Confabs Falling to Cable*, DENVER POST, July 22, 2004, at 3F (noting that reduced coverage will mean that those without cable will see “more canned speeches,” “less primetime analysis,” and “fewer of the odd, defining moments that reveal who the parties really are”).

31. See *infra* Part I.B.3.

32. See *infra* Part II.B.

33. See A. Michael Froomkin, *Technologies for Democracy*, in DEMOCRACY ONLINE 3,

In light of how the Internet has begun to displace broadcasting as the nation's central media platform, this Article examines why and how the federal government should adjust its disposition toward the Internet, and particularly broadband, from one of *laissez faire* nonintervention to one that more affirmatively and comprehensively promotes democratic and First Amendment values online by means of a *broadband* public interest standard. My central argument is that, although the broadcast public interest standard fell far short of its aspirations, the principal goals valorized by that standard—universal service, localism, diversity, noncommercial content, and the promotion of democratic engagement in a competitive marketplace of ideas—should serve as a template for more proactive federal interventions into the broadband realm. Such a broadband public interest standard would apply the lessons learned by its broadcast progenitor in a manner that would more effectively yield the democratic, social, and political goals that the broadcast public interest standard attempted, but mostly failed to deliver, while helping to mitigate some of the Internet's antidemocratic, atomizing tendencies.

Part I of this Article provides a brief overview of the historical, theoretical, and regulatory foundations of the broadcast public interest standard, offers an assessment of its current condition, and suggests reasons why it has fallen short of its core objectives. Part II discusses the Internet's past and current regulatory statuses, and examines the ways in which the Internet promotes and undermines free speech and democratic values. This Part demonstrates how the government's noninterventionist disposition and reliance on the private marketplace alone have failed to realize the Internet's potential as an instrument for true deliberative democratic engagement and free expression. Part III discusses a set of interrelated and proactive federal legislative and regulatory interventions that can form the foundation of—and operationalize—a new broadband public interest standard. Just as the broadcast standard attempted to do in broadcasting, this new standard would work to optimize the democracy-enhancing qualities of the Internet while helping to mitigate its harms. This Part is subdivided into two subparts. The first calls for a much more proactive and direct federal role in the proliferation of broadband Internet service, and discusses both supply- and demand-side interventions toward broadband universality. The second discusses content-neutral initiatives to help cultivate digital democracy and expression, such as federal financial and technical supports for local public online deliberative spaces and subsidies for noncommercial locally oriented online content. This subpart also

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9–17 (Peter M. Shane ed., 2004) (describing the variety of online tools for facilitating democratic engagement and participation).

briefly analyzes the implications of network neutrality on online democracy and expression. Finally, Part IV looks at how a broadband public interest standard—designed around the affirmative interventions discussed in Part III—would avoid some of the constraints and complications that bedeviled the broadcast standard, while promoting and at last realizing the broadcast standard’s important values.

## I. THE BROADCAST PUBLIC INTEREST STANDARD

### A. Statutory and Regulatory Foundations

The broadcast public interest standard was created as one manifestation of the public interest theory of administrative governance, which emerged as the dominant approach to regulation at the height of the New Deal and its immediate aftermath. Its earliest advocates were Louis Brandeis, Charles Francis Adams, and John M. Landis.<sup>34</sup> Landis’s ideas about public interest regulation of railroads later were generalized by many scholars<sup>35</sup> as well as Supreme Court Justices<sup>36</sup> who promoted public interest administrative governance after having contributed to the building of New Deal institutions earlier in their careers.<sup>37</sup>

The public interest approach to regulation was novel in that it construed the federal agency’s role as “exercis[ing] its discretion in implementing statutes with a view to the national interest or general welfare, rather than yielding to factional pressure at the behest of one or another powerful interest group.”<sup>38</sup> An early and persistent challenge to public interest regulatory theorists and adherents was the articulation of a cogent and durable definition of the “public interest.” Professor Mark Niles notes that

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34. See generally THOMAS K. McCRAW, *PROPHETS OF REGULATION* (1984).

35. See Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHL.-KENT L. REV. 1039, 1056 (1997) (citing the work of Clark Byse, Kenneth Culp Davis, Louis Jaffe, Walter Gellhorn, Nathaniel Nathanson, and Bernard Schwartz).

36. See *id.* at 1059 (listing Justices Frankfurter, Jackson, Reed, Murphy, Douglas, and Fortas).

37. Thomas Merrill posits that this notion of regulating in the public’s interest was the “mindset of the men (they were almost all men) in their thirties and forties who had served in the New Deal, and who fanned out to fill administrative, academic and judicial posts in the 1950s and early 1960s.” *Id.* at 1048.

38. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 558 (2000); see also Mark C. Niles, *Punctuated Equilibrium: A Model for Administrative Evolution* 15 (Sept. 4, 2007) (unpublished manuscript, on file with author) (positing that public interest regulation was rooted in an “endemicall[ly] positive *faith* in the potential of government, and particularly administrative government, to serve the common good”). According to Thomas Merrill, the theorists and officials who extolled public interest governance had “faith that complex problems can be mastered by human reason” and that the administrative agency was “specifically designed to achieve this ideal” since it “is a centralized source of governmental authority that can bring coordinated solutions to social and economic problems throughout its jurisdiction.” Merrill, *supra* note 35, at 1048–49.

“the public interest theorists sought not to define the public interest so much as to create and protect structures which allowed an organically defined version of the public interest to percolate naturally to the top of the political arena.”<sup>39</sup>

It was in this regulatory milieu that Congress in 1927 created the Federal Radio Commission (FRC), the FCC’s predecessor—one of many new regulatory agencies charged with identifying and enforcing the public interest in a number of burgeoning areas of commerce, including shipping, food and drugs, energy, and commodities trading.<sup>40</sup> In enacting the 1927 Radio Act, Congress responded to calls for more federal oversight over a radio industry threatened by excessive signal interference by charging the new FRC with the authority to regulate broadcasting in furtherance of an undefined “public interest, convenience, or necessity.”<sup>41</sup>

### B. Defining “Public Interest” in Broadcasting

The history of the broadcast public interest standard has been called “the search for the holy grail.”<sup>42</sup> Former FCC Chair Newton Minow has suggested that the term was used in the legislation to provide an overarching regulatory standard to direct the government’s interventions into the wholly novel and uncharted territory of broadcasting.<sup>43</sup> Congress

39. Niles, *supra* note 38, at 17.

40. Radio Act of 1927, Pub. L. No. 69-632, §§ 3, 9, 11, 44 Stat. 1162, 1166–67, *repealed by* Act of June 19, 1934, Pub. L. No. 73-416, ch. 652, tit. VI, § 602(a), 48 Stat. 1064, 1102. The 1927 Radio Act created the Federal Radio Commission (FRC) for an initial trial period of one year, with the primary purpose of adjudicating broadcast licensing and technical permit applications. See ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* 12–13 (3d ed. 1982).

41. See Radio Act of 1927 §§ 9, 11 (enunciating the public interest standard as serving “public convenience, interest or necessity” in § 9 and articulating the more common, above-quoted standard in § 11).

42. Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 605 (1998). Senator Clarence Dill (D-WA), a principal drafter of the Radio Act of 1927, recalled that the source of the “public interest, convenience, and necessity” language in the Radio Act was a Senate Commerce Committee staffer who previously had worked at the Interstate Commerce Commission (ICC), which itself was charged by Congress to further the “public interest, convenience, and necessity” in regulating railroads. PHILIP M. NAPOLI, *FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA* 67 (2001). Senator Dill recalled that he and his colleagues thought that the language “sounded pretty good, so we decided we would use it, too.” NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION AND THE FIRST AMENDMENT* 4 (1995). Newton Minow surmises that a junior lawyer from the ICC, loaned to the Senate to help draft the new communications legislation, had proposed the “public interest” term because he had seen it in other federal statutes dealing with regulated industries. Krasnow & Goodman, *supra*, at 610.

43. See NEWTON N. MINOW, *EQUAL TIME* 8–9 (1964). Judge Henry Friendly traced the origins of “public convenience, interest, and necessity” to the Transportation Act of 1920, where it “conveyed a fair degree of meaning” in directing authorizations for new railroad

incorporated the language again in creating the more powerful FCC by means of the 1934 Communications Act.<sup>44</sup> The Supreme Court later characterized these terms as “explicitly and by implication left to the Commission’s own devising.”<sup>45</sup> According to the Court, they constituted a delegation of “expansive powers” by means of a “comprehensive mandate” to make the best use of the public airwaves.<sup>46</sup>

What became known as the broadcast public interest standard, also referred to as the “public trustee doctrine,” was intended to be a malleable, “supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”<sup>47</sup> Defining and pursuing the “public interest” was a challenge across many New Deal agencies with specialized “public interest” missions.<sup>48</sup> In the FCC’s case, Congress has referred to the public interest in delegating regulatory authority to the agency across broadcast as well as nonbroadcast areas.<sup>49</sup> But for the agency, fulfilling its public interest mandate in broadcasting has proved especially vexing, given the industry’s technological, commercial, and constitutional peculiarities.

Analyzed in the broadest terms, the broadcast public interest standard has evolved through three eras defined by shifts in the balance between predominantly proactive regulation in pursuit of democratic objectives and a more reactive, deregulatory posture rooted in neoliberal free-market views of government oversight.<sup>50</sup> The FCC’s regulatory vacillations

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construction. HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 54–55 (1962), *quoted in* T. BARTON CARTER, MARC A. FRANKLIN & JAY B. WRIGHT, *THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF THE MASS MEDIA* (9th ed. 2005). Judge Friendly asserts that it conveyed less meaning when used in the Motor Carrier Act of 1935 and the Civil Aeronautics Act of 1938, “but under those statutes there would usually be some demonstrable factors.” *Id.* He concludes that “[t]he standard was almost drained of meaning” when it was included in the 1934 Communications Act. *Id.*

44. *See, e.g.*, The 1934 Communications Act, 47 U.S.C. § 201 (2000) (empowering the Commission to prescribe rules and regulations “in the public interest”).

45. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

46. *NBC, Inc. v. United States*, 319 U.S. 190, 219 (1943); *see also* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380 (1969) (characterizing Congress’s “mandate to the FCC to assure that broadcasters operate in the public interest” as “a broad one”).

47. *Pottsville Broad. Co.*, 309 U.S. at 138.

48. Niles, *supra* note 38, at 12–14.

49. *See, e.g.*, 47 U.S.C. § 160(a)(3) (regulatory forbearance authority in telecommunications); *id.* § 201(a) (services and charges applicable to common carriers); *id.* § 214(e)(2) (designation of telecommunications carriers eligible for universal service support); *id.* § 573(a)(1) (open-video-service certifications).

50. For an excellent and much more detailed history of the broadcast public interest standard, see Lili Levi, *The Four Eras of FCC Public Interest Regulation*, 60 ADMIN. L. REV. 813, 825–47 (2008). *See also* PATRICIA AUFDERHEIDE, *COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996*, at 12–21 (1999); Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371 (2006); Varona, *supra* note 7, at 18–32.

notwithstanding, the FCC's overarching objective in administering the public interest standard always has been to "meet certain basic needs of American politics and culture, over and above what the marketplace may or may not provide," in order to "cultivate a more informed citizenry, greater democratic dialogue, diversity of expression, a more educated population, and more robust, culturally inclusive communities."<sup>51</sup>

*1. 1930s Through 1960s—Proactive Regulation "to Promote and Realize the Vast Potentialities" of Broadcasting*

In the first four decades of American broadcast regulation, the FRC and then the FCC attempted to define both the government's relationship to broadcasters and the *content* of public interest programming. In 1930, the FRC declared that the broadcast public interest standard had at its core the democratization of information and the competitive exchange of ideas in a broadcast marketplace of ideas.<sup>52</sup> Once in place, the FCC—with congressional acquiescence—interpreted its mission in regulating broadcasting as invigorating the political life and democratic culture of the nation. In a 1949 report, the FCC stated that the goal of broadcast regulation "in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day."<sup>53</sup> Underscoring the importance of localism, the FCC dictated that broadcasters must "devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to

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51. DIGITAL BROADCASTING FUTURE, *supra* note 9, at 21; *see also* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973) (describing government's role as "an 'overseer' and ultimate arbiter and guardian of the public interest"); *Red Lion*, 395 U.S. at 384–86 (recounting evolution of the fairness doctrine and the public interest standard); *see also* Rainey, *supra* note 12, at 271 (discussing the "dissemination of information pertinent to democratic decisionmaking" as the key purpose of public interest broadcast regulation).

52. Great Lakes Broad. Co., F.R.C. No. 4900 (1928), *reprinted in* 3 FRC ANN. REP. 32, 33 (1929), *aff'd in part and rev'd in part*, Great Lakes Broad. Co. v. Fed. Radio Comm'n, 37 F.2d 993 (D.C. Cir. 1930). The FRC interpreted the public interest standard as, *inter alia*, requiring in "all discussions of issues of importance to the public . . . ample play for the free and fair competition of opposing views." *Id.* at 33. In another proceeding, the FRC offered the earliest elucidation of the public trusteeship model in broadcasting regulation directing that "the station itself must be operated as if owned by the public. . . . It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: 'Manage this station in our interest.'" Schaeffer Radio Co., F.R.C. No. 5228 (June 5, 1930) (unpublished), <http://www.fcc.gov/fcc-bin/assemble?docno=291101>, *reprinted in* John W. Willis, *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 J. FED. COMM. B. ASS'N 5, 14 (1950).

53. Report on Editorializing, 13 F.C.C. 1246, 1249 (1949). In this Report, the Commission formally announced the fairness doctrine by recognizing "the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues." *Id.*

the consideration and discussion of public issues of interest in the community served by the particular station” to satisfy the “right of the public to be informed.”<sup>54</sup> Professor Philip M. Napoli notes that the Commission’s early commitment to localism was not “an end in and of itself” but rather an objective “motivated by both political and cultural concerns” and the promotion of “political participation and education among the citizenry.”<sup>55</sup>

The FCC also gradually articulated a nuanced approach to the diversity principle. It justified many of its programming and multiple- and cross-ownership regulations by emphasizing the importance of competition among providers of broadcast service, as well as the related values of diversity in viewpoint, programming sources, formats and content, and the racial, ethnic, and gender statuses of licensees.<sup>56</sup> Although not often discussed in the early years of broadcasting regulation, the notion of “exposure diversity” gained preeminence in relation to the marketplace of ideas concept.<sup>57</sup> It is not enough that a participant in the ideas marketplace have access to a diversity of ideas from a plethora of sources since access alone does not ensure consumption. For the marketplace of ideas to function well as an instrument for democratic self-government, the participants actually must be exposed to a diversity of competing ideas.<sup>58</sup>

The Supreme Court generally deferred to the FCC’s early interpretations of its democracy-enhancing regulatory mission in broadcasting. In its 1943 *NBC, Inc. v. United States* decision, the Court upheld the FCC’s later-repealed “chain broadcasting” rules, which the agency adopted in the interest of promoting diversity and localism.<sup>59</sup> Rejecting the broadcast

54. *Id.*

55. Philip M. Napoli, *The Localism Principle in Communications Policymaking and Policy Analysis: Ambiguity, Inconsistency, and Empirical Neglect*, 29 POL’Y STUD. J. 372, 380 (2001) (emphasis omitted).

56. See 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620, 13,627–37 (2003) [hereinafter 2003 Order] (report, order, and notice of proposed rulemaking) (reviewing various forms of diversity in broadcast policy). For an excellent and detailed discussion of the FCC’s varying interpretations of the diversity principle, see *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (D.C. Cir. 1950) (recognizing that the national policy that “there be competition in the radio broadcasting industry” is closely related to the diversity principle); NAPOLI, *supra* note 42, at 128–57 (discussing variants of diversity principle and competition); Ronald J. Krotoszynski Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813.

57. See NAPOLI, *supra* note 42, at 146–48.

58. See CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at 3–18 (2007) (discussing the dangers of narrow filtration of media); see also Ellen P. Goodman, *Proactive Media Policy in an Age of Content Abundance*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 366 (Philip M. Napoli ed., 2007) (discussing the importance of exposure diversity in the digital media marketplace).

59. *NBC, Inc. v. United States*, 319 U.S. 190, 198 (1943).

networks' argument that the rules were an improper restraint on commerce, the Court reasoned that the Communications Act "[did] not restrict the Commission merely to supervision of the [broadcast] traffic. It put[s] upon the Commission the burden of determining the composition of that traffic."<sup>60</sup> According to the Court, the "avowed aim" of the 1934 Communications Act was "to secure the maximum benefits of radio to all the people of the United States" by "endow[ing] the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio."<sup>61</sup>

The 1934 Communications Act required the Commission to assign broadcasting licenses in such a way as to blanket the nation with universally available and locally oriented broadcast service.<sup>62</sup> In proliferating VHF television service in the 1940s, the FCC allocated stations even to small towns whose economies were thought too meager to support broadcasting service so as many Americans as possible could access broadcasting.<sup>63</sup>

*a. Attempts at Specific Requirements: The "Blue Book" and the 1960 Programming Statement*

Emboldened by judicial deference and the broad congressional delegation of authority,<sup>64</sup> the FCC set out to adopt a detailed and durable set of programming requirements. In response to the criticism that its early descriptions of public interest programming were too vague,<sup>65</sup> the FCC in

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60. *Id.* at 215–16.

61. *Id.* at 217; *see also id.* ("Section 303(g) [of the 1934 Communications Act] provides that the Commission shall 'generally encourage the larger and more effective use of radio in the public interest.'").

62. *See, e.g.,* Communications Act of 1934, 47 U.S.C. § 307(b) (2000) (requiring that, in overseeing commercial broadcasting, "the Commission shall make [the] distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same"); *see also id.* § 396(a)(5) (addressing public television and declaring that "it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States . . . which will constitute a source of alternative telecommunications services for all the citizens of the Nation"); Napoli, *supra* note 55, at 374 (pointing out that the principle of locally oriented broadcasting emerged as a national imperative from both the Radio Act of 1927 and the Communications Act of 1934).

63. *See* Napoli, *supra* note 55, at 374–75 (arguing that the FCC's distribution principles sought to prioritize "the autonomy of local broadcasters, as opposed to encouraging the development of national networks").

64. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 428–29 (2001) (arguing that such a broad delegation of authority violated the nondelegation doctrine).

65. *See* Bill F. Chamberlin, *Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard*, 60 N.C. L. REV. 1057, 1061–62 (1982) (arguing that it was in part because the FCC was primarily concerned with matters



1946 issued a list of affirmative programming obligations that became popularly known as the “Blue Book.”<sup>66</sup> The Blue Book required broadcast licensees to provide a “reasonable” amount of live and locally originated noncommercial programming, to cover issues of local importance, and—upon penalty of license nonrenewal—to air programming in certain categories, including “discussion,” “education,” and “talks.”<sup>67</sup> Faced with a loud backlash from the already-potent broadcast lobby that attacked the Blue Book as a violation of broadcasters’ First Amendment rights, the FCC largely ignored the Blue Book and very rarely referred to it in subsequent enforcement and rulemaking proceedings.<sup>68</sup>

The FCC tried again fourteen years later by adopting the 1960 Programming Statement.<sup>69</sup> Unlike the Blue Book, the 1960 Programming Statement did not attempt to prescribe a national, one-size-fits-all public interest programming menu but instead reminded broadcasters that as public trustees they had to ascertain the particular “public interest, needs, and desires of the communit[ies]” in which they were licensed and had to air programming responsive to those needs.<sup>70</sup> The content of public interest programming was dictated less by the FCC than by the public itself. The 1960 Programming Statement provided that such programming could include content that provided “opportunity for local self-expression,” “public affairs programs,” “political broadcasts,” “service to minority groups,” and “educational programs.”<sup>71</sup> This attempt at a comprehensive set of public interest requirements was somewhat more effective than its 1946 predecessor,

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other than detailed review of public issue programming during the 1930s and 1940s).

66. See generally FED. COMM’NS COMM’N, REPORT, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946) (outlining the FCC’s new policies for more detailed review of station performance when examining license renewal applications).

67. See Chamberlin, *supra* note 65, at 1063 n.24 (discussing the programming requirements evident in the FCC’s new license renewal application after the publication of the Blue Book).

68. See Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 156 (2006) (describing how the FCC gave in to outside pressures and the Blue Book “bombed”). An especially telling sign of the FCC’s retreat from the Blue Book was its renewal in 1950 of station WOAX’s license despite the station management’s explicit refusal to air any of the public interest programming required by the Blue Book. *Id.*

69. Commission Programing [sic] Inquiry, 44 F.C.C. 2303 (1960) (report and statement of policy) (en banc).

70. *Id.* at 156–58. The ascertainment requirements, elaborated upon in a separate rulemaking proceeding, provided guidelines for broadcasters on how to execute and document ascertainment efforts. See Primer on Ascertainment of Cmty. Problems by Broad. Applicants, 27 F.C.C.2d 650, 656–58 (1971) (clarifying the meaning of certain language in the FCC’s broadcast license application which had been given different meanings by different applicants).

71. Varona, *supra* note 68, at 157 (quoting Commission Programing Inquiry, 44 F.C.C. at 2314).

but the FCC rarely referred to it in reviewing license renewal applications.<sup>72</sup>

*b. More Specification, the Fairness Doctrine, and Noncommercial Broadcasting*

Smaller scale attempts at elucidating the public interest requirements came in 1965, when the FCC standardized the 1960 Programming Statement's licensing decision criteria,<sup>73</sup> and again in 1976, when it declared that licensing applications proposing less than 5% "local" or "informational" programming would not qualify for streamlined consideration.<sup>74</sup> Then, in 1974, the Commission issued the *Fairness Report* in which it reiterated the importance of uninhibited, "robust, wide open" deliberation of public issues on the airwaves, and defended the constitutionality of the fairness doctrine, which required broadcasters to (1) "devote a reasonable percentage of time to coverage of public issues"; and (2) cover these issues fairly by "provid[ing] an opportunity for the presentation of contrasting points of view."<sup>75</sup>

Concerned that the broadcast public interest standard still did not optimize the democratic, cultural, and educational value of broadcasting, Congress enacted the Educational Television Facilities Act of 1962, which created a capital grant fund for public, noncommercial broadcasting.<sup>76</sup> Five years later it enacted the Public Broadcasting Act of 1967, which created the publicly funded Corporation for Public Broadcasting (CPB) with the mission of facilitating "the full development of educational broadcasting."<sup>77</sup>

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72. The FCC, in fact, continued granting broadcast license renewals in large groups, without any reference to the 1960 Programming Statement guidelines nor the apparent failure of the applicants to provide any public interest programming in satisfaction of the guidelines. See, e.g., *Renewals of Broad. Licenses for Ind., Ky., & Tenn.*, 42 F.C.C.2d 900, 900 (1973) (granting the license renewal applications of 374 station licensees); see also Varona, *supra* note 7, at 25 & n.98 (providing more examples of en masse license renewals).

73. See Policy Statement on Comparative Broad. Hearings, 1 F.C.C.2d 393, 394 (1965) (noting that the statement was issued for the purposes of "clarity and consistency of decision" and eliminating "time-consuming elements not substantially related to the public interest").

74. See Amendment to Section 0.281 of the Comm'n Rules: Delegations of Auth. to the Chief, Broad. Bureau, 59 F.C.C.2d 491, 492 (1976) (fixing a low percentage requirement for certain programming types rather than leaving the meaning of the term "substantial" up to the individual discretion of the licensee).

75. Fairness Report of 1974, 48 F.C.C.2d 1, 7, 9 (1974) *aff'd sub nom.* Nat'l Citizens Comm. for Broad. v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

76. See Educational Television Facilities Act of 1962, 47 U.S.C. § 390 (2000) (declaring that the purposes of the Act were to facilitate diversity in availability, operation, and ownership of public broadcast services and to strengthen existing service to the public).

77. Public Broadcasting Act of 1967, 47 U.S.C. § 396(g)(1)(A) (2000) (amended in 1978 to replace "educational broadcasting" with "public telecommunications"); see also

c. *Red Lion Broadcasting Co. v. FCC: The Public's First Amendment Rights as Paramount*

At the end of this era of proactive FCC engagement in public interest programming, the Supreme Court, in 1969, again reaffirmed the constitutionality of the broadcast public interest standard with a strong endorsement of affirmative government interventions into the speech market to promote democratic values. In the unanimous *Red Lion Broadcasting Co. v. FCC* case, the Court upheld the fairness doctrine and the related regulations on political attacks and editorializing.<sup>78</sup> Rejecting the broadcasters' First Amendment challenge, the Court reasoned that, because the radio-frequency spectrum is a scarce national resource, the First Amendment would allow the government to condition the use of licensed spectrum on compliance with affirmative public interest programming requirements.<sup>79</sup> The objective of broadcast regulation, according to the Court, was "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."<sup>80</sup> This was especially so since broadcasting had "supplant[ed] atomized, relatively informal communication with mass media as a prime source of national cohesion and news."<sup>81</sup> That power of broadcasting to attract the public's attention as a modern, electronic *Agora*, by means of the public's own resource, rendered the speech rights of the licensees subordinate to those of the audience members: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>82</sup>

But *Red Lion* did not only make reference to scarcity-dependent regulation of broadcasters' speech. The Court also reaffirmed the importance of government's role, more generally, in endeavoring to present the public with democracy-enhancing information, especially given the

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Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 292 (D.C. Cir. 1975) (discussing how in 1970 CPB and a group of noncommercial licensees formed the Public Broadcasting Service (PBS) and National Public Radio (NPR)).

78. 395 U.S. 367, 375 (1969) (interpreting such regulations as an enhancement of free speech rather than an abridgement).

79. *See id.* at 388 ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").

80. *Id.* at 390 (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)); *see also Associated Press*, 326 U.S. at 20 (applying the Sherman Act to the newspaper industry and declaring that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

81. *Red Lion*, 395 U.S. at 386 n.15.

82. *Id.* at 390.

unique value of broadcasting to serve as a convener and central focus of public attention. Quoting *Garrison v. Louisiana*, the Court noted that “[s]peech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>83</sup> The people, the Court reasoned, would become better citizens by virtue of government’s facilitation of “the presentation of vigorous debate of controversial issues of importance and concern to the public.”<sup>84</sup>

## 2. 1970s and 1980s—*The Taming of Red Lion by the Invisible Hand*

The regulatory tides at the FCC began to turn in the 1970s, with mounting public skepticism of government’s ability to realize the public good. The Vietnam War, the Pentagon Papers controversy, Watergate, and especially President Richard Nixon’s efforts to strong-arm the FCC into penalizing broadcasters that aired programs critical of his Administration soured the public on government and specifically its influence on the media.<sup>85</sup> The nation looked for alternatives to governmental pursuit of the public interest and spotted the invisible hand.

In a law review article coauthored with Daniel L. Brenner, President Reagan’s FCC Chairman Mark S. Fowler proposed “a new direction for governmental regulation of broadcasting” that relied “on the broadcasters’ ability to determine the wants of their audiences through the normal mechanisms of the marketplace.”<sup>86</sup> Fowler and Brenner insisted that Congress and the FCC should regard “broadcasters not as fiduciaries of the public, as their regulators have historically perceived them, but as marketplace competitors.”<sup>87</sup> Later defending his deregulatory animus, Fowler famously quipped that broadcasters should face no particularized regulation whatsoever, since “television is just another appliance. It’s a toaster with pictures.”<sup>88</sup> Fowler’s demand for a more market-driven approach to broadcast regulation was manifestly rooted in the then-prevailing Chicago School theories of free competition advocating that the commercial marketplace was better at delivering the public interest than

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83. *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

84. *Red Lion*, 395 U.S. at 385.

85. See Owen M. Fiss, *The Censorship of Television*, 93 NW. U. L. REV. 1215, 1218 (1999) (discussing the threat to television from censorship both by state actors and by actors within the television industry itself).

86. See Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209–10 (1982) (arguing that the marketplace approach better serves the public in an environment increasingly defined by new media and “technological plenty”).

87. *Id.* at 210.

88. Bernard D. Nossiter, *Licenses to Coin Money: The FCC’s Big Giveaway Show*, 241 NATION 402, 402 (1985) (quoting remarks by Mr. Fowler in an address to radio and television executives).

regulatory dictates.<sup>89</sup>

The Reagan Era deregulation of broadcasting was swift and comprehensive. The FCC eliminated many requirements, including some multiple-ownership restrictions, radio programming guidelines, requirements for documenting the ascertainment of community programming needs, program log requirements, and mandatory minimum quantities of public affairs programming.<sup>90</sup> It lengthened the television license terms from three to five years and radically streamlined the license renewal process so that licenses were conferred under a “postcard renewal” mechanism devoid of any meaningful review of a licensee’s public interest programming.<sup>91</sup> Just a few years before Reagan, in 1974, the FCC characterized the fairness doctrine as “the single most important requirement of operation in the public interest—the *sine qua non* for grant of a renewal of license.”<sup>92</sup> But the FCC eliminated the fairness doctrine in 1987, reasoning that it was having the counterproductive effect of inhibiting the speech of broadcasters, who were avoiding the coverage of controversial issues of public importance in order to stay clear of the fairness doctrine’s balancing requirements.<sup>93</sup>

### 3. 1990s to Today: Continued Deregulation and a Modest Revival of Public Interest Regulation (Red Lion Roars Again)

Congress and the FCC continued to eliminate or weaken some broadcast public interest regulations throughout the 1990s, while promulgating new requirements in the name of the public interest. In 1993, the Commission

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89. See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 665 (1998) (explaining Chicago School theorists’ preference for rational-choice models over regulatory structures); see also Douglas Litowitz, *A Critical Take on Shasta County and the “New Chicago School,”* 15 YALE J.L. & HUMAN. 295 (2003) (discussing the popularity of rational-choice models among legal theorists following Robert Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986), but noting the limits of this perspective and espousing the benefits of critical theory).

90. See Varona, *supra* note 7, at 27–28 (detailing then-FCC Chairman Mark Fowler’s deregulatory policies and their effects on the broadcasting market).

91. *Id.* at 28.

92. Fairness Report of 1974, 48 F.C.C.2d 1, 10 (1974), *aff’d sub nom.* Nat’l Citizens Comm. for Broad. v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied* 436 U.S. 926 (1978).

93. See Complaint of Syracuse Peace Council, 2 F.C.C.R. 5043, 5049–52 (1987) (finding that the fairness doctrine inhibits broadcasters’ coverage of controversial issues and concluding that it should be eliminated), *recon. denied*, 3 F.C.C.R. 2035 (1988), *aff’d sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989). In 2000, the D.C. Circuit issued a writ of mandamus ordering the FCC to repeal the personal attack and political editorializing rules that were closely related to the fairness doctrine and were upheld in *Red Lion*. See Radio–Television News Dirs. Ass’n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000) (issuing the writ).

announced that home-shopping television stations that air only satellite-delivered product advertising and no local public affairs, news, or other locally-oriented programming still “are serving the public interest, convenience and necessity” and qualify for mandatory carriage on cable systems as local stations under the 1992 Cable Act.<sup>94</sup> Congress passed the Telecommunications Act of 1996 (1996 Telecom Act), which constituted the most sweeping revision of federal communications law since the 1934 Communications Act.<sup>95</sup> The 1996 Telecom Act eliminated some ownership restrictions, including the national cap on AM and FM radio station ownership,<sup>96</sup> and increased the national television multiple-station ownership limit from a 25% maximum national audience reach (set in 1985) to a 35% audience reach limit.<sup>97</sup>

The significant liberalization of longstanding station ownership restrictions enabled broadcast group owners to grow exponentially. Clear Channel Communications increased its radio station holdings from forty-three stations before passage of the 1996 Telecom Act to 1,200 radio stations in 2004.<sup>98</sup> The hazards of the ensuing media consolidation were illustrated vividly in January 2002, when a freight train derailed in Minot, North Dakota (population 37,000), spilling large quantities of anhydrous ammonia fertilizer and creating a lethal and suffocating toxic vapor cloud.<sup>99</sup>

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94. See Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 5321, 5328–29 (1993) (“[A]s long as a home shopping broadcast station remains authorized to hold a Commission license, it should be qualified for mandatory carriage.”).

95. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C. (2000)) (amending the Communications Act of 1934).

96. See *id.* § 202(a), 110 Stat. at 110 (“The Commission shall modify section 73.3555 of its regulations (47 C.F.R. § 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.”). At the local level, the 1996 Telecom Act allowed same-entity ownership of up to eight commercial radio stations in markets with a total of forty-five or more commercial radio stations, up to seven commercial radio stations in markets with thirty to forty-four of such stations, up to six in markets with between fifteen and twenty-nine of such stations, and up to five in markets with fewer than fifteen of such stations. *Id.* § 202(b)(1), 110 Stat. at 110; see also Leonard M. Baynes, *Race, Media Consolidation, and Online Content: The Lack of Substitutes Available to Media Consumers of Color*, 39 U. MICH. J.L. REFORM 199 (2006) (analyzing effects of 2003 media-ownership rulings on communities of color); Catherine J.K. Sandoval, *Antitrust Law on the Borderland of Language and Market Definition: Is There a Separate Spanish-Language Radio Market? A Case Study of the Merger of Univision and Hispanic Broadcasting Corporation*, 40 U.S.F. L. REV. 381, 386–89 (2006) (discussing liberalization of the radio ownership rules and its deleterious effects on the radio-dependent Latino/a community).

97. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1)(B), 110 Stat. 56, 111.

98. John Helyar, *Radio's Stern Challenge*, FORTUNE, Nov. 1, 2004, at 123, 124.

99. Jennifer S. Lee, *On Minot, N.D., Radio: A Single Corporate Voice*, N.Y. TIMES, Mar. 31, 2003, at C7 (discussing the incident in Minot as an example of the potentially

When the emergency responders telephoned the local radio stations, they were unable to reach anyone because Clear Channel owned twenty-three of the eighty commercial stations in North Dakota, including six stations in Minot, all of which were airing satellite feeds from Clear Channel's headquarters in San Antonio, Texas.<sup>100</sup>

Undeterred, the FCC in 2003 decided to increase the national television ownership cap to a total national audience reach limit of 45% (up from 35%).<sup>101</sup> It did this after having received approximately 800,000 public comments, 99% of which were in opposition to the proposal.<sup>102</sup> The FCC's action created so much public protest that Congress responded by rolling back the new national ownership rule to 39% of national audience reach.<sup>103</sup> In addition, the Third Circuit in *Prometheus Radio Project v. FCC* rejected the "diversity index" devised by the FCC in justifying a number of its changes to the media ownership rules as "arbitrary and capricious" and relying on "irrational assumptions and inconsistencies," including that the Internet is a fitting substitute for local programming and source diversity in local broadcast markets.<sup>104</sup>

*a. The Broadcast Public Interest Standard Survives (Tattered, but Still Alive)*

Despite the aggressive deregulation of broadcasting, the government continues to rely on the public interest standard—and its localism, diversity, universal service, and democracy-building principles—both in enforcing the vestigial public interest regulations and promulgating new ones. Congress itself has appealed to these principles in enacting new proactive broadcast legislation. For example, in enacting the 1990

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deleterious effects of FCC deregulation).

100. *Id.*

101. See 2003 Order, *supra* note 56, at 13,814.

102. See *Media Ownership Rules and FCC Reauthorization: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 108th Cong. 3 (2003) (statement of Michael J. Copps, Comm'r, Federal Communications Commission) ("Of the nearly three quarters of a million comments we have received, nearly all oppose increased media consolidation—over 99.9 percent.").

103. See *Powell Sees No Fast End to Media Rules Debate*, L.A. TIMES, Dec. 3, 2004, at C4 (discussing the attempt by the FCC to relax regulations and the subsequent constriction of the regulations by Congress). For a detailed survey of the broadcast ownership rules, see Robert B. Horwitz, *On Media Concentration and the Diversity Question*, in MEDIA DIVERSITY AND LOCALISM 9, 22–24 (Philip M. Napoli ed., 2007) (outlining the ownership rules).

104. 373 F.3d 372 (3d Cir. 2004). The Commission's desire to lift ownership restrictions has not abated. In June 2008, the FCC lifted the newspaper–broadcast cross-ownership rule. See FED. COMM'NS COMM'N, SMALL ENTITY COMPLIANCE GUIDE, MEDIA OWNERSHIP, No. 07-216 (2008), [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-1310A1.doc](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-08-1310A1.doc) (informing small businesses of the recently relaxed broadcast ownership requirements).

Children's Television Act (CTA), Congress declared that "as part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children."<sup>105</sup> The CTA requires the FCC to "consider the extent to which the licensee . . . has served the educational and informational needs of children" in its programming.<sup>106</sup> Citing that authority, the FCC in 1996 adopted new regulations aimed at enhancing children's educational programming, providing certain license renewal benefits to television broadcasters demonstrating that they have aired a minimum of three hours per week of educational and informational programming for children ages sixteen and younger.<sup>107</sup> Broadcasters also are required to comply with certain advertising restrictions in programming primarily directed to children.<sup>108</sup> In addition, Congress and the FCC have appealed to television's effects on children by increasing penalties for the airing of indecent material from \$27,500 to \$325,000 per incident, particularly following the 2004 Super Bowl halftime show in which Janet Jackson momentarily exposed a breast.<sup>109</sup>

The federal government's interest in universal access for free broadcasting also has survived the deregulatory era. In 2006, Congress appropriated \$990 million for the subsidization of a program to distribute up to two \$40 discount coupons to low-income households for the purchase of digital-to-analog retroconverters for citizens who could not afford a new digital television set and would like to use their analog television sets to receive free over-the-air broadcast signals after broadcast stations ceased transmitting on analog frequencies.<sup>110</sup>

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105. 47 U.S.C. § 303a (2000).

106. *Id.* § 303b(a).

107. See Policies and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations, 11 F.C.C.R. 10,660 (1996) (report and order) (adopting abbreviated renewal application procedures for broadcasters who air at least three hours of children's programming per week, reducing the burden of the full renewal process on such broadcasters).

108. Children's Television Act of 1990, 47 U.S.C. §§ 303a, 303b, 394 (2000). For example, television licensees are prohibited from incorporating more than twelve minutes of advertising per children's programming hour during weekdays and more than ten-and-a-half minutes per hour on weekends. *Id.* § 303a(b).

109. CBS's fine was overturned by the Third Circuit in July 2008. *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008).

110. See Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 3002, 120 Stat. 4, 21 (2006) (enacting these requirements). Section 3002(a) of this statute required analog full-power television broadcasting to cease on February 17, 2009, while § 3002(b) requiring the FCC to terminate all full-power analog station licenses on the following day. This same statute charged the National Telecommunications and Information Administration (NTIA) with administering the converter program, with part of the funding for the discount coupons coming from the forthcoming auction of the analog broadcast spectrum returned to the government once the analog-to-digital conversion is complete. See *id.* § 3004 (establishing a fund for this purpose in the Treasury of the United



In a 2004 Notice of Inquiry on broadcast localism, the Commission declared that “[e]ven as the Commission deregulated many behavioral rules for broadcasters in the 1980s, it did not deviate from the notion that [broadcasters] must serve their local communities.”<sup>111</sup> It reaffirmed that “[b]roadcasters, who are temporary trustees of the public’s airwaves, must use the medium to serve the public interest, and the Commission has consistently interpreted this to mean that licensees must air programming that is responsive to the interests and needs of their communities of license.”<sup>112</sup> In January 2008, the FCC proposed a number of new measures aimed at improving “broadcaster efforts to provide community-responsive programming such as news and public affairs, and programming targeted to the particular needs or interests of certain segments of the public.”<sup>113</sup> These range from “community advisory boards” to advise the station on the needs of local viewing audiences, local audience surveys, and the adoption of “public interest minimums” for public affairs and political programming.<sup>114</sup>

Driving the FCC’s interest in rejuvenating the broadcast public interest standard, no doubt, are recent studies showing that local public affairs and political programming on free broadcast television are generally scarce and altogether nonexistent on many stations. A study of 285 broadcast television stations by Fordham University’s McGannon Communications Research Center found that 59% of the commercial stations surveyed aired no local public affairs program during the two-week survey period.<sup>115</sup> And a 2004 Lear Center study on local news coverage of the 2004 campaign found a paucity of broadcast coverage of local political campaigns.<sup>116</sup>

Ironically, despite the shortage of political coverage on broadcast stations, broadcasters profit enormously from political advertising. As part of their public interest duties, broadcast licensees must give “reasonable access” for the “purchase of reasonable amounts of time” to “legally qualified candidate[s] for Federal elective office”<sup>117</sup> at the “lowest unit

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States); *see also* NTIA Rules to Implement and Administer a Coupon Program for Digital-to-Analog Converter Boxes, 72 Fed. Reg. 12,097 (Mar. 15, 2007) (adopting regulations to establish and administer the coupon program).

111. Broad. Localism, 19 F.C.C.R. 12,425, 12,425 (2004).

112. *Id.*

113. Broad. Localism, 23 F.C.C.R. 1324, 1326 (2008) (notice of proposed rulemaking).

114. *Id.* at 1343–44.

115. *Id.* at 1341–42.

116. *See id.* at 1351 (noting that only 8% of news programs surveyed contained any local political coverage at all).

117. 47 U.S.C. §§ 312a(7), 315 (2000); *see also* 47 C.F.R. § 73.1941 (2007) (equal opportunities). In addition, should a licensee “permit any person who is a legally qualified candidate for 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.” 47 U.S.C. § 315(a) (2000).

charge.”<sup>118</sup> During the 2004 campaigns alone, television stations earned \$1.6 billion in political advertising revenue.<sup>119</sup> For the 2008 election, political advertising revenues for broadcasters were expected to exceed \$3 billion.<sup>120</sup>

Although broadcasters must abide by a number of other rules rooted in the public interest standard,<sup>121</sup> the standard has fallen far short of the democracy-affirming goals of Congress and the early regulators. As early as 1961, at a time when broadcasters were airing significantly more public affairs programming than today, FCC Chairman Newton Minow had declared the broadcast standard a failure and the broadcast landscape a “vast wasteland” that offered little in the way of cultivating democratic engagement in their communities of license.<sup>122</sup>

### C. Why Did the Broadcast Public Interest Standard Fall Short?

Elsewhere I have discussed reasons why the broadcast public interest standard has had such a troubled history.<sup>123</sup> Other scholars and media law practitioners have offered their own criticisms.<sup>124</sup> Aside from receiving

118. 47 C.F.R. § 73.1942.

119. Mark Memmott & Jim Drinkard, *Election Ad Battle Smashes Record in 2004*, USA TODAY, Nov. 26, 2004, at 6A (citing a report by the nonpartisan Alliance for Better Campaigns, which based its findings on research conducted by TNS Media Intelligence/Campaign Media Analysis Group).

120. Mark Preston, *Political Television Advertising to Reach \$3 Billion*, CNN.COM, Oct. 15, 2007, <http://www.cnn.com/2007/POLITICS/10/15/ad.spending/> (citing research conducted by TNS Media Intelligence/Campaign Media Analysis Group).

121. For example, the broadcast public interest standard also is used as justification for the Commission’s prohibition on obscene broadcast content. Pub. Interest Obligations of TV Broad. Licensees, 14 F.C.C.R. 21,633, 21,634 (1999). The public interest standard also supports the restriction on airing “indecent” content between the hours of 6:00 a.m. and 10:00 p.m. 47 C.F.R. § 73.3999 (2007). In addition, the standard serves as the regulatory basis for requirements concerning equal employment opportunity at licensed stations (47 C.F.R. § 73.2080), closed-captioning (47 C.F.R. § 79), and the identification of sponsorship (47 C.F.R. § 73.1212).

122. Newton N. Minow, Chairman, Fed. Comm’n Comm’n, Address to the National Association of Broadcasters (May 9, 1961), in MINOW & LAMAY, *supra* note 42, at 188 app. 2.

123. See Varona, *supra* note 7, at 52–89 (noting the tension between the First Amendment and the FCC’s regulatory mandate); see also Varona, *supra* note 68, at 162–72 (arguing that the concept of television broadcasting as a marketplace of ideas is not readily applicable to commercial broadcasting).

124. See, e.g., Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293 (2003) (arguing that the FCC has failed to prevent the negative portrayal of minorities through pejorative stereotypes); Daniel Patrick Graham, *Public Interest Regulation in the Digital Age*, 11 COMMLAW CONSPECTUS 97 (2003) (discussing the application of the public interest standard to digital television broadcasting); Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341 (1998) (analyzing how the public interest standard should continue to apply in an era of digital television); Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee*

very little congressional direction, the FCC was hampered by legislation that is internally inconsistent.<sup>125</sup> The Communications Act on the one hand directs the Commission to regulate broadcasters “consistent with the public interest”<sup>126</sup> but on the other hand commands that “no regulation or condition shall be promulgated . . . by the Commission which shall interfere with the right of free speech by means of radio communication.”<sup>127</sup> The Commission has increasingly avoided walking this “tightrope”<sup>128</sup> altogether, particularly in light of the persistent and broad-based criticism levied against the scarcity rationale, which—in light of digital spectrum management technologies—rests on increasingly weak footing.<sup>129</sup>

Structural impediments also have bedeviled the broadcast public interest standard. The aspiration that commercial broadcasting stations serve as electronic platforms for a ubiquitous marketplace of ideas ignored both the unidirectional, noninteractive structure of the medium as well as its economic realities. Viewers, not public interest programs, are the commodities that are traded on the commercial broadcast airwaves.<sup>130</sup> Advertisers, not the audience members, are broadcasting’s consumers.<sup>131</sup> And the many broadcast licensees owned by public corporations act as if they were more accountable to profit-driven shareholders than to the

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*Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101 (1997) (arguing that vested interests of Congress and the FCC prevent meaningful reform of the public interest standard); Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997) (arguing that regulation requiring broadcasters to provide public interest programming is justified by the government’s grant of spectrum frequencies); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989) (refuting the scarcity rationale on grounds that it fails to justify a lower threshold of First Amendment protection for broadcasters); Sunstein, *supra* note 13 (theorizing causes of the dysfunctions in public interest broadcasting regulation and proposing a variety of reforms).

125. See *CBS Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 117 (1973) (discussing the FCC’s attempts at balancing the public interest with First Amendment values).

126. 47 U.S.C. § 302a(a) (2000).

127. *Id.* § 326.

128. *CBS*, 412 U.S. at 117.

129. For a more detailed and complete analysis of the debate concerning the scarcity rationale, see Varona, *supra* note 68, at 164–68.

130. See Sunstein, *supra* note 13, at 514 (discussing the relationship between broadcasters, viewers, and advertisers in the marketplace); see also C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 25–87 (1994) (arguing, primarily through an economic analysis, that the media’s financial dependence on advertising affects the substance and distribution of nonadvertising content and ultimately leads to a less free and less democratic press).

131. See BAKER, *supra* note 130, at 25–87; see also JEFF CHESTER, *DIGITAL DESTINY* 3 (2007) (noting that a survey of 118 broadcast news directors revealed that more than half reported being pressured by advertisers to run positive stories or kill negative stories for the advertisers’ benefit).

viewers and listeners for whom they hold their licenses in trust.<sup>132</sup> Commercial broadcasters have succeeded at keeping this dysfunctional regulatory model in place, giving back very little public interest *quid* for the *quo* of their lucrative licenses, by exercising their unparalleled lobbying muscle in Washington. The FCC's "capture"<sup>133</sup> by the broadcast lobby and the symbiosis between airtime-dependent members of Congress and the local broadcasters back home<sup>134</sup> have conspired to keep the broadcast public interest standard intact and impervious to meaningful reform.

## II. THE INTERNET AS MARKETPLACE OF IDEAS

Despite the *Red Lion* Court's characterization of broadcasting as a "marketplace of ideas,"<sup>135</sup> the metaphor never quite fit the medium. As the seminal image in First Amendment philosophy, the marketplace metaphor is widely attributed to John Milton, who in his *Areopagitica* rejected the government licensing of publishers in favor of a "free and open encounter" of ideas,<sup>136</sup> and John Stuart Mill, who in *On Liberty* promoted "the clearer perception and livelier impression of truth, produced by its collision with error."<sup>137</sup>

The marketplace of ideas image has long been criticized for its allusion to the inapposite analogue of laissez-faire economic markets. Implicit in the metaphor is the assumption that a free and full discussion would best reveal truth by keeping the marketplace free of government intrusion and dependent solely on the trade in ideas by private, rational, autonomous

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132. See Krotoszynski, *supra* note 124, at 2116 ("[A] station group or network executive cannot place the public interest ahead of the shareholders' interests without potentially violating a fiduciary obligation to the corporation.").

133. The agency capture concept, conceived by Marver Bernstein in 1955, posits that an agency can grow so interdependent with the industry it regulates that it ultimately is captured or controlled by the regulatees themselves. MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 79–97 (1955); see also Merrill, *supra* note 35, at 1043 (describing agency capture as "meaning that agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating").

134. Professor Ronald J. Krotoszynski, Jr. makes this point especially well, writing that commercial "broadcasters provide the incumbent politicians with the media exposure they need to remain in office and, in return, the officeholders keep the Commission at bay." Krotoszynski, *supra* note 124, at 2117.

135. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

136. JOHN MILTON, *AREOPAGITICA* 58 (Sir Richard C. Jebb ed., Cambridge Univ. Press 1918) (1644), available at <http://www.uoregon.edu/~rbear/areopagitica.html>.

137. JOHN STUART MILL, *On Liberty*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 102, 104 (H.B. Acton ed., E.P. Dutton & Co. 1951) (1863). Justice Oliver Wendell Holmes is credited with incorporating the marketplace metaphor into American free-speech jurisprudence by means of his 1919 *Abrams v. United States* dissent, where he wrote that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." 250 U.S. 616, 630 (1919).

actors.<sup>138</sup> Two years before *Red Lion* was decided, Professor Jerome Barron dismissed the notion as a “romantic view,” arguing that “if ever there were a self-operating marketplace of ideas, it has long ceased to exist.”<sup>139</sup>

In light of the antipathy of corporate media to unpopular and unorthodox ideas, the absence of government from the marketplace of ideas does not alone make it free.<sup>140</sup> And in fact economic markets tend to operate more efficiently and effectively with some amount of government intervention.<sup>141</sup> Other scholars have made similar arguments, criticizing the metaphor for assuming equality in access to the marketplace where none exists<sup>142</sup> and taking for granted the rationality of marketplace actors when in fact they are rendered irrational by the manipulation of the commercialized mass media.<sup>143</sup> Professor Ed Baker in particular has argued convincingly that the commercially dominated market does not satisfy preferences as much as it generates and manipulates them.<sup>144</sup> Yet despite the inherent problems with the metaphor, it persists as our core rationale for the freedom of speech and as the means to the ends of human dignity, autonomy, and effective self-governance.<sup>145</sup> The FCC continues to declare that “[a] diverse and robust marketplace of ideas is the foundation of our democracy.”<sup>146</sup>

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138. See Weinberg, *supra* note 8, at 1138–39 (arguing that the marketplace of ideas metaphor is flawed because of its inherent generalizations); see also ROBERT TSAI, ELOQUENCE AND REASON 60–68 (2008) (analyzing the libertarian roots of the marketplace of ideas metaphor).

139. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641–43 (1967).

140. *Id.* at 1643 (asserting that government “indifference becomes critical when a comparatively few private hands are in a position to determine not only the content of information but its very availability”).

141. See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992) (noting that market intervention is a necessary means for counteracting “deficiencies in the real world of commerce”).

142. See, e.g., Weinberg, *supra* note 8, at 1149 (lamenting the fact that “those with extensive institutional or financial resources” have greater access to “effective mass communication”).

143. See, e.g., *id.* at 1157–64 (bemoaning the tendency of broadcasters to maintain the status quo by programming content aimed at “reinforcing people’s existing attitudes [rather than] changing them”); Jason Mazzone, *Speech and Reciprocity: A Theory of the First Amendment*, 34 CONN. L. REV. 405, 408–09 (2002) (arguing that the “risk of marketplace approach is, therefore, to trivialize speech”); Herbert Marcuse, *Repressive Tolerance*, in *A CRITIQUE OF PURE TOLERANCE* 90–97 (1965) (“Universal tolerance becomes questionable when its rationale no longer prevails, when tolerance is administered to manipulated and indoctrinated individuals who parrot, as their own, the opinion of their masters, for whom heteronomy has become autonomy.”).

144. C. EDWIN BAKER, *MEDIA, MARKETS AND DEMOCRACY* 87–95 (2d ed. 2004).

145. For an excellent history of the marketplace metaphor, see SMOLLA, *supra* note 141, at 6–17.

146. 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620, 13,627 (2003) (report, order, and

As a unidirectional, publicly inaccessible, tightly controlled, and largely commercial medium rooted in content-referential regulation, broadcasting has never hosted a free marketplace of ideas. But what about the Internet? Does it provide the platform for “free and open encounters” that broadcasting ultimately failed to deliver? And what, so far, have been its effects on democracy?

Although the notion is hard to believe, the Internet still is a very young popular technology. The term *Internet* first appeared in the *New York Times* only twenty-one years ago—four years before the Internet was privatized—in a 1988 story about looming computer security threats in which even the now-commonplace computer term *virus* appeared in quotations.<sup>147</sup> Remarkably, in a Harris Poll conducted in 1994—just fifteen years ago—two-thirds of respondents said that they had not heard of the Internet.<sup>148</sup> In light of this youth, the Internet’s full effects on our speech culture and democracy are just starting to be analyzed. Preliminary assessments, however, paint a mixed picture. Whereas the Internet has catalyzed speech, democratic action, and democratic engagement in some ways, it has undermined them in others. The following Sections discuss how.

#### *A. Autonomy and the Internet*

The Internet attracted great popular attention in the early 1990s, emerging from the obscurity of its origins as a little known tool of scientific researchers. At that time, the demands of government noninterventionists—those who insisted that the government allow the Internet to develop free of regulation, in a private, nongovernmental arena—carried great currency. They still do. Many industry advocates, scholars, and other commentators argue not only that the Internet should not be regulated, but that it *cannot* be regulated.<sup>149</sup> Nicholas Negroponte famously said that the Internet’s architecture renders “the nation-state . . . not relevant.”<sup>150</sup> Distinguishing it from the tightly regulated and mediated broadcasting media, Internet

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notice of proposed rulemaking).

147. John Markoff, *Author of Computer ‘Virus’ Is Son of N.S.A. Expert on Data Security*, N.Y. TIMES, Nov. 5, 1988, at 1.

148. DAVIS, *supra* note 5, at 168.

149. See, e.g., James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 15 (2004) (citing PETER W. HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM 4 (1997)); Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943, 995 (1998).

150. Andrew Higgins & Azeem Azhar, *China Begins to Erect Second Great Wall in Cyberspace*, GUARDIAN (UK), Feb. 5, 1996. See generally NICHOLAS NEGROPONTE, BEING DIGITAL (1995).

exceptionalists argued that the Internet was a creature of, and instrument for, independence from government control and individual self-expression and actualization. In his 1996 *Declaration of the Independence of Cyberspace*, John Perry Barlow touted cyberspace as “the new home of the Mind” and issued the following warning to the “Governments of the Industrial World”: “You are not welcome among us. You have no sovereignty where we gather. . . . [L]eave us alone.”<sup>151</sup>

When a large segment of the academic community turned its attention to the Internet as a fertile subject of study beginning in the mid-1990s, notable scholars wrote about how the Internet’s decentralized, international (cross-border), and open architecture made government regulation impracticable and unsustainable.<sup>152</sup> Some scholars argued that even if modest governmental interventions were possible, the government should forbear from regulating the new Internet frontier, deferring instead to innovations in online self-governance emerging as new social norms and customs,<sup>153</sup> and forms of private contracting.<sup>154</sup> It was argued that because the Internet gave anyone with access to the Web the power to be his or her own editor and publisher for little or no cost—what Professor Eugene Volokh called

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151. John Perry Barlow, *A Declaration of the Independence of Cyberspace* (Feb. 8, 1996), available at <http://homes.eff.org/~barlow/Declaration-Final.html>.

152. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing that the Internet creates a new sphere of human activity by cutting across territorial borders, thereby undermining the practicability of laws based on geographic boundaries); Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. 447, 448 (2000) (book review) (“The first generation of cyberspace scholarship shared the utopianism of the digital vanguard” by arguing that “[b]y its very rudderless, decentralized, transnational structure, . . . the Internet must ultimately elude any attempt at government regulation.”); see also David G. Post, *Against “Against Cyberanarchy,”* 17 BERKELEY TECH. L.J. 1365, 1366 (2002) (“Communication in cyberspace is not ‘functionally identical’ to communication in realspace; [therefore] the jurisdictional and choice-of-law dilemmas posed by cyberspace activity cannot be adequately resolved by applying the ‘settled principles’ and ‘traditional legal tools’ developed for analogous problems in realspace.”).

153. See, e.g., David G. Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, J. ONLINE L., art. 3, 1995, <http://web.wm.edu/law/publications/jol/articles/post.shtml> (asserting that government regulation would interfere with the Internet’s free market of privately developed rule sets); I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993, 1025–41 (1994) (arguing that Internet rules of conduct should be self-developed and not imposed by government); Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413, 419–26 (1997) (arguing that a system of self-governance is best suited to devise specialized rules, promote voluntary compliance, and produce efficient results).

154. See, e.g., Llewellyn J. Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL’Y 475, 484 (1997) (“Cyberians must reject any attempt to shrink-wrap governance in cyberspace by imposing a standard form contract of adhesion as the model for contracting in cyberspace. . . . [C]ontracting in cyberspace should be the quintessential *negotiated* contract that represents a true meeting of the minds.”).

“cheap speech”<sup>155</sup>—there would be no valid grounds for the government to regulate the Internet in favor of increased access, diversity of content sources, or other public interest values.<sup>156</sup> The private marketplace would deliver those democratic and speech benefits on its own.

Congress adopted this hands-off, anti-interventionist approach to the Internet very clearly in the 1996 Telecom Act, in which it articulated as an overarching policy the preservation of a “vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>157</sup> The government has stayed true to the 1996 Telecom Act’s nonregulatory approach, and with few exceptions has ceded the Internet’s regulation almost entirely to the commercial marketplace.<sup>158</sup>

Of course, the irony of the cyberlibertarianism prevalent in the 1990s was that the Internet owes its existence to government subsidies and the strict common-carrier regulation of telecommunications companies carrying Internet traffic.<sup>159</sup> The Internet, in fact, is a creature of regulation. The *interconnected network* that became the Internet originated in 1969 as

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155. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1847 (1995); see also Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1129–32 (1999) (describing the Internet as “‘a decentralized, global medium of communication that links people, institutions, corporations and governments around the world,’ and that enables communications to take place ‘almost instantaneously’” (quoting *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996))).

156. See Netanel, *supra* note 152, at 448 (noting that the Internet “is at once a distinct, self-contained realm and a gauntlet to the inefficient, undemocratic, top-down administration of the territorial state”).

157. 47 U.S.C. § 230(b)(2) (1996).

158. The government has, however, imposed regulations on Internet carriers in discrete areas, such as Voice over Internet Protocol (VoIP). See, e.g., Communications Assistance for Law Enforcement Act (CALEA), Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended at 47 U.S.C. §§ 1001–1010 (1994)) (requiring telecommunications carriers to cooperate with law enforcement electronic surveillance activities); Am. Council on Educ. v. FCC, 451 F.3d 226 (D.C. Cir. 2006) (upholding FCC decision to apply CALEA wiretapping requirements to broadband and VoIP providers); see also Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act), Pub. L. No. 108-187, 117 Stat. 2699 (2003) (codified as amended at 15 U.S.C. § 7701 (2006)) (enacting standards against unsolicited commercial e-mail and requiring the Federal Trade Commission to promulgate rules against unsolicited messages on mobile networks); Telephone Number Requirements for IP-Enabled Services Providers, 22 F.C.C.R. 19,531 (2007) (report, order, and notice of proposed rulemaking) (extending local number portability to VoIP services); IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers, 20 F.C.C.R. 10,245 (2005) (report, order, and notice of proposed rulemaking) (imposing 911 obligations on VoIP providers).

159. See Catherine J.K. Sandoval, *Disclosure, Deception and Deep-Packet Inspection: Net Neutrality and the Role and Limits of Federal Trade Commission Act Restraints on Internet Service Providers* 12–14 (Jan. 2009) (unpublished manuscript, on file with author) (detailing the extensive federal regulation that facilitated the early proliferation of the commercial Internet).



part of a military research initiative in search of a resilient “packet-switched” communications system capable of instantly surviving the destruction of entire sectors of the network.<sup>160</sup> Throughout the 1970s and 1980s, the U.S. Advanced Research Projects Agency (ARPA) developed a file transfer protocol (FTP), electronic mail, newsgroup, and other information handling protocols.<sup>161</sup> It later funded the University of California at Berkeley to incorporate what became the “transmission control protocol” and “Internet protocol” (TCP/IP)—the language of the Internet—into the UNIX operating system upon which the Internet was built.<sup>162</sup> These standards and norms operate on the Internet’s *logical* layer, which rests above its *physical* layer (i.e., the network of computing and switching devices, servers, and transmission fiber), and below its *applications* (e.g., software and end-user devices) and *content* (e.g., text, graphics, and audio) layers.<sup>163</sup>

In the 1980s, the National Science Foundation devoted over \$200 million to expand the emerging Internet, interconnecting federal and an increasing number of university and other research facilities (through a system called NSFNet).<sup>164</sup> Under contract with the Department of Defense, the Stanford Research Institute managed the early domain name system, which enabled and registered dot-com addresses, functionally policing which servers and Internet websites had access to the Internet.<sup>165</sup>

What most set the stage for the Internet’s tipping point—from obscure communications network connecting a relatively small realm of federal-government and educational servers to the main global communications platform it is today—were two sets of relatively low-profile decisions. The

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160. JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS* 129–30 (2005). Because the military long-distance communications network depended heavily on the AT&T telephone network, an attack on the AT&T main switches could have prevented the President or military brass in Washington from sending missile-launch messages to silo locations in Arizona, Nebraska, or Montana. *Id.*

161. *Id.* at 130; see also Edward L. Rubin, *Computer Languages as Networks and Power Structures: Governing the Development of XML*, 53 SMU L. REV. 1447, 1449–52 (2000) (“The origins of the Internet lie in efforts by the Defense Department to establish communication linkages among the computers in its Advanced Projects Research Agency (ARPA), which was set up in the wake of the Sputnik launch.”).

162. NUECHTERLEIN & WEISER, *supra* note 160, at 130.

163. For a detailed description of the Internet’s various layers, see *id.* at 118–25. Some Internet theorists envision the layers differently, assigning them different names and conflating two of the four layers identified by most. For example, Professor Lawrence Lessig writes of three layers: the physical layer, a middle “code” layer, and a top content layer. See Lawrence Lessig, *The Internet Under Siege*, FOREIGN POL’Y, Nov.–Dec. 2001, at 56, 59, available at <http://www.lessig.org/content/columns/foreignpolicy1.pdf>.

164. NUECHTERLEIN & WEISER, *supra* note 160, at 130.

165. JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* 33–34 (2006). In the first years of the Internet’s existence, the dot-com naming system was comprised of only one text file named “hosts.txt,” which was stored on a Stanford University server. *Id.* at 33.

federal government in 1992 privatized NSFNet and started registering Internet addresses for commercial uses.<sup>166</sup> At the same time, the federal government enforced an array of common carriage regulations, including rate nondiscrimination and facilities interconnection requirements, against telecommunications companies, affording new Internet Service Providers (ISPs) access to the national telecommunications grid at affordable rates.<sup>167</sup> As a result, narrowband “dial-up” Internet service spread across the United States.<sup>168</sup>

The United States retains ultimate authority over the servers hosting the Internet’s root files, which control website naming and numbering and, ultimately, access to the Internet itself.<sup>169</sup> Nevertheless, as noted above, it generally has stayed true to the “hands-off” nonregulatory disposition established in the 1996 Telecom Act, imposing very few regulatory requirements on Internet providers and doing very little to optimize the Internet as a democratic instrument. As a communications platform, the Internet hosts expression that is in most senses autonomous from government coercion, censorship, or filtration.

### *B. Speech and Democracy Online*

Independence from government authority does not alone set the stage for a free marketplace of ideas and democratic exchange. The marketplace itself must be conducive to an open and accessible competition in ideas, so that truth, in the words of Mill, is “fully, frequently, and fearlessly

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166. See Scientific and Advanced Technology Act of 1992, 42 U.S.C. § 1862(g) (2000). Two of the Internet’s founders, Robert E. Kahn and Vinton G. Cerf, noted that the government’s decision to privatize the Internet was with the hope that “the enthusiasm of private sector interests to build upon the government funded developments to expand the Internet and make it available to the general public.” Robert E. Kahn & Vinton G. Cerf, *What Is the Internet (and What Makes It Work)*, 5 (Dec. 1999), [http://www.cnri.reston.va.us/what\\_is\\_internet.html](http://www.cnri.reston.va.us/what_is_internet.html), quoted in NUECHTERLEIN & WEISER, *supra* note 160, at 131.

167. See Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359, 372 (2007) (discussing how “[e]xponential growth in Internet use” was spurred by the enforcement of common carrier regulations for the benefit of ISPs).

168. *Id.*

169. See GOLDSMITH & WU, *supra* note 165, at 30–31 (discussing the early battle between the United States and private operators for “root authority” over the Internet); Jonathan Bick, *The Internet as Government Action*, N.J. L.J., Oct. 3, 2005, <http://www.bicklaw.com/Publications/TheInternetasGovernmentAction.htm> (arguing that the U.S. government’s authority stems in part from its control over the Domain Name System (DNS)); Bradley S. Klapper, *U.S. Insists on Keeping Control of Web*, USA TODAY.COM, Sept. 29, 2005, [http://www.usatoday.com/tech/news/techpolicy/2005-09-29-us-web-control\\_x.htm](http://www.usatoday.com/tech/news/techpolicy/2005-09-29-us-web-control_x.htm) (explaining the reluctance of the United States to cede domain management authority to the United Nations). Given the U.S. government’s role in launching the Internet, it is no wonder that law professor and former FCC Office of Plans and Policy analyst Jonathan Weinberg observed that “the mindset in the U.S. government was that this really was *our* Internet.” GOLDSMITH & WU, *supra* note 165, at 32.

discussed”<sup>170</sup> and ultimately can gain currency in the marketplace. But what really is meant by “democracy” and “democratic exchange” in debates about the effects of media, and specifically the Internet, on our democracy?

In theory, democracy—from the fifth-century B.C.E. Greek root *demokratia*—is “rule by the people.”<sup>171</sup> In practice, as political theorist W.B. Gallie observes, democracy is a contested and protean concept.<sup>172</sup> Although there are many commonly accepted variations of democracy,<sup>173</sup> my analysis of the Internet’s democratic effects will focus on four of the principal interrelated democratic models recognized in American political thought: direct democracy, representative democracy, liberal democracy, and deliberative democracy.

Direct democracy, which involves unmediated decisionmaking through mechanisms such as referenda and ballot initiatives, is popular with the American people.<sup>174</sup> Direct democratic governance, however, has long been disfavored by theorists as the least accountable and self-actualizing model of self-governance,<sup>175</sup> vulnerable to what James Madison termed the “confusion and intemperance of the multitude” that “can admit no cure for the mischiefs of faction.”<sup>176</sup> Jean Jacques Rousseau, whose political

170. JOHN STUART MILL, ON LIBERTY 42 (Tichnor & Fields 2d ed. 1863) (1859).

171. Amy Gutmann, *Democracy*, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 411 (Robert E. Goodin & Philip Pettit eds., 1993).

172. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 168–69 (1956); see also WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE (1974).

173. See, e.g., Gutmann, *supra* note 171, at 411–18 (including brief descriptions of Schumpeterian, populist, liberal, participatory, social, and deliberative democracy).

174. See Peter M. Shane, *The Electronic Federalist: The Internet and the Eclectic Institutionalization of Democratic Legitimacy*, in DEMOCRACY ONLINE, *supra* note 33, at 69 (noting a recent survey that places public support for direct democratic mechanisms at between 70% and 80% (citing DAVID MCKAY ET AL., CONTROVERSIES IN AMERICAN POLITICS AND SOCIETY 91 (2002))).

175. Plato reveals himself as a strong critic of direct or classical democracy. In the dialogue *The Statesman*, he arranges for the Stranger to tell Socrates that, among all of the forms of government, “democracy is the worst of [them]” so far as law-abiding is concerned, and the best for flouting the law. PLATO, *The Statesman*, in THE COLLECTED DIALOGUES OF PLATO INCLUDING THE LETTERS 1074 (Edith Hamilton & Huntington Cairns eds., Lane Cooper et al. trans., 1961). Aristotle took up Plato’s antidemocratic mantle in characterizing “extreme” Athenian (direct) democracy as the worst of all forms of government since “all offices are open to all, and the will of the people overrides all law.” ARISTOTLE, *The Politics*, in THE BASIC WORKS OF ARISTOTLE 1119 (Richard McKeon ed., 1941); see also Shane, *supra* note 174, at 69. Professor Shane writes that “It is difficult to see . . . how direct democracy promotes the equal consideration of the interests of all persons.” *Id.*

176. THE FEDERALIST NO. 10, at 43–44 (James Madison) (Cambridge Univ. Press 2003) (“A common passion or interest will . . . be felt by a majority . . . and there is nothing to check the inducements to sacrifice the weaker party . . .”). Agreeing with Madison, Alexander Hamilton said that “a pure democracy, if it were practicable, would be the most perfect government. Experience has proved that no position is more false than this.” THE

philosophy often is described as favoring direct democratic ideals, acknowledged that “there never has been a real democracy, and there never will be” since it is “against the natural order for the many to govern.”<sup>177</sup> Although direct democracy has gained popularity at the state level, it plays virtually no role in federal government given the Constitution’s hostility to direct popular lawmaking.<sup>178</sup>

Representative democracy is the form of governance most familiar to Americans. This form of governance entails popular election of representatives by means of majority or plurality support, and the exercise by those elected representatives of decisionmaking power delegated to them by the people.<sup>179</sup> The presumption is that the elected representatives will act in furtherance of the public good through their application of expertise and calm consideration, qualities thought to be lacking in the direct democratic model. But the representative model is criticized as prone to corruption, to the overinfluence of political parties, and to conflicts of interest, patronage, and expense, while offering little of the transparency, immediacy, and accountability of the direct democratic model.<sup>180</sup>

Liberal democracy prioritizes individual autonomy and liberty over majoritarian, collectivist notions of the “public interest.”<sup>181</sup> Attributed in

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QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS FROM THE MEN AND WOMEN WHO CREATED AMERICA 60 (Buckner F. Melton, Jr. ed., 2004) (speaking at the New York Ratification Convention on June 21, 1788).

177. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 65 (G.D.H. Cole trans., 1950).

178. See Shane, *supra* note 174, at 70 (observing the limited role accorded direct democracy in the Constitution’s framing, ratification, and content). By contrast, thirty-four states have state-constitution-defined direct-democratic decisionmaking means. JOSEPH F. ZIMMERMAN, *THE NEW ENGLAND TOWN MEETING: DEMOCRACY IN ACTION* (1999); see also *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (upholding, through a refusal of jurisdiction, Oregon’s initiative and referendum mechanisms, reasoning that the controversy was a political rather than a judicial question).

179. See Shane, *supra* note 174, at 68 (theorizing that such governance is premised on the assumption that citizens, through exercise of self-determination, will warrant their allegiance to the outcome and elected politicians will yield equal consideration for the interests of all people).

180. See generally Gary Orren, *Fall from Grace: The Public’s Loss of Faith in Government*, in *WHY PEOPLE DON’T TRUST GOVERNMENT* 92–93 (Joseph S. Nye, Jr. et al. eds., 1997) (arguing that continued public distrust of American politicians and the political process is inextricably tied to the government itself, and not simply a byproduct of external factors such as technological innovation, social transformation, or global economic trends); JOHN HASKELL, *DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT? DISPELLING THE POPULIST MYTH* 2–3 (2001) (positing that advocates of direct democracy argue that “[r]epresentative institutions act to stymie the expression of the popular will and fail accurately to consider the public interest when policy is made”).

181. See Gutmann, *supra* note 171, at 413 (describing liberal democracies’ insistence that basic liberties, such as freedom of thought, speech, press, association, and religion must be paramount to the will of popular rule).

large part to the philosophies of John Locke and John Stuart Mill,<sup>182</sup> the liberal democratic theory prioritizes constraints on the power of representative governments and popular majorities from interference with the rights and freedoms of individuals.<sup>183</sup> In prioritizing individual rights over public good, liberal democratic theory is the source of much criticism. In *Democracy's Discontent*, for example, Professor Michael Sandel argues compellingly that the primacy of liberalism, individual rights, and consumerism in American society, in place of more communitarian and deliberative activities, has resulted in the weakening of the nation's civic life and democracy as a whole.<sup>184</sup>

The deliberative democratic model is valued in contemporary political thinking as most in harmony with the multivalent principles of self-governance, including autonomy, dignity, equality, self-fulfillment, and free expression in collective self-interest.<sup>185</sup> Deliberative democracy best marries democracy with freedom of speech by transcending governance as the aggregation of atomized preferences and interests, and by engaging autonomous citizens with a diversity of interests and viewpoints in substantive dialogue on issues of public importance.<sup>186</sup> As observed by Professor Peter Shane, "[T]he fundamental accountability in deliberative democracy does not run from the governor to the governed, but from each citizen to every other."<sup>187</sup> This citizen-centered interdependence in political decisionmaking, according to Professor Beth Noveck, is what makes public deliberation "fundamental to participatory democratic life"

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182. See DAVID R. HILEY, DOUBT AND THE DEMANDS OF DEMOCRATIC CITIZENSHIP 9 (2006) (identifying the "historic worry about disorder and the tyranny of the many" with "liberal theories from John Locke and John Stuart Mill"); see also Rainey, *supra* note 12, at 317–20 (discussing individualistic theories of the First Amendment).

183. See JOHN RAWLS, A THEORY OF JUSTICE 61 (rev. ed. 1999).

184. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 4, 5, 27, 250–73, 318 (1996) (describing Americans' dual concern with fears of community erosion and feelings of waning self-governance).

185. See ANDREW CHADWICK, INTERNET POLITICS 25 (2006); Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1804 (1995) (arguing that the goals of the First Amendment are linked with a deliberative democracy, and that the law must harness new technologies for democratic ends); Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U. J. SCI. & TECH. L. 1, 5, 12 (2003) (asserting that deliberative speech, rather than free speech, makes true democracy possible); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 67–87 (James Bohman & William Rehg eds., 1997).

186. See, e.g., James Bohman & William Rehg, *Introduction* to DELIBERATIVE DEMOCRACY, *supra* note 185, at ix ("Deliberative democracy refers to the idea that legitimate lawmaking issues from the public deliberation of citizens."); see also CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 134 (1993) (discussing the primacy of political deliberation in the American conception of liberal republicanism).

187. Shane, *supra* note 174, at 72.

and “at the root of American democracy.”<sup>188</sup> By merging autonomy with community, deliberative democrats value the “freedom to think as you will and speak as you think” as “means indispensable to the discovery and spread of political truth.”<sup>189</sup>

Individual autonomy is important to the general notion of *demokratia*, insofar as we take it as a given that, in order to govern ourselves and act as effective civic agents, we must be able to think and speak for ourselves, free from the constraints and distorting influences of governmental or private forces. “Meaningful autonomy,” according to Professor Baker, is the ability “to lead a meaningfully self-authored life without unnecessary or inappropriate frustration by others.”<sup>190</sup> But autonomy alone, uncoupled with meaningful engagement in political discussion with fellow citizens, is of limited worth to the individual as both a speaker and citizen.<sup>191</sup> Because thought and language are so inexorably linked, democratic self-governance requires us to be able to express ourselves as well as hear the expression of others.<sup>192</sup> Moreover, the benefits of individual autonomy—e.g., self-discovery, self-authorship, and moral and political agency—come partly as a *consequence* of discourse with other autonomous individuals and the concomitant exposure to a diversity of viewpoints and information.<sup>193</sup>

Deliberative democratic theories can be traced back far beyond the founding of the American republic. Kant called for the “public use of . . . reason” as a route to enlightenment;<sup>194</sup> even Aristotle wrote that “[w]hen there are many [who contribute to the process of deliberation],” they “may surpass—collectively and as a body, although not individually—

188. Noveck, *supra* note 185, at 5, 12.

189. *Whitney v. California*, 274 U.S. 357, 375 (1927).

190. C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, 21 SOC. PHIL. & POL’Y 215, 220 (2004). Professor Baker calls the other conceptualization of autonomy “formal autonomy” and describes it as a recognition in law of “an agent’s legal right to choose what to do with herself (and her property)” and “dominion over [one’s] own mind and body.” *Id.* at 223.

191. Political philosopher Judith Lichtenberg makes an elegant variation of this point. She writes that “[a] person cannot think freely if he cannot speak; and he cannot think freely if others cannot speak, for it is in hearing the thoughts of others and being able to communicate with them that we develop our thoughts.” Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, in *DEMOCRACY AND THE MASS MEDIA* 108 (Judith Lichtenberg ed., 1990).

192. See Jason Mazzone, *Speech and Reciprocity: A Theory of the First Amendment*, 34 CONN. L. REV. 405, 417–20 (2002) (theorizing that deliberation, not only is fundamental to self-government, but also promotes reciprocity as cooperative behavior for mutual benefit and ultimately enhancement of democracy).

193. See Baker, *supra* note 190, at 220–21; see also Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 902–05 (1994) (providing convincing arguments for the conceptualization of autonomy as a First Amendment value); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

194. IMMANUEL KANT, *An Answer to the Question: ‘What Is Enlightenment?’*, in *KANT’S POLITICAL WRITINGS* 55 (Hans Reiss ed., H.B. Nisbet trans., 1971).

the quality of the few best.”<sup>195</sup> Modern theorists, most notably Jürgen Habermas, posit that deliberative democracy can transform citizens whose political views start as undeveloped, inconsistent, and confused, into more enlightened and informed participants in the public sphere.<sup>196</sup>

Viewed through the lenses of these four general theories of democratic governance—and especially the aspiration of deliberative democracy and its related free speech ideals—the Internet reveals a mixed record of effectiveness as a democracy- and speech-enhancing instrument. Contrary to the utopian declarations of the early cyberlibertarians, the Internet has evolved into a communications substrate that promotes democratic and free speech ideals but also undermines them in very significant and troubling ways.

### 1. Online Citizen Activism

#### a. *The Democratization of Information and the Demise of Unidirectional Monoculture*

In contrast to unidirectional, homogenizing, and overly commercialized broadcasting media, the Internet makes available countless opportunities for citizens to speak, relate, and gather political, cultural, and social information from a multiplicity of sources. The blogosphere, which started as a collection of “web logs” or diary websites, has evolved into a source of citizen journalism, political information and commentary, and creative expression of all sorts.<sup>197</sup> It has served as a powerful check on governments and elected representatives, both by exposing government abuses ignored or underreported by mainstream media and by providing citizens of speech-repressing regimes a vehicle for dissenting, information sharing, and organizing.<sup>198</sup>

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195. ARISTOTLE, THE POLITICS OF ARISTOTLE 123 (Ernest Barker trans., Oxford Univ. Press 1962).

196. Tali Mendelberg, *The Deliberative Citizen: Theory and Evidence*, in POLITICAL DECISION-MAKING, DELIBERATION AND PARTICIPATION 153 (Michael X. Delli Carpini et al. eds., 2002). Summarizing Habermas’s vision as follows: “An informed and engaged citizenry enriches the political process in at least two ways. It stimulates what we hope are better decisions by contributing to the policy stew and by holding politician-cooks to account. More fundamentally, participation legitimates the process by which we reach decisions.” Froomkin, *supra* note 33, at 3–4.

197. For an excellent overview of the importance of the blogosphere in the new media ecology, see Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 690–94 (2007).

198. See Leslie David Simon, *Democracy and the Net: A Virtuous Circle?*, in DEMOCRACY AND THE INTERNET: ALLIES OR ADVERSARIES? 9 (Leslie David Simon ed., 2002) (noting that the Internet “dramatically increases citizens’ ability to ‘seek, receive and impart information and ideas through any media and regardless of frontiers’”). Burmese bloggers were the only reliable source of information for international observers of the

The Internet—specifically bloggers and other citizen journalists—has brought to light the significant failings of government officials in this<sup>199</sup> and other<sup>200</sup> countries, and wrongdoings of law enforcement<sup>201</sup> that would have gone unexposed and unredressed in the pre-Internet media ecosystem. As an especially recent example, the 2008 George Polk Award for legal reporting was awarded for the first time to a blogger, Joshua Micah Marshall, in recognition of his reporting on the firing of eight United States Attorneys, which ultimately led to the resignation of Attorney General Alberto Gonzales.<sup>202</sup> Citizen journalists on the Internet also have exposed the failings and oversights of the traditional media themselves.<sup>203</sup> In addition, some broadcast and print news media have used their affiliated blogs to run stories that have not yet satisfied journalistic standards (i.e., verification or confirmation) or are too scandalous to carry on the air or in newsprint but are later substantiated.<sup>204</sup>

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crackdown on dissidents in that country. Wayne Drash & Phil Black, *Blogs Helping Expose Myanmar Horrors*, CNN.COM, Sept. 27, 2007, <http://www.cnn.com/2007/WORLD/asiapcf/09/27/myanmar.dissidents/index.html>. Likewise, Zimbabweans have turned to blogs to share stories about government atrocities that have been altogether ignored by government-owned broadcast media and were out of the reach of foreign journalists who were barred from entry. *Zimbabweans Use Blogs for Info: Since the Silencing of Independent Media, People Turning Online for News*, MSNBC.COM, July 20, 2008, <http://www.msnbc.msn.com/id/25772666/print/1/displaymode/1098/>.

199. For example, blogger Matt Drudge broke the story concerning President William J. Clinton's affair with intern Monica Lewinsky. An anonymous blogger brought attention to the sexually explicit messages exchanged by Rep. Mark Foley (R-FL) and teenage congressional pages. Moreover, bloggers, not the mainstream media, initially brought to light racist remarks made by Sen. Trent Lott (R-MS) at a birthday celebration for former segregationist Sen. Strom Thurmond (R-SC). See Lisa Napoli, *The Post-Lewinsky Winner Is the Web*, N.Y. TIMES, Sept. 28, 1998, at C7; Anne E. Kornblut & Katharine Q. Seelye, *Papers Knew of Foley E-Mail but Did Not Publish Articles*, N.Y. TIMES, Oct. 3, 2006, at A20; Paul Janensch, *Bloggers, Right and Left, Have Become Modern Vigilantes*, HARTFORD COURANT, Feb. 17, 2005, at D2.

200. See, e.g., Loretta Chao, *Gymnastics Question for the Ages . . . of the Ages*, WALL ST. J., Aug. 23–24, 2008, at A12 (reporting that an ordinary American citizen searching the Internet from his home in Washington, DC, discovered Chinese documents online apparently contradicting official Chinese statements regarding the age of Chinese Olympic gold medalists); see also Levi, *supra* note 197.

201. See, e.g., Jim Dwyer, *When Official Truth Collides with Cheap Digital Technology*, N.Y. TIMES, July 30, 2008, at B1. A cyclist was jailed on charges of assaulting a police officer with a bicycle on the basis of a sworn statement by Officer Patrick Pogan. A passerby's video uploaded to YouTube, however, showed very clearly that the cyclist swerved to avoid Officer Pogan, and the latter lunged toward the cyclist "as if he were a halfback running along the sidelines, and sent him flying." *Id.*

202. See Noam Cohen, *Blogger, Sans Pajamas, Rakes Muck and a Prize*, N.Y. TIMES, Feb. 25, 2008, at C1.

203. See, e.g., Marianne M. Jennings, *Where Are Our Minds and What Are We Thinking? Virtue Ethics for a 'Perfidious' Media*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 637, 667–71 (2005) (discussing the role of bloggers in revealing the journalistic flaws in CBS News' reporting of President George W. Bush's National Guard service).

204. For example, mainstream broadcast and print journalists did not devote any airtime or newsprint to the story broken by tabloid *National Enquirer* about the infidelity of former



The Internet and the political blogosphere have become especially good sources for in-depth analysis and discussion of political candidates and their campaigns, enabling voters to research the positions of the candidates and engage in related discussions (sometimes with campaign staff members themselves).<sup>205</sup> Mastery of the television medium became an imperative for political candidates in high-profile elections from 1960 onward, following the first-ever televised debate between then-Senator John Kennedy (D-MA) and then-Vice President Richard Nixon, who appeared wan, nervous, and generally uncomfortable compared to the much more telegenic, and ultimately victorious, Kennedy.<sup>206</sup> In the 2006 congressional and 2008 presidential campaigns, mastery of the Internet proved pivotal in many races, with online organizing and fundraising overtaking more traditional campaigning practices in efficiency and effectiveness.<sup>207</sup>

The combination of the Internet with the wide availability of inexpensive digital video recording devices has subverted old-world “insider” versus “outsider” distinctions in political campaigning. Elected officials now have difficulty saying in putatively private, small-audience settings what would be politically and socially perilous if said to general audiences. YouTube

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senator and vice-presidential candidate John Edwards, despite the story’s having permeated the blogosphere for several days. The *L.A. Times* covered the story prominently in its blog despite having not mentioned it at all in its broadsheets. See *National Enquirer Alleges John Edwards Affair; Blogosphere Readies Salt Shaker*, L.A. TIMES BLOG, July 23, 2008, available at <http://opinion.latimes.com/opinionla/2008/07/john-edwards-af.html>. Only after Mr. Edwards publicly acknowledged the affair did the mainstream news operations publish information about the story. See, e.g., Scott Martelle & Seema Mehta, *Edwards’ Affair Puts Him on the Sidelines*, L.A. TIMES, Aug. 9, 2008, at A1; Richard Pérez-Peña & Bill Carter, *Reticence of Mainstream Media Becomes a Story Itself*, N.Y. TIMES, Aug. 9, 2008, at A14. Howard Wolfson, the communications director for Senator Hillary Clinton’s presidential campaign, later argued that the mainstream media’s failure to cover the Edwards affair story allowed Edwards to stay in the race longer than he should have, splitting the vote and ultimately costing Clinton the nomination. Brian Ross & Jake Tapper, *Wolfson: Edwards’ Cover-Up Cost Clinton the Nomination*, ABCNEWS.COM, Aug. 11, 2008, <http://abcnews.go.com/Blotter/Story?id=5553013&page=1>.

205. See Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 523–26 (2007) (asserting that blogs drive national conversation and detailing the benefits of blog communication, including access to original research and the opportunity to hear directly from experts); see also Gracie Lawson-Borders & Rita Kirk, *Blogs in Campaign Communication*, 49 AM. BEHAV. SCIENTIST 548, 555–56 (2005) (describing blogs as a “participatory outlet” and citing Howard Dean’s *Blog for America* as stating that “people from all across the country . . . are debating, organizing, arguing, joking, and bringing innovative ideas to our organization”).

206. See ALAN SCHROEDER, *PRESIDENTIAL DEBATES: FORTY YEARS OF HIGH-RISK TV* 3–6, 14, 99 (2000). On television, Kennedy appeared “calm and nerveless in appearance” while Nixon looked “tense, almost frightened, at turns glowering and, occasionally, haggard-looking to the point of sickness.” *Id.* at 6.

207. See Jim VandeHei & Alexander Burns, *Why the GOP Fell So Far, So Fast*, POLITICO.COM, Sept. 1, 2008, <http://www.politico.com/news/stories/0808/13018.html> (reporting that the Democratic party’s dominance in Internet campaigning has given it a significant advantage in, inter alia, fundraising and getting out the vote).

videos of Senator George Allen's "Macaca" moment and of Oklahoma State Representative Sally Kern's statements about gay people posing a bigger threat to the nation than "terrorism and Islam" by going after two-year-olds are vivid illustrations.<sup>208</sup> The Internet has infiltrated "insider only" political spaces, often exposing politicians' true colors to the scrutiny of the general public.

As Professor Susan Crawford notes, the Internet—and especially the new Web 2.0 social networking and personal webcasting websites such as blogs, MySpace, YouTube, and others—have created a "substrate for new forms of social relationships."<sup>209</sup> The Internet has allowed geographically or socially isolated people to build online communities and engage in meaningful interactions online. This is especially true for racial, religious, sexual, and other minorities living in generally hostile communities, whose interests and political and cultural concerns are not adequately reflected in mainstream media.<sup>210</sup>

The Internet also has empowered individuals to undertake significant social and political collective action without having to go through the high-overhead organizations—like political parties, labor unions, and grassroots activist groups—that had cornered the market in the pre-Internet world.<sup>211</sup>

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208. See Tim Craig & Michael D. Shear, *Allen Quip Provokes Outrage, Apology*, WASH. POST, Aug. 15, 2006, at A1 (detailing Senator Allen's slip when he referred to his opponent's campaign volunteer, S.R. Sidarth, as "Macaca"); Shannon Muchmore, *Anti-Gay Remarks Blasted*, TULSA WORLD, Mar. 14, 2008, at A1 (discussing Representative Kern's statements). The Internet also has blurred the distinctions between "on-air" and behind-the-scenes commentary of political pundits. For example, in September 2008, a video spread widely on the Internet that showed conservative pundits Peggy Noonan and Mike Murphy speaking very negatively about the naming of Governor Sarah Palin as the Republican vice-presidential nominee moments after the two had spoken in positive terms about the nomination during a live televised interview. See Jim Rutenberg, *Old Friends in the Media See a New Side of McCain*, N.Y. TIMES, Sept. 4, 2008, at A20.

209. Crawford, *supra* note 167, at 369.

210. For example, the Internet is credited with playing a central role in the evolution of the gay and lesbian community, both as a central gathering place for mutual support and as a platform for political organizing. See Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 162 (2003). In addition, whereas atheism and religious skepticism are almost absent on mainstream media due to advertiser sensitivities and other commercial pressures, the Internet has enabled these individuals who adhere to these views to connect, share information, and organize political action. See Jeff Gardner, *Face of the New Atheism*, NAT'L CATHOLIC REG., Aug. 10, 2008, at A1, available at <http://ncregister.com/site/article/15575> (profiling an influential, atheist professor and blogger whose success is credited in part to the Internet). Communities with multiple minority statuses—for example African-Americans who are deaf—also have turned to the web to bridge physical distances by building online communities. See National Black Deaf Advocates, <http://www.nbda.org> (employing the Internet as a tool to unite, and advocate for, deaf African-Americans).

211. See CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* (2008) (addressing the various ways in which "social tools" allow people to do things together without requiring traditional organizational structures); JOHN HENRY CLIPPINGER, *A CROWD OF ONE: THE FUTURE OF INDIVIDUAL IDENTITY* (2007) (discussing the

Much charitable giving, in fact, has migrated online, saving charities millions in fundraising and overhead costs.<sup>212</sup>

*b. Direct Democracy 2.0?*

The facility with which many citizens now can access political information online and communicate with one another and their elected officials promotes important aspects of representative and liberal democracy. There is concern, however, that the Internet has exacerbated direct democratic strains in ways that work against the values of representative and deliberative democracy.

Alexander Hamilton wrote in *The Federalist* that, although republican, representative government demands that elected officials remain accountable to their constituents, accountability “does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse.”<sup>213</sup> The benefits that come with the Internet’s elimination of distance, time, and cost as barriers for communication between elected officials and their constituents, therefore, may be outweighed by the distorting effects this accelerated and magnified constituent communication may have on the business of government—a distortion aggravated by the demographic disparities between online and offline communities.<sup>214</sup>

Although it is true that the Internet can serve as a check on government, it is also true that the Internet may replace the tyranny of unaccountable government with the tyranny of an irrational but vocal public. In the words of political scientist Arthur Isak Applbaum,

The claim that the greater participation of all entails the greater freedom of all suffers from a fallacy of composition . . . [I]t does not follow that if the government were more responsive to the will of the majority we would all be more free, because we can—and do—tyrannize one another.<sup>215</sup>

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origins of identity and their influence on today’s highly interconnected world of social networking and virtual reality).

212. Arianna Huffington, *Charity May Begin at Home, but It’s Moving Online*, HUFFINGTON POST, July 25, 2008, [http://www.huffingtonpost.com/arianna-huffington/charity-may-begin-at-home\\_b\\_115082.html](http://www.huffingtonpost.com/arianna-huffington/charity-may-begin-at-home_b_115082.html) (noting that “the Internet is definitely energizing philanthropy and changing the way that we give” with online donations rising from \$250 million in 2000 to \$7 billion in 2006).

213. THE FEDERALIST NO. 71 (Alexander Hamilton), in THE FEDERALIST: THE FAMOUS PAPERS ON THE PRINCIPLES OF AMERICAN GOVERNMENT 459 (Benjamin Fletcher Wright ed., 2004).

214. Professor Cass Sunstein warns of the “serious risk that costless communication will increase government’s responsiveness to short-term or poorly considered public outcries, or to sensationalistic anecdotes that are a poor basis for governance.” CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 258 (1995).

215. Arthur Isak Applbaum, *Failure in the Cybermarketplace of Ideas*, in GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE 23 (Elaine Ciulla Kamarck &

The framers, Madison as well as Hamilton, valued distance and delay in communication separating Congress and its constituents as important checks on the passions and power of the populace, and as safeguards for the time, space, and peace required for elected officials in Washington to do the work of government with quiet diligence.<sup>216</sup> Applbaum posits that “precisely those aspects of interactive communication that thrill the direct democrats make the identification and organization of factious majorities more likely.”<sup>217</sup>

I agree that by cheapening, accelerating, and amplifying the speech of Internet-enabled and politically engaged constituents, the Internet can disrupt and corrupt the federal government’s important deliberative work by presenting a distorted version of popular preferences. But this analysis is incomplete insofar as it fails to account for the extent to which the ties between members of Congress and their constituents have grown attenuated and weak as the republic’s population has increased with no commensurate change in the size of Congress. Although Congress needs insulation from the heat of popular passions, too much insulation breeds an insularity at odds with the duty of Congress to remain accountable and accessible to the citizens that elected it. The framers recognized the importance of constituent consultation and communication in the work of Congress.<sup>218</sup> The Internet, in fact, may have succeeded at restoring some of the necessary links between Congress members and constituents that time and population growth have eroded.

The Constitution requires that each state send at least one representative to the House of Representatives and that “[t]he Number of Representatives shall not exceed one for every thirty thousand,”<sup>219</sup> but it provides no cap on the total membership of the House. Both by means of the Constitution’s wording and statements in *The Federalist*, the framers made clear their intention that the number of representatives was to increase periodically in proportion to the growth in population.<sup>220</sup> Congress did, in fact, increase

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Joseph S. Nye, Jr. eds., 2002); see also *id.* at 26 (“[M]en are not angels, one cannot judge one’s own cause without bias, passions and interests give rise to faction, and factions are prone to tyrannize.”).

216. *Id.* at 26–28.

217. *Id.* at 27.

218. See, e.g., THE FEDERALIST NO. 56 (James Madison), in THE FEDERALIST WITH LETTERS OF “BRUTUS” 274 (Terrence Ball ed., 2003) (noting the “sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents”).

219. U.S. CONST. art. I, § 2.

220. See Christopher St. John Yates, *A House of Our Own or a House We’ve Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 COLUM. J.L. & SOC. PROBS. 157, 175–79 (1992) (citing numerous statements at the Constitutional Convention and in *The Federalist* reflecting the intent that the House of Representatives’ size grow with population). In *The Federalist No. 58* (“The Future Size of the House”),

the size of the House of Representatives occasionally, based on population increases, until 1910. There were 65 representatives for 3.9 million Americans in the first Congress (a 1-to-60,000 ratio).<sup>221</sup> The ratio was 1 to every 39,000 citizens in 1810, 100,000 citizens in 1860, and 211,000 citizens in 1910.<sup>222</sup> Then, in 1929, Congress froze the size of the House of Representatives at 435 members.<sup>223</sup> With an estimated U.S. population of 303,824,640,<sup>224</sup> today's representational ratio for the "People's House" is one congressman for every 698,447 Americans—a ratio 1,164% higher than at the inception of the republic, and one described as "cramped" compared to those of the much larger European national assemblies.<sup>225</sup>

It reasonably can be argued, therefore, that the Internet's facility in quickly and cheaply connecting citizens with their representatives in Washington has had the positive effect of reversing the significant alienation of Americans from their servants in the "People's House." An early example of this rapid mobilization of popular opposition to the actions of Congress was the quick formation of the now 3.2 million-member website MoveOn.org to organize online opposition to the impeachment proceedings against President Bill Clinton.<sup>226</sup> MoveOn's online organizing was credited not only with helping put an end to congressional efforts to oust the President that were widely criticized as wasteful and excessively partisan, but also with shifting control of Congress from Republican to Democratic hands in 2006.<sup>227</sup>

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James Madison explained that one of the purposes of the Decennial Census was "to augment the number of representatives . . . under the sole limitation that the whole number shall not exceed one for every thirty thousand inhabitants." THE FEDERALIST NO. 56 (James Madison), in THE FEDERALIST WITH LETTERS OF "BRUTUS," *supra* note 218, at 282.

221. George F. Will, *Congress Just Isn't Big Enough*, WASH. POST, Jan. 14, 2001, at B7.

222. *Id.*; see also James K. Glassman, *Let's Build a Bigger House*, WASH. POST, June 17, 1990, at D2.

223. Yates, *supra* note 220, at 180.

224. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (July 2008 estimate).

225. See Matthew Cossolotto, *Fight for a Bigger House*, HARTFORD COURANT, Oct. 7, 2001, at C4 (noting that the British House of Commons contains 659 members for a national population of 60 million (a 1:91,000 ratio) and the French National Assembly contains 577 members representing a nation of 59 million (a 1:102,000 ratio)).

226. See About the MoveOn Family of Organizations, <http://www.moveon.org/about.html> (last visited Oct. 20, 2008) (describing the organization's purpose and history); see also Brendan T. Holloway, *McConnell v. Federal Election Commission: The Supreme Court Rewrites the Book on Campaign Finance Law: Will Political Speech Survive This Most Recent Onslaught?*, 13 COMMLAW CONSPPECTUS 107, 132–33 (2004) (describing MoveOn.org's portrayal of itself as a grassroots organization); Scott Duke Harris, *The Radical Centrists*, L.A. TIMES MAG., Feb. 29, 2004, at I-22, available at <http://articles.latimes.com/2004/feb/29/magazine/tm-moveon09> (describing MoveOn's rise from an online petition to an influential website with millions of members).

227. See Jeff Zeleny, *Democrats Urge Their Flush Candidates to Share the Wealth*,

But there is valid cause for concern. The Internet has increased the accountability of elected officials by, *inter alia*, making more political information available to constituents back home and empowering those citizens, individually and in virtual groups, to pressure elected officials to take certain actions. As discussed below, however, the composition of the online constituency does not come close to reflecting that of the true electorate, given the persistent and significant disparities in Internet, and especially broadband, access. Direct democratic communication online, therefore, may distort true constituent interests and preferences, leading to government responses that favor the preferences of citizens who are online and, therefore, are heard the loudest (or at all).

## 2. E Pluribus Pluribus—*Whither Deliberative Democracy Online?*

Whereas direct democracy is disfavored, the ideal of deliberative democracy has proved elusive. Although theorists have proposed varying definitions, modern deliberative democrats generally seek at least five qualities in successful citizen deliberation: (1) openness of deliberation to all citizens; (2) equality among participants, including the universal ability to raise questions and engage in debate; (3) rationality in discussion; (4) the enforcement of reasonable ground rules to ensure productive discussion; and (5) transparency and openness in the discussions and any conclusions.<sup>228</sup> Evaluated against these criteria, the current state of the Internet cannot be said to be conducive to genuine democratic deliberation.

### *a. Access*

The fundamental obstacle to inclusive and fully representative deliberative democracy online is that the United States remains a country divided between those with access to broadband Internet service and those without. The federal government's generally hands-off, marketplace-reliant approach to the proliferation of household-level broadband access has led to the nation's precipitous decline in broadband Internet penetration as compared to the rest of the industrialized world. The Organisation for Economic Co-operation and Development (OECD) publishes the most

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N.Y. TIMES, Oct. 24, 2006, at A23 (describing MoveOn.org's personalized e-mail message mobilization campaign to get members of Congress with at least \$200,000 in their campaign account and no competitive challenge in the upcoming 2006 election to donate 30% to other Democratic candidates).

228. See Shane, *supra* note 174, at 71 (providing an excellent discussion of the general requirements of deliberative democracy). Professor Beth Simone Noveck proposes that deliberation should be accessible, free from censorship, autonomous, relevant, transparent, reflecting equality and responsiveness, pluralistic, inclusive, informed, public, and facilitated. Noveck, *supra* note 185, at 12–18.

authoritative comparison of Internet broadband penetration among the thirty most industrialized nations. In its most recent survey, the United States had fallen to 15th place out of the 30 most developed nations for broadband penetration, with 23.3 broadband subscribers per 100 inhabitants,<sup>229</sup> down from 12th place in 2006 and 4th place in the first of such OECD surveys in 2001.<sup>230</sup> The OECD also reported that the United States placed 14th internationally in average download speed for broadband connections, while having the 8th highest average subscription price for broadband service.<sup>231</sup> Other respected broadband rankings place the United States even lower.<sup>232</sup>

In July 2008, the Pew Internet & American Life Project reported that 55% of American adults have broadband access at home, up from 47% in 2007.<sup>233</sup> Although this was a promising increase in overall broadband penetration, Pew reported relatively flat growth in broadband adoption among African-Americans (43%, compared with 57% for non-Hispanic whites) and a reduction in the rate of broadband adoption by economically disadvantaged households (25%, down from 28% in 2007).<sup>234</sup> In addition,

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229. ORG. FOR ECON. CO-OPERATION AND DEV., OECD BROADBAND STATISTICS: OECD BROADBAND PENETRATION AND GDP PER CAPITA (2007), <http://www.oecd.org/sti/ict/broadband> (follow “OECD broadband penetration and GDP per capita”). In determining these rankings, the OECD defines broadband as “having download speeds equal to or faster than 256 kbit/s.” ORG. FOR ECON. CO-OPERATION AND DEV., OECD BROADBAND SUBSCRIBER CRITERIA, <http://www.oecd.org/sti/ict/broadband> (follow “OECD Broadband Criteria”).

230. Timothy Karr, *The Cure for America's Internet*, HUFFINGTON POST, June 3, 2008, [http://www.huffingtonpost.com/timothy-karr/the-cure-for-americas-int\\_b\\_104963.html](http://www.huffingtonpost.com/timothy-karr/the-cure-for-americas-int_b_104963.html).

231. See ORG. FOR ECON. CO-OPERATION AND DEV., OECD BROADBAND STATISTICS, AVERAGE ADVERTISED BROADBAND DOWNLOAD SPEED, BY COUNTRY (2007), <http://www.oecd.org/sti/ict/broadband> (follow “Average Advertised Broadband Download Speed, by Country (October 2007)”) (noting an average speed of 8.860 Mbps in the United States, compared to 93.693 in Japan, 44.157 in France, and 43.301 in South Korea, respectively ranked 1st, 2nd and 3rd); ORG. FOR ECON. CO-OPERATION AND DEV., OECD BROADBAND STATISTICS, BROADBAND AVERAGE MONTHLY SUBSCRIPTION PRICE (2007), <http://www.oecd.org/dataoecd/22/44/39575002.xls> [hereinafter OECD 2007 MONTHLY SUBSCRIPTIONS REPORT] (noting an average subscription rate in the United States of \$53.06, last measured in October 2007); see also Organisation for Economic Co-operation and Development, OECD Broadband Portal, <http://www.oecd.org/sti/ict/broadband> (last visited Feb. 15, 2009) [hereinafter OECD Portal] (listing other reports).

232. For example, the Information Technology and Innovation Foundation (ITIF) ranked the United States fifteenth in its 2008 broadband rankings. THE INFORMATION TECH. & INNOVATION FOUND., 2008 BROADBAND RANKINGS, <http://www.itif.org/files/2008BBRankings.pdf>. Similarly, the British telecommunications research firm Point-Topic Ltd. placed the United States 17th among developed countries in broadband deployment. Peter Svensson, *Is U.S. Stuck in Internet's Slow Lane?*, MSNBC.COM, Oct. 30, 2007, <http://www.msnbc.msn.com/id/21549824/>.

233. PEW INTERNET & AM. LIFE PROJECT, HOME BROADBAND ADOPTION 2008, at i (2008) [hereinafter PEW 2008 BROADBAND REPORT], [http://www.pewinternet.org/ppf/r/257/report\\_display.asp](http://www.pewinternet.org/ppf/r/257/report_display.asp).

234. *Id.* at ii, 3 (classifying as economically disadvantaged or “poor” those households with annual incomes of \$20,000 or less).

while 60% of survey respondents living in suburban communities reported having household broadband access, only 38% of respondents in rural communities reported having such access.<sup>235</sup>

Recent data for American Internet penetration also show persistent disparities across racial, ethnic, income, educational, generational, and geographical strata. Given generational differences in familiarity and comfort with computers generally, it may not be surprising that, whereas 90% of people between the ages of 18 and 29 report using the Internet regularly, only 35% of people over 65 report regular use.<sup>236</sup> More surprising, however, is that whereas 76% of non-Hispanic whites report regular Internet use, only 56% of non-Hispanic African-Americans do.<sup>237</sup>

A 2007 Pew Research Center comprehensive study of Internet access for and use by Latinos/as revealed similarly troubling disparities. Although Latinos/as already comprise 15% of the U.S. population and are the fastest

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235. *Id.* at 3. Some commentators defend the American performance in the international broadband penetration rankings by noting the size of the American land mass compared to the more densely populated and compact nations with much more favorable broadband statistics. For example, FCC Chairman Kevin Martin wrote, "Given the geographic and demographic diversity of our nation, the U.S. is doing exceptionally well. Comparing some of the leading countries with areas of the U.S. that have comparable population density, we see similar penetration rates." Kevin Martin, Op-Ed., *Why Every American Should Have Broadband Access*, FIN. TIMES (Asia Ed.), Apr. 2, 2006, <http://www.ft.com/cms/s/2/837637ee-c269-11da-ac03-0000779e2340.html>. In reality, however, Sweden and Canada have less population density than the United States (measured by rurality) and are significantly higher in the rankings than the United States. See Mark Lloyd, *The Broadband Divide: Rural Access Lags Far Behind Cities*, CENTER FOR AM. PROGRESS, Oct. 23, 2007, at 2 (arguing that "the big difference" is that both Canada and Sweden "have national policies aimed at promoting broadband deployment, with a particular emphasis on service to rural areas"). Five of the fourteen nations ranked higher than the United States in the OECD rankings—including sixth-ranked, Iceland—have population densities lower than that of the United States. See *Testimony of Benjamin Scott on Behalf of Consumer Federation of America, Free Press and the Consumers Union Before the S. Comm. on Commerce, Science and Transportation Regarding Communications, Broadband and Competitiveness: How Does the U.S. Measure Up?* (Apr. 24, 2007), at 12, available at <http://www.freepress.net/files/42407bssentestimony.pdf> [hereinafter *Scott Congressional Testimony*] (citing December 2006 OECD penetration versus population density comparisons). Nevertheless, the FCC continues to argue, most recently in a June 2008 report, that "in making international comparisons, it is important to account for differences in geography and population distribution, given the economics of density in supplying broadband." Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 23 F.C.C.R. 9615, 9647 (2008).

236. See PEW INTERNET & AM. LIFE PROJECT, DEMOGRAPHICS OF INTERNET USERS (2008) [hereinafter PEW 2008 INTERNET DEMOGRAPHICS REPORT], [http://www.pewinternet.org/trends/User\\_Demo\\_7.22.08.htm](http://www.pewinternet.org/trends/User_Demo_7.22.08.htm). The survey of 2,251 adults (with a margin of error of +/-2%) was based on the following questions: "Do you use the Internet, at least occasionally?" and "Do you send or receive e-mail, at least occasionally?" *Id.*

237. *Id.*



growing minority group,<sup>238</sup> only 56% use the Internet regularly and only 29% have broadband Internet access at home.<sup>239</sup> Language and educational attainment are two of the causes cited for the significant disparity in Latino/a Internet use.<sup>240</sup> Educational attainment generally, across all races and ethnicities, correlates with levels of Internet access and use. Whereas 93% of college-educated Americans are regular Internet users, only 38% of those who lack a high school diploma claim regular use.<sup>241</sup> And whereas 57% of Americans residing in urban areas report subscribing to broadband at home, only 38% of rural Americans do.<sup>242</sup>

*i. Availability*

The government estimates that approximately 10% of American households cannot subscribe to terrestrial broadband service if they desired to do so because no carrier provides the service in their area.<sup>243</sup> But the FCC's statistics purporting to show that 90% of the country has access to true broadband service have been resoundingly criticized as inaccurate. Until June 2008 the agency required broadband service providers to report broadband service based only on zip codes, without distinguishing between commercial and residential users.<sup>244</sup> This overly broad-stroked data collection resulted in the government's classification of entire zip code areas, which in rural territories can encompass many square miles, as being served by broadband when in reality only one commercial customer on the

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238. See Sam Roberts, *A Generation Away, Minorities May Become the Majority in U.S.*, N.Y. TIMES, Aug. 14, 2008, at A1 (noting that by 2050, Latinos/as will account for 30% of the American population, tripling in number to 133 million).

239. See PEW INTERNET & AM. LIFE PROJECT, LATINOS ONLINE i–ii (2007), [www.pewinternet.org/pdfs/Latinos\\_Online\\_March\\_14\\_2007.pdf](http://www.pewinternet.org/pdfs/Latinos_Online_March_14_2007.pdf).

240. The Pew study found that among Latinos/as who only speak Spanish, only one in three use the Internet. *Id.* at iii. Moreover, because 41% of Latinos/as do not have high school diplomas (compared to 10% of non-Hispanic whites and 20% of non-Hispanic African-Americans), Pew reasons that their average lower educational attainment contributes to the Internet use and access disparity. *Id.* at i–ii.

241. PEW 2008 INTERNET DEMOGRAPHICS REPORT, *supra* note 236. Of the cohort who have a high school diploma but lack a college degree, 66% are regular Internet users, and 87% who have some college education but lack a degree are regular users. *Id.* In terms of broadband access among these cohorts, 70% of Americans with a college degree have broadband access at home, whereas only 21% of Americans without a high school diploma and 34% of Americans with a high school diploma but no college degree have such home broadband access. PEW 2008 BROADBAND REPORT, *supra* note 233, at 3.

242. PEW 2008 BROADBAND REPORT, *supra* note 233, at 3.

243. GOV'T ACCOUNTABILITY OFFICE, GAO-06-426, BROADBAND DEPLOYMENT IS EXTENSIVE THROUGHOUT THE UNITED STATES, BUT IT IS DIFFICULT TO ASSESS THE EXTENT OF DEPLOYMENT GAPS IN RURAL AREAS 18 (2006) [hereinafter GAO 2006 BROADBAND REPORT].

244. *Id.* at 14–16; see also *infra* note 498 and accompanying text (describing the FCC's June 2008 decision to improve broadband data collection practices following widespread and longstanding criticism).

edge of the territory subscribed to broadband.<sup>245</sup> Moreover, the FCC's definition of broadband had encompassed any Internet service with download speeds of above 200 Kbps (kilobits per second)—a speed that is not much higher than dial-up and drastically below the speed required for delivering many of broadband's innovative services.<sup>246</sup> This has caused some commentators to dismiss the U.S. government's broadband penetration figures as inflated and unreliable.<sup>247</sup> Telecommunications industry analyst Mark Lloyd noted that “the truth of the matter is that over 10 years after the 1996 Telecom Act we don't really know where advanced telecommunications services are deployed in America.”<sup>248</sup>

*ii. Cost*

In addition to racial, ethnic, and geographic disparities, the related differences in household income account for the persistence of the digital divide. Among households with annual incomes above \$75,000, 95% report being regular Internet users,<sup>249</sup> and 82% have household broadband access.<sup>250</sup> But among households with annual incomes below \$30,000, only 53% report using the Internet at all<sup>251</sup> and a mere 42% have household broadband service.<sup>252</sup> This income-based access disparity is largely explained by the fact that household broadband access remains expensive throughout most of the United States.<sup>253</sup> Americans, in fact, pay

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245. See GAO 2006 BROADBAND REPORT, *supra* note 243, at 14. The GAO noted that “[c]ompanies report service in a zip code even if they only serve businesses.” *Id.* at 16. It found “that in some zip codes more than one of the large established cable companies reported service. Because such providers rarely have overlapping service territories, this likely indicates that their deployment was not zip-code-wide and that the number of providers reported in the zip code overstates the level of competition to individual households.” *Id.*

246. For example, anything less than 10 Mbps (50 times the speed of the FCC's threshold) would be inadequate to accommodate high-quality video, real-time interactivity, and many telemedicine applications. See Grant Gross, *California Broadband Report Offers Model for Other States*, PC WORLD, Jan. 19, 2008, <http://www.pcworld.com/printable/article/id,141536/printable.html>.

247. See, e.g., Mark Lloyd, *Raise the Bar on Broadband*, CENTER FOR AM. PROGRESS, July 18, 2007, <http://www.americanprogress.org/issues/2007/07/broadband.html> (referring to the FCC's 200 Kbps benchmark as “slowband”).

248. Lloyd, *supra* note 235.

249. PEW 2008 INTERNET DEMOGRAPHICS REPORT, *supra* note 236.

250. PEW 2008 BROADBAND REPORT, *supra* note 233, at 3.

251. PEW 2008 INTERNET DEMOGRAPHICS REPORT, *supra* note 236.

252. PEW 2008 BROADBAND REPORT, *supra* note 233, at 3.

253. The OECD October 2007 statistics for average monthly broadband subscription prices place the United States among the most expensive member nations, with a monthly average subscription price of \$53.06, compared to Germany at \$39.62 (USD), the United Kingdom at \$39.67 (USD), South Korea at \$37.81 (USD), Turkey at \$37.03 (USD), and Poland at \$39.04 (USD). OECD 2007 MONTHLY SUBSCRIPTIONS REPORT, *supra* note 231; see also Allen S. Hammond, *The Digital Divide in the New Millennium*, 20 CARDOZO ARTS

significantly higher monthly subscription rates for broadband Internet service that is not as widely available as and significantly slower than broadband services available in many other developed nations. For example, compared to the average U.S. broadband monthly subscription rate of \$53.06 for an average download speed of 8.9 Mbps (megabits per second), Japan has an average broadband subscription rate of \$41.05 (USD) for broadband service at average download speeds of 93.7 Mbps<sup>254</sup>—over ten times faster (and more capacious) than the average broadband service in the United States. In other words, a video of a two-hour legislative hearing that in Japan could take three minutes to download could take well in excess of one hour to download in many American broadband homes.

What is of even more concern is that the relative standing of the United States in the OECD surveys is trending downward. As the OECD penetration and subscription figures show, the United States continues to fall behind the rest of the developed world in broadband penetration, pricing, and quality of service. And the FCC's own data show that broadband adoption in the United States has been *slowing* since 2004.<sup>255</sup>

### iii. *Why Is Broadband Important?*

The focus of this Article is on *broadband* instead of Internet access in the broader sense because the most vibrant democratic engagement online is not as present in the e-mail and plain-text narrowband realm as much as it is in broadband. In fact, in a 2008 study, the Pew Internet and American Life Project revealed remarkable differences in the online experiences between dial-up and broadband users, with “broadband” defined as access delivered by cable modem, DSL, or similar high-speed connection.<sup>256</sup> Broadband users engage in significantly more activities involving interactive expression, political engagement, and political information gathering.

For example, on a “typical day,” household broadband users were almost three times as likely to use their connection to search for information about the 2008 election and four times as likely to visit a state or local government website, to watch a video on a video-sharing website like

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& ENT. L.J. 135 (2002) (examining income disparities as a principal cause of the digital divide).

254. See OECD 2007 MONTHLY SUBSCRIPTIONS REPORT, *supra* note 231; OECD Portal, *supra* note 231. In France, the average monthly broadband subscription price is \$44.77 (USD) for service that averages an advertised download speed of 44.2 Mbps. *Id.*

255. FED. COMM'NS COMM'N, INDUS. ANALYSIS & TECH. DIV., WIRELINE COMPETITION BUREAU, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF JUNE 30, 2006, at 1–3 (2007), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-270128A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf).

256. PEW 2008 BROADBAND REPORT, *supra* note 233, at 5, 19.

YouTube, or to download a podcast.<sup>257</sup> Broadband users were five times as likely to visit a blog, more than twice as likely to use a social networking website like MySpace or Facebook, and twice as likely to create or work on their own blog.<sup>258</sup>

In addition, home broadband users are significantly more likely than dial-up users to access news websites, look for information related to a personal hobby or interest, do employment-related research, use Wikipedia, or peruse the blogosphere.<sup>259</sup> They also are significantly more likely to create and post original content to the Internet, including blog and discussion posts and graphical content.<sup>260</sup> Few would question, in fact, that the increase in household broadband connectivity has driven much of the rise of amateur, collaborative creativity and innovation—from Wikipedia and YouTube to the creation of new open-access software models.<sup>261</sup>

Today's online population—especially in the highly expressive fora accessible primarily via broadband—is much wealthier, more highly educated, younger, more suburban, and significantly less racially and ethnically diverse than the general population. It cannot be said, therefore, that today's Internet is conducive to open and inclusive deliberative democratic discussion. Online political and other fora are open only to those who can afford to subscribe and, if so, have broadband service available in their communities. Because so many Americans are left offline, there is no openness and equality of access, and therefore no true deliberative democracy, in the broadband public sphere.<sup>262</sup>

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257. *Id.* at 19.

258. *Id.*

259. *Id.* In 2007, Pew concluded that “a high-speed, ‘always on’ connection clearly allows users to engage frequently in a wider range of online activities than dial-up users.” PEW INTERNET & AM. LIFE PROJECT, HOME BROADBAND ADOPTION 2007, at 11, [http://www.pewinternet.org/pdfs/PIP\\_Broadband%202007.pdf](http://www.pewinternet.org/pdfs/PIP_Broadband%202007.pdf).

260. See PEW INTERNET & AM. LIFE PROJECT, THE BROADBAND DIFFERENCE: HOW ONLINE AMERICANS’ BEHAVIOR CHANGES WITH HIGH-SPEED INTERNET CONNECTIONS AT HOME 3 (2002), [http://www.pewinternet.org/PPF/r/63/report\\_display.asp](http://www.pewinternet.org/PPF/r/63/report_display.asp).

261. See YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 33 (2006) (noting that the wider accessibility of personal computers and broadband connectivity has spurred the creation of Wikipedia and innovative software); see also Terry Fisher, Professor & Dir., Berkman Ctr. for Internet & Soc’y, Harvard Univ., The Future Digital Economy: Digital Content—Creation, Distribution and Access, Dinner Speech at Meeting Organised Jointly by the Italian Minister for Innovation and Technologies and the Organisation for Economic Co-operation and Development 2–3 (Jan. 30, 2006), <http://www.oecd.org/dataoecd/16/44/36138608.pdf> (crediting broadband networks with the rise in amateurism in the creation of a new digital culture).

262. Network theorist Albert-László Barabási, at the conclusion of a web-mapping project, wrote, “The most intriguing result . . . was the *complete* absence of democracy, fairness, and egalitarian values on the Web.” ALBERT-LÁSZLÓ BARABÁSI, LINKED: HOW EVERYTHING IS CONNECTED TO EVERYTHING ELSE AND WHAT IT MEANS FOR BUSINESS, SCIENCE, AND EVERYDAY LIFE 56–57 (2003).

### C. Private Censorship

Despite the cyberlibertarians' utopian vision of the Internet as an engine of free speech—as well as both Congress's<sup>263</sup> and the Supreme Court's<sup>264</sup> own early characterizations of the Internet as a fertile substrate for autonomous expression—in reality the Internet is a haven for private censorship. News and blog websites can offer users a diverse and substantively rich trove of information, but as is the case with broadcasting, the ability of the viewer or reader to respond with his or her own expression is not guaranteed online.<sup>265</sup>

In privatizing the Internet, Congress privatized control over online expression as well, largely removing that expression from the First Amendment's protective reach.<sup>266</sup> In addition, the First Amendment public-forum doctrine—through which the Supreme Court has accommodated speech in public spaces—would not apply to the vast majority of websites, since they do not constitute government spaces analogous to sidewalks, streets, or other public areas open to free speech.<sup>267</sup>

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263. See, e.g., Communications Decency Act of 1996, § 230(a)(3), 47 U.S.C. § 230(a)(3) (2000) (calling the Internet “a forum for a true diversity of political discourse”).

264. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 853 (1997) (characterizing the Internet as a “vast platform from which to address and hear from a worldwide audience” and claiming that “[a]ny person or organization with a computer connected to the Internet can ‘publish’ information”).

265. See Anick Jesdanun, *Is It Censorship or Protection? In Monitoring Online Content, Internet Companies Are Judge and Jury*, WASH. POST, July 20, 2008, at A3 (discussing the power of service providers to limit expression on their websites, such as the posting of images on a photo-sharing service).

266. Professor Dawn C. Nunziato, one of the first scholars to examine the problem of Internet censorship, argues in a pathbreaking article that “[w]hat follows from such privatization is that today there are essentially no places on the Internet where free speech is constitutionally protected.” Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1130 (2005). Congress codified the privatization of Internet content control by means of § 230 of the 1996 Communications Decency Act, in which it absolved interactive computer service providers (including both ISPs as well as website owners) from liability both for content posted by third parties and for voluntary actions to remove “objectionable” material, “whether or not such material is constitutionally protected.” Communications Decency Act of 1996, § 230(c)(2), 47 U.S.C. § 230(c)(2) (2000).

267. See Varona, *supra* note 68, at 190–94 (2006) (providing an overview of the Supreme Court's public forum analysis). In brief, the Supreme Court has identified three First Amendment classifications for public property: “traditional” public fora, “designated” public fora, and “nonpublic” fora. The Court considers traditional public fora as being those government-owned spaces that “have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens and discussing public questions.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). In these traditional public fora, the “government may not prohibit all communicative activity” and must show that any content-based restriction on speech satisfies strict scrutiny and is necessary to serve a compelling state interest. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). “Designated” public fora are government-owned spaces that are not traditional public fora, but that the government intentionally has opened

Thus, despite the popular notion that the Internet is one big public forum, in fact the Internet exists as a limitless agglomeration of websites and fora, with the vast majority owned by private, nongovernmental entities that are not at all subject to the anticensorship requirements imposed by the First Amendment.<sup>268</sup>

### 1. *Censorship on Social Networking and News Media Websites*

Virtually all of the most popular websites, particularly those that host a significant quantity of political discussion and public debate, are privately controlled and regularly enforce Terms of Service (ToS) provisions allowing for the removal of any user-posted content at the website owners' sole discretion. For example, the popular social networking website Facebook, which has played an unprecedented role as an organizing vehicle in the 2008 presidential election,<sup>269</sup> warns in its Terms of Use that the website "may delete or remove (without notice) any Site Content or User Content in its sole discretion, for any reason or no reason."<sup>270</sup> Many highly

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to some public expressive use (like municipal auditoriums and public meeting rooms). Once opened to the public at large, any speech restrictions in designated public fora also are subjected to First Amendment strict scrutiny. *Id.* at 45–46. Some courts have used the terms "designated" and "limited" interchangeably, although others have referred to limited public fora to refer to fora designated for use by only a certain class of speakers or for only certain types of speech. *See* *Sumnum v. Callaghan*, 130 F.3d 906, 916 (10th Cir. 1997); *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 182 n.2 (3d Cir. 1999). Access and speech restrictions in nonpublic fora, meaning public property that is both not traditionally regarded as a platform for public expression and not intentionally opened for public discourse, survive review "so long as the distinctions drawn are reasonable in light of the purpose served by the forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

268. *See* Nunziato, *supra* note 266, at 1121 (noting that there is currently very little free speech protection on the Internet); Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998); Stacey D. Schesser, *A New Domain for Public Speech: Opening Public Spaces Online*, 94 CAL. L. REV. 1791 (2006) (discussing the lack of public fora online); Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 206–10 (1998) (discussing the need for "cybersidewalks" on the largely privatized web).

269. *See* Brian Stelter, *The Facebooker Who Friendened Obama*, N.Y. TIMES, July 7, 2008, at C1 (discussing how the presidential campaign of then-Senator Barack Obama relied on the Internet to "raise more than two million donations of less than \$200 each" and cheaply and quickly mobilize supporters during the primaries). According to the *Washington Post*, Obama said, "One of my fundamental beliefs from my days as a community organizer is that real change comes from the bottom up . . . . And there's no more powerful tool for grass-roots organizing than the Internet." *Id.*; *see also* Jose Antonio Vargas, *Grass Roots Planted in Cyberspace*, WASH. POST, Mar. 30, 2007, at C1 (detailing former Senator Edwards's enthusiastic adoption of social networking sites as a tool for recruiting supporters during the presidential primaries).

270. Facebook.com, Terms of Use, <http://www.facebook.com/terms.php> (last visited Sept. 22, 2008). The other top social networking website, MySpace, has very similar ToS policies and has a long record of censoring user-generated content, including deleting content relating to competitor sites, deleting content critical of its owner, Rupert Murdoch,

rated television network and newspaper websites with interactive fora hosting lively discussions on political, cultural, and other matters—many with particularly localized themes—are governed by similar ToS policies.<sup>271</sup> For example, the “Rules of Engagement” for the discussion fora on the CBS News website concedes that “what is not allowable is subjective” and requires that comments be “polite and civil”—“no bathroom humor, no comparing anyone to Hitler, Stalin, or Pol Pot.”<sup>272</sup> Many newspapers’ websites prohibit “insult[s].” One warns specifically that it removes posts “calling someone a moron, idiot, etc.”;<sup>273</sup> another prohibits comments that are “hurtful,” “vulgar,”<sup>274</sup> or “in poor taste”;<sup>275</sup> yet another will delete comments “you wouldn’t say in front of your mother at the dinner table.”<sup>276</sup>

Popular websites hosting user-generated video and text, like YouTube, MySpace, and LiveJournal, also have engaged directly in (or have allowed users to commit) censorship that would violate the First Amendment if it occurred in a public space.<sup>277</sup> For example, in August 2008, MySpace

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and deleting nonsexual content concerning homosexuality. See Kristen Nicole, *MoveOn Openly Battling MySpace Censorship*, MASHABLE.COM, May 18, 2007, <http://mashable.com/2007/05/18/moveon-myspace/>.

271. For example, the *Los Angeles Times* warns readers who post comments to the company’s website ([www.latimes.com](http://www.latimes.com)) that “[a]ny decisions as to whether User Content violates any Posting Rule will be made by latimes.com in its sole discretion.” LATimes.com, Terms of Service, <http://www.latimes.com/services/site/lat-terms/0,6713384.htmlstory> (last visited Sept. 14, 2008). On the *San Diego Union-Tribune* website ([www.signonsandiego.com](http://www.signonsandiego.com)), the company warns posters that it “reserve[s] the right to remove posting privileges of any user who violates [the Terms of Use] or for any other reason.” SignOnSanDiego.com, Terms of Use, <http://www.signonsandiego.com/about/privacy/terms-of-use.html> (last visited Sept. 14, 2008) (emphasis added). The Walt Disney Internet Group websites, which include the interactive site for ABC News and the ABC owned-and-operated television and radio stations, are governed by ToS that reserve to Disney “the right to screen, refuse to post, remove or edit User-Generated Content at any time and for any or no reason in our absolute and sole discretion without prior notice, although we have no duty to do so or to monitor any Public Forum.” Disney.com, Terms of Use, <http://disney.go.com/corporate/legal/terms.html> (last visited Nov. 29, 2008).

272. Rules of Engagement, CBSNews.com, <http://www.cbsnews.com/stories/2005/10/20/utility/main959709.shtml> (last visited Oct. 21, 2008).

273. BillingsGazette.net, Talk Back Commenting Policy, <http://billingsgazette.net/info/?h/commentpolicy/> (last visited Oct. 21, 2008).

274. SignOnSanDiego.com, *supra* note 271.

275. LATimes.com, *supra* note 271.

276. Editorial, *Understanding the Surge*, Pool Rules—Leave a Comment Interface, METROWESTDAILYNEWS.COM, July 25, 2008, <http://www.metrowestdailynews.com/opinions/editorials/x2109422824/Editorial-Understanding-the-surge> (free registration required).

277. See, e.g., Benjamin Smith, *Internet Vulnerable to Free Speech Issues*, POLITICO, May 10, 2007, at 1, available at <http://www.politico.com/news/stories/0507/3919.html> (detailing several instances where YouTube removed user videos that would have been protected if the First Amendment applied, including the removal of a video featuring

deleted pictures uploaded by parents of a fully clothed child who had survived burn injuries as an infant but still showed significant facial scarring, claiming that the pictures were “offensive” and a violation of the website’s ToS.<sup>278</sup> The website threatened to delete the parents’ entire MySpace account if they reposted the pictures, which showed the boy engaged in mundane activities such as eating.<sup>279</sup>

## 2. *Censorship in the Blogosphere*

Many observers tout the unique ability of bloggers to, in the words of David Kline, “combine information with debate,” leading “to a strengthening of the civic mindedness of the citizenry” and to “extraordinarily high levels of political participation.”<sup>280</sup> For example, in launching his blog with Professor Gary Becker, Judge Richard Posner wrote that “the [I]nternet enables the instantaneous pooling (and hence correction, refinement, and amplification) of . . . ideas and opinions, facts and images, reportage and scholarship.”<sup>281</sup> Although the collective *blogosphere* may be what Professor Cass Sunstein calls “a kind of gigantic

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presidential candidate John McCain singing “Bomb, Bomb Iran”). YouTube administrators can take down videos at their own initiative or in response to the “flagging” by users of content that may be a violation of the company’s ToS. *Id.* In addition, anyone uploading a video to YouTube can opt to delete all of the comments posted in reaction to the video that disagree with or otherwise have a negative reaction to its contents. YouTube Help Center, Video Comments: Removing Comments on My Videos, <http://www.google.com/support/youtube/bin/answer.py?hlrm=en&answer=56112> (last visited Aug. 8, 2008); see also Declan McCullagh, *Mass Deletion Sparks LiveJournal Revolt*, CNETNEWS.COM, May 30, 2007, [http://news.cnet.com/Mass-deletion-sparks-LiveJournal-revolt/2100-1025\\_3-6187619.html](http://news.cnet.com/Mass-deletion-sparks-LiveJournal-revolt/2100-1025_3-6187619.html) (reporting on the outrage following LiveJournal’s deletion of 500 websites hosted on its service on the grounds that they promoted sexual abuse of minors and “other illegal activities,” but encompassing many websites with no such content, including a website hosting Spanish-language discussions of the Nabokov novel *Lolita* and a number of science fiction websites). Barak Berkowitz, the chairman and chief executive of LiveJournal’s parent company, defended the actions: “Our decision here was not based on pure legal issues—it was based on what community we want to build and what we think is appropriate within that community and what’s not.” *Id.*

278. Patrick Donovan, *Pictures of Burned Indiana Child Banned from MySpace*, NBCNEWS.COM, Aug. 28, 2008, <http://www.ksdk.com/news/world/story.aspx?storyid=153281>.

279. The child’s father, Billy McComb, said, “Regardless of what he looks like he’s still a child—he’s not a monster.” *Id.*

280. David Kline, *Toward a More Participatory Democracy*, in *BLOG! HOW THE NEWEST MEDIA REVOLUTION IS CHANGING POLITICS, BUSINESS, AND CULTURE* 1, 11 (David Kline & Dan Burstein eds., 2005).

281. Richard Posner, *Introduction to the Becker-Posner Blog*, Dec. 5, 2004, [http://www.becker-posner-blog.com/archives/2004/12/introduction\\_to\\_1.html](http://www.becker-posner-blog.com/archives/2004/12/introduction_to_1.html). Judge Posner writes that blogging is “a fresh and striking exemplification of Friedrich Hayek’s thesis that knowledge is widely distributed among people and that the challenge to society is to create mechanisms for pooling that knowledge.” *Id.*



town meeting,”<sup>282</sup> many individual *bloggers*, as nongovernmental, private actors, can and often do censor visitor comments, thereby distorting the tenor and flow of discussions. Others disallow public participation altogether.

For example, Arianna Huffington’s metablog website, the *Huffington Post*, which refers to itself as “the Internet newspaper,” has been widely accused of censoring posts in a politically slanted manner.<sup>283</sup> Huffington, a self-avowed liberal, revealed that among the “certain obvious things” the moderators do not allow to be posted are “conspiracy theories.” “If you thought Sept. 11 was caused by the Bush Administration, your comment is not going to appear unless it is a mistake.”<sup>284</sup> Conservative blogger Michelle Malkin warns commentators on her website that she “reserve[s] the right to delete your comments or revoke your registration for any reason whatsoever.”<sup>285</sup> In 2006, Malkin herself complained of having a video “highlighting the victims of Islamic violence” inappropriately removed from YouTube.<sup>286</sup>

### 3. *Censorship by Broadband Providers*

Not only is there rampant censorship by individual website owners, but there are increasing reports of censorship by broadband service providers themselves. Many of these instances involve expression concerning important political, legal, and social controversies. For example, in September 2007, Verizon Wireless refused to carry text messages sent by NARAL Pro-Choice America urging political action to its enrolled and prospective members.<sup>287</sup> One month earlier, AT&T had temporarily

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282. CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 185 (2006).

283. See, e.g., *Huffington Post Censors Posts Favorable to Palin or McCain*, Sept. 1, 2008, <http://saywhatyoureallymean.blogspot.com/2008/09/huffington-post-censors-posts-favorable.html>.

284. Daniel Libit, *The Commentocracy Rises Online*, POLITICO.COM, July 24, 2008, <http://www.politico.com/news/stories/0708/11890.html>.

285. MichelleMalkin.com, Terms of Use, <http://michellemalkin.com/terms-of-use/> (last visited Sept. 22, 2008).

286. Michelle Malkin, *Banned on YouTube*, Oct. 4, 2006, <http://michellemalkin.com/archives/006048.htm?print=1> (questioning whether any criticism of jihad would qualify as inappropriate “hate” under YouTube’s ToS); see also Tom Zeller, Jr., *A Slippery Slope of Censorship at YouTube*, N.Y. TIMES, Oct. 9, 2006, at C5 (positing that, as part of a “campaign to spit-shine its image and, perhaps, to look a little less ragtag to potential buyers,” YouTube removed especially incendiary political videos from the site, including Michelle Malkin’s “First They Came” video denouncing Islamic intolerance).

287. See Adam Liptak, *Verizon Rejects Text Messages from an Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, at A1 (noting that a sample message was “End Bush’s global gag rule against birth control for world’s poorest women! Call Congress. (202) 224-3121. Thnx! Naral Text4Choice”); Jeffrey Gold, *Verizon Reverses Text-Messaging Decision*, STAR-LEDGER, Sept. 28, 2007, at 66 (following public outcry, senior Verizon Wireless

censored a webcast of a concert by Pearl Jam during a Lollapalooza celebration in which the band's lead singer replaced regular lyrics to their hit "Daughter" with "George Bush, leave this world alone; George Bush find yourself a home."<sup>288</sup> In 2006, one of the largest cable modem-based broadband providers in the nation, Comcast, was accused of blocking access to AfterDowningStreet.com, the website run by a grassroots organization known for activism against the Iraq war.<sup>289</sup> The blocking continued for one week, hampering the group's efforts in organizing a massive protest rally.<sup>290</sup>

In addition, broadband providers have been found to censor communications on their networks that disparage them or otherwise undermine their commercial advantage.<sup>291</sup> For example, Verizon and AT&T disclose to new subscribers that they reserve the right to terminate the accounts of users who use their networks to criticize the companies' business practices.<sup>292</sup> And in 2006, America Online (AOL) was found to be blocking e-mails from a coalition of 600 organizations—including the AFL-CIO and the Gun Owners of America—that circulated an online petition opposing AOL's proposal to charge a premium for bulk e-mail to circumvent the company's filters.<sup>293</sup>

#### 4. *The New Scarcity: Scarce Audience, Abundant "Spectrum"*

A popular response to the problem of legal censorship on the predominantly private Internet is that editorial controls and moderation of user-posted content are necessary to preserve civility and focus on especially popular websites. Without these controls, the vitriolic, obscene, or abusive speech of vandals and the uncivil would drive away other

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executives determined that the decision not to allow the text messages was "an incorrect interpretation of a dusty internal policy").

288. See Nate Anderson, *Pearl Jam Censored by AT&T, Calls for a Neutral Net*, ARSTECHNICA.COM, Aug. 9, 2007, <http://arstechnica.com/news.ars/post/20070809-pearl-jam-censored-by-att-calls-for-a-neutral-net.html>; Lawrence Lessig, *Jamming the Pearl*, LESSIG.ORG, Aug. 10, 2007, [http://lessig.org/blog/2007/08/jamming\\_the\\_pearl.html](http://lessig.org/blog/2007/08/jamming_the_pearl.html) ("This censoring event, whether AT&T's 'mistake' or not, should be a rallying point for this [net neutrality] movement.").

289. Greg Piper, *No Harm Yet for Content, VoIP from Network Owners, Bells Say*, COMM. DAILY, Mar. 24, 2006.

290. *Id.*

291. See DAWN C. NUNZIATO, NET NEUTRALITY, FREE SPEECH, AND DEMOCRACY IN THE INTERNET AGE 16–19 (forthcoming 2009), *preface available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1266365](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266365).

292. *Id.* at 17 (citing AT&T Worldnet, AT&T DSL Service Subscriber Agreement, <http://worldnet.att.net/general-info/terms-dsl-data.html> (last visited Oct. 21, 2008)); *see also* Verizon Internet Services, Inc., Online Terms of Service, [http://www.verizon.net/policies/popups/tos\\_popup.asp](http://www.verizon.net/policies/popups/tos_popup.asp) (last visited Oct. 21, 2008).

293. Chris Gaither & Joseph Menn, *AOL Blocks Critics' E-Mails*, L.A. TIMES, Apr. 14, 2006, at C1.

participants and destroy the forum.<sup>294</sup> These are important concerns. In *Democracy in America*, Alexis de Tocqueville noted that in a democracy, the government rarely needs to regulate speech since “public disapprobation is enough” for the “multitude . . . to coerce those who do not think like themselves.”<sup>295</sup> On the Internet, however, the effect of public disapproval is much weaker thanks to the medium’s allowance of anonymous or pseudonymous expression by speakers not physically proximate to—and therefore not at risk of retribution from—those with whom the speaker disagrees. As a result, some studies show that dissenters are more willing to express their grievances online without fear of social ostracism or disapprobation.<sup>296</sup> On one hand, this bodes well for the diversity and vibrancy of the ideas marketplace online. The expression of dissenting ideas, free from fear of physical retribution, promotes individual autonomy and self-identity, dissipates resentments that may fester into dangerous anger if repressed, and enriches the marketplace. But on the other hand, freedom from social constraints may render much online expression too angry, too coarse, and so abusive that it denies human dignity, silences opposition, and undermines democratic dialogue.<sup>297</sup>

As autonomous speakers protected by the First Amendment, private website owners get to decide the tone and substance of their websites, even if such decisions exclude worthy viewpoints and discriminate against valid modes of expression. Editorial decisions can shape the thematic distinctiveness and identity of a website and, consequently, are themselves an important form of protected expression. Moreover, if someone were blocked from sharing her ideas on one website, then she is free to find another website where the expression would be allowed to stand. Or she

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294. For example, Professor Stephen L. Carter argues that the Internet poses a serious challenge to civility as a result of the preponderance of autonomous, instantaneous expression, and the paucity of thoughtful intermediation. See STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* 193–202 (1998). Carter writes that “President Clinton . . . proclaimed that the Internet is becoming ‘our new town square,’ but I am not sure that this is a town where the student of civility wants to live.” *Id.* at 200.

295. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 261 (Phillips Bradley ed., 1945) (1840).

296. See Tamara Witschge, *Online Deliberation: Possibilities of the Internet for Deliberative Democracy*, in *DEMOCRACY ONLINE*, *supra* note 33, at 109, 115 (discussing a number of empirical studies demonstrating that “anonymity and the absence of social presence . . . can . . . work against a genuine democratic exchange” online).

297. I agree with Professor Kent Greenawalt’s assertion that “[e]xtremely harsh personal insults and epithets directed against one’s race, religion, ethnic origin, gender, or sexual preference pose a problem for democratic theory and practice.” Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 288 (1990). Some researchers have found that *because* of the relative anonymity of Internet interactions, dissenters are subjected to much more “vigorous attack and humiliation” as a result of their unpopular views and often flee the discussion forum as a result. See, e.g., DAVIS, *supra* note 5, at 162, 163.

could avoid having to comply with the quixotic standards of third-party website owners and launch a website all her own, governed by standards she devises.<sup>298</sup>

These defenses to the current state of affairs are not without validity, but they too readily discount the harms of private Internet censorship. First, whereas broadcast spectrum used for channels of programming is exceedingly scarce and the broadcast audience is abundant, the reverse is true on the Internet. As Professor Ellen P. Goodman has observed, “Today, the scarce resource is attention, not programming.”<sup>299</sup> Although there virtually is no limit on the number of Internet “channels” or websites that can be launched, audiences are hard to come by and the vast majority of websites get little or no traffic.<sup>300</sup> Despite the Supreme Court’s idealistic declaration that “any person with [an Internet connection] can become a town crier with a voice that resonates farther than it could from any soapbox,”<sup>301</sup> the reality is that political expression “is less like crying oyez from the central marketplace and more like whispering in a labyrinth.”<sup>302</sup>

Although a speaker whose content was blocked from a well-trafficked website can simply start up her own blog or website, the likelihood is that the uncensored website would receive considerably less traffic than the censored one.<sup>303</sup> Only a tiny percentage of blogs have amassed large audiences. The rest are read by very small numbers of readers or none at

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298. Although this scenario would be less prone to censorship than that of postings to websites controlled by others, it would still be susceptible to censorship and content controls applied by the ISP or platform provider, such as a blog-hosting website like Blogspot.com or LiveJournal.com. See *supra* notes 286–89 and accompanying text.

299. Goodman, *supra* note 8, at 1392. Political scientist Herbert Simon, known for his study of what he called the architecture of complexity, presaged the current condition of attention scarcity when he posited in 1971 that “a wealth of information creates a poverty of attention.” Herbert A. Simon, *Designing Organizations for an Information-Rich World*, Speech at the Johns Hopkins University and Brookings Institute Symposium, in *COMPUTERS, COMMUNICATIONS AND THE PUBLIC INTEREST* 37, 40 (Martin Greenberger ed., 1971), cited in Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Interest Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 13, 16 (2006).

300. See BENKLER, *supra* note 261, at 245 (“Many Web pages and blogs will simply go unread, and will not contribute to a more engaged polity.”).

301. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

302. Noveck, *supra* note 185, at 26. Of course, the notion of the soapbox speaker in the town center attracting an audience with the allure of his or her words and ideas is likely a romantic conceit. As Steven G. Gey notes, “[S]peakers on street corners have rarely been as concerned with communicating Truth as they have been focused on winning converts or motivating those who are already converted.” Gey, *supra* note 268, at 1538–39. Although the soapbox speaker as democratic symbol is “antiquated and somewhat inaccurate,” Gey notes that “it is a myth that is indispensable to democracy.” *Id.*

303. “Many leading services, particularly online hangouts like Facebook, . . . MySpace or . . . YouTube, have acquired a cachet that cannot be easily replicated. To evict a user from an online community would be like banishing that person to the outskirts of town.” Jesdanun, *supra* note 265.

all.<sup>304</sup> In addition, although website owners have been known to reverse their decisions to remove users' content following the protest of the content authors or their supporters, removal of the material in today's very fast-paced media landscape for even a short amount of time can have a very negative effect on the vibrancy and sophistication of online exchanges.<sup>305</sup>

Audience aside, because broadband providers themselves are engaging in content discrimination and have the legal authority and incentive to censor many more of the messages carried on their networks, subscribers may not be as free as some may assume to express themselves on an alternate website. Subscribers whose expression is censored by their broadband carriers are entirely at the mercy of those carriers, since any alternate websites would be transmitted through the same censoring conduit.<sup>306</sup>

### 5. Valuable Dissent Can Be Impolite

Another problem caused by the rampant private censorship online relates to the role of angry or disagreeable language in political discussion and democratic deliberation. The United States was born of heated revolutionary protest, and in light of those origins always has recognized "the essential value of robust, abrasive, uninhibited dissent."<sup>307</sup> Valuable democratic

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304. See Gregory M. Lamb, *A One-Stop Shop for the 'Best' Blogs*, CHRISTIAN SCI. MONITOR, Nov. 30, 2005, at 14 ("Though many of the tens of millions of blogs have few readers, a tiny percentage . . . have won large audiences."); *Blogging: Going Pro*, ECONOMIST, Nov. 18, 2006, at 67 (noting that most blogs are "personal diaries that happen to be online" and "have tiny audiences").

305. See Smith, *supra* note 277, at 8 (observing that in two cases of YouTube censorship, the removed material was restored after protests, "but in the new politics, a few hours offline can make a huge difference").

306. See NUNZIATO, *supra* note 291, at 2 (discussing ability and incentives for broadband providers to censor subscribers' content).

307. HARRY KALVEN JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 235 (Jamie Kalven ed., 1988). There are limits, of course. In 1942, the Supreme Court articulated its "fighting words" doctrine, carving out from First Amendment protection "insults" and other expressions "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). The Court, however, has not upheld a conviction under the fighting words doctrine since *Chaplinsky* was decided, and instead has struck down enforcement of prohibitions on "offensive" language in public places. See, e.g., *Cohen v. California*, 403 U.S. 15, 16, 26 (1971) (overturning conviction of Paul Robert Cohen for wearing a jacket bearing the words "Fuck the Draft" inside a courthouse); see also CONSTITUTIONAL LAW 1013 (Kathleen M. Sullivan & Gerald Gunther eds., 14th ed. 2001) (noting that the Court "has not sustained a conviction on the basis of the fighting words doctrine"). Professor Stephen W. Gard dismisses the fighting words doctrine as "nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression." Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536 (1980). Yet many share the view of Chief Justice Burger in his *Rosenfeld v. New Jersey* dissent, where the Court summarily vacated the conviction of a defendant who, speaking before a school board meeting attended by at least forty children, referred to teachers and

dialogue in fact can include speech that is angry, coarse, vulgar, and even insulting, and not something one would want to say in front of one's mother at the dinner table. Dissent can be impolite, or impolitic, and still be worthwhile. Although Internet utopians may strive for especially rarified dialogue in their neck of the online woods, the reality is that much online discussion is like offline discussion. It is sometimes rude, crude, and angry.

The Supreme Court has noted repeatedly that criticism of public officials and public figures in particular "will not always be reasoned or moderate."<sup>308</sup> In light of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," the Supreme Court has protected speech that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>309</sup> And political speech described as "vulgar," "offensive," "shocking," or "insulting" is nevertheless protected under the First Amendment in most circumstances; indeed, the Supreme Court noted that ridicule of public officials and figures has "played a prominent role in public and political debate."<sup>310</sup> Dissonance and disagreement, uncomfortable and impolite as they may be, are important in public debate. "However pernicious an opinion may seem," the Supreme Court may find value in it as part of "the competition of . . . ideas."<sup>311</sup>

#### *D. Online Exposure Diversity—The Diminishing Returns of Digital Autonomy*

The ability of traditional broadcasting to serve as a point of common focus has often enabled it to expose large numbers of citizens to some democratically valuable material—like political news, public affairs, and

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school board members, inter alia, as "motherfuckers." See 408 U.S. 901, 904 (1972) (Powell, J., dissenting) (describing the uttered phrase as "m - - - - f - - - -"). Burger wrote, "When we undermine the general belief that the law will give protection against fighting words and profane and abusive language . . . we take steps to return to the law of the jungle." *Id.* at 902 (Burger, C.J., dissenting).

308. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48, 57 (1988) (rejecting Jerry Falwell's defamation and intentional infliction of emotional distress claims against *Hustler* after the latter published a parodic advertisement detailing "a drunken incestuous rendezvous" between Falwell and his mother).

309. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

310. *Hustler*, 485 U.S. at 54–55. When the *New York Times* opened its website postings to public comment in late 2007, it also created a "comment desk" of four part-time staffers assigned to screen all of the submissions before posting them. When one of the moderators warned participants that vitriolic messages would not be posted, some users balked and posted comments such as, "We need an open dialogue in this country, now more than ever," and "Mandating tepid civility in blog comments has an ideological component. 'Politeness' bars sharply worded disagreement by dissenters against those who claim to be authority, but doesn't usually bar dismissive or patronizing arguments by authority against the dissenters." Clark Hoyt, Op-Ed., *Civil Discourse, Meet the Internet*, N.Y. TIMES, Nov. 4, 2007, at 14.

311. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

local news and information—that they otherwise would not have affirmatively sought. By contrast, the Internet’s plethora of largely unmediated and unedited content, and the ability of users to filter out almost all material except that which they specifically seek, has raised significant concerns about its effects on democracy, our sense of local and national community, and political education and participation. As Professor Sunstein has warned, “Unplanned, unanticipated encounters are central to democracy itself.”<sup>312</sup> Democracy depends on diversity.

### 1. *The Importance—and Scarcity—of Heterogeneous Exchange Online*

For truth to gain currency and prominence in a marketplace of ideas, it must be allowed to compete in a vibrant, unbridled trade, with speakers and listeners encouraged to explore widely, inviting serendipitous exchanges, instead of settling for the same handful of familiar “stalls.” Access to diversity is not enough; there also must be a willingness to engage in it. In theorizing that the seminal purpose of the First Amendment was self-governance, Professor Alexander Meiklejohn argued that the duty of citizen-sovereigns was not only to speak, but to hear and consider ideas different from their own.<sup>313</sup> The great sociologist Robert Merton’s work in serendipity teaches us that unexpected, inadvertent research discoveries do not happen entirely by accident, but by means of purposeful, planned exposure to a diversity of information with weak or even no links to the primary task at hand.<sup>314</sup> A mindful openness to the new and unexpected idea can provide an enlightened confirmation of an initial belief or reveal its rooting in a false premise. Mill himself wrote that it was “hardly possible to overrate the value . . . of placing human beings in contact with persons dissimilar to themselves” and “with modes of thought and action unlike those with which they are familiar” since this social dissimilarity has been “one of the primary sources of progress.”<sup>315</sup>

Broadcasters, like newspaper editors, offer their audiences a certain amount of *planned* serendipity—giving viewers, listeners, and readers not

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312. CASS R. SUNSTEIN, REPUBLIC.COM 8 (2001).

313. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 65–66 (Lawbook Exchange 2004) (1948). Professor Meiklejohn wrote that “[w]e listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves.” *Id.* at 66.

314. ROBERT K. MERTON & ELINOR BARBER, THE TRAVELS AND ADVENTURES OF SERENDIPITY: A STUDY IN SOCIOLOGICAL SEMANTICS AND THE SOCIOLOGY OF SCIENCE 140–46 (2004).

315. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 581 (W.J. Ashley ed., Longmans, Green & Co. 1909) (1848), available at <http://www.econlib.org/library/Mill/mlP1.html>.

only what they seek, but also information that they did *not* set out to find yet would be better off knowing. For example, the news of a World Series upset may be followed by a much less prominent story on falling graduation rates in urban high schools. Outside of certain news websites, this planned serendipity is in scarce supply on the Internet.

In the largely private fora of today's Internet, there is not free competition of ideas in central, open gathering spaces, but rather an atomization of attention and a segregation of users by interests and allegiances into a universe of noninteracting websites catering to the likeminded.<sup>316</sup> Although there is abundant debate and discussion online, the exchanges often are internecine dialogues within self-selected affinity groups. For example, DailyKos.com is the top-rated political discussion website, averaging more than 1.4 million visits per day,<sup>317</sup> hosting hundreds of lively discussions at any one time. But its founder is clear about the website's leanings: "This is a Democratic blog, a partisan blog."<sup>318</sup> Given its name, one would assume that another top-rated website, Townhall.com and its thousands of blog discussions, would serve as a platform for a diversity of opinions and ideas. But it too is unapologetically slanted, calling itself "the first conservative web community . . . designed to

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316. Professor Sunstein has written extensively and eloquently about this problem. See CASS R. SUNSTEIN, *REPUBLIC.COM* 3, 23 (2001) (noting that Internet users are able to create their own "Neighborhood Me" or "Daily Me" in which they purposely only encounter and interact with people just like them and ideas with which they agree); CASS R. SUNSTEIN, *REPUBLIC.COM* 2.0, at 63–64 (2007) ("New technologies, emphatically including the Internet, make it easier for people to surround themselves . . . with the opinions of like-minded but otherwise isolated others, and to insulate themselves from competing views. For this reason alone, they are a breeding ground for polarization, and potentially dangerous for both democracy and social peace."). Professor Sunstein further wrote,

A system of individually designed communications options could . . . result in a high degree of balkanization, in which people are not presented with new or contrary perspectives. Such a nation could not easily satisfy democratic and deliberative goals. In such a nation, communication among people with different perspectives might be far more difficult or even impossible. In such a nation, there may be little commonality among people with diverse commitments, as one group caricatures another or understands it by means of simple slogans that debase reality and eliminate mutual understanding.

Sunstein, *supra* note 185, at 1786–87. Professor Stephen L. Carter also has written about the Internet's facilitation of fragmentation. Comparing it to religion, he writes,

The online world seems to be the place to eliminate dissonance more thoroughly than any religion ever did. You can spend your days and nights metaphorically surrounded by anonymous people who will gleefully assure you that your most unlikely fantasies are the reality—gleeful, because you are simultaneously assuring them.

CARTER, *supra* note 294, at 201.

317. See SiteMeter Site Summary, DailyKos.com, <http://www.sitemeter.com/?a=stats&s=sm&dailykos> (last visited Nov. 25, 2008) (showing a daily average of 1.4 million unique visitors).

318. Posting of kos [sic] to Daily Kos, <http://www.dailykos.com/story/2004/11/15/212411/47> (Nov. 15, 2004) (18:23 PDT).



amplify conservative voices in America's political debates."<sup>319</sup>

Blog directory Technorati currently tracks 112.8 million blogs,<sup>320</sup> but one would be hard-pressed to find truly deliberative discussions reflecting a diversity of major political and ideological viewpoints. Although there are likely liberal visitors to conservative websites, or libertarian visitors to socialist websites, it is unlikely that they will feel sufficiently at home to contribute meaningfully to discussions and play any role but that of interloping contrarian. Self-censorship on the part of these dissenting "outsiders" would deprive the rest of the participants of valuable information that may have corrected inaccuracies or misapprehensions in the dominant discourse.<sup>321</sup>

An especially extreme example of the insularity of some public affairs and discussion websites is that of OneNewsNow.com, which is owned by the conservative American Family Association (AFA) and offers "[n]ews from a Christian perspective."<sup>322</sup> As a service to its readers, the AFA news feed automatically replaces certain words in Associated Press (AP) stories, like the word "homosexual" for "gay," since the latter term, according to the website's news director, puts homosexuality "in a positive light."<sup>323</sup> This practice resulted in an AP story about champion sprinter Tyson Gay's having won his Olympic track semifinal being re-headlined for OneNewsNow.com readers as "Homosexual eases into 100 final at Olympic trials" with references to "Tyson Homosexual" throughout the story.<sup>324</sup>

The fragmentation of Internet communities is troubling, especially given the increasing balkanization of the broadcast realm. In the wake of the fairness doctrine's demise, broadcast media and their cable television counterparts have compartmentalized into sectors that have very evidently dispensed with journalistic neutrality in favor of advancing distinct political and ideological agendas. For example, despite its "fair and balanced" slogan, Fox Broadcasting and Fox News Channel advance self-avowedly

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319. About Townhall.com, <http://www.townhall.com/AboutUs.aspx> (last visited Nov. 28, 2008).

320. Welcome to Technorati, <http://www.technorati.com/about/> (last visited Nov. 28, 2008).

321. Professor Sunstein warns that such self-censorship "is a serious social loss," positing that Communism survived throughout Eastern Europe partly because people incorrectly believed that it was widely supported. CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 81–82 (2003) ("The fall of Communism was made possible by the mounting disclosure of privately held views, which turned pluralistic ignorance into something closer to pluralistic knowledge.").

322. OneNewsNow.com, <http://www.onenewsnow.com/general.aspx?id=1202> (last visited Nov. 28, 2008).

323. Al Kamen, *I Feel Pretty and Witty and . . . What?*, WASH. POST, July 2, 2008, at A13.

324. *Id.*

conservative, Republican-slanted versions of the news.<sup>325</sup> By contrast, MSNBC and Air America Radio are known to slant in favor of liberal perspectives.<sup>326</sup> Public radio has been characterized as favoring liberal ideologies, while commercial talk radio for the most part favors conservative ones.<sup>327</sup> Fulsome debate and dissension within these bulwarks are not especially welcome, as exemplified by the self-proclaimed “dittoheads,” the listeners who call in to the program of top-rated talk radio host Rush Limbaugh and are put through the call screeners to (almost always) agree with him.<sup>328</sup> During the 2008 presidential campaign, a Washington, DC broadcast group owner renamed its two area AM talk stations “McCain 570” and “Obama 1260,” with hosts and programming dedicated exclusively to conservative and liberal slants, respectively.<sup>329</sup>

Fragmentation online also should concern us in light of how the nation as a whole is becoming increasingly segregated in terms of where we live, in what journalist Bill Bishop and sociologist Robert G. Cushing have called “the big sort.”<sup>330</sup> According to Bishop and Cushing, the nation is

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325. See Timothy Noah, *Fox News Admits Bias!*, SLATE, May 31, 2005, <http://www.slate.com/id/2119864/> (asserting that despite the “fair and balanced” slogan, “[n]o fair-minded person actually believes that Fox News is unbiased”). Fox News London Bureau Chief Scott Norvell wrote in the May 20, 2005 version of *Wall Street Journal Europe*, “Even we at Fox News manage to get some lefties on the air occasionally, and often let them finish their sentences before we club them to death and feed the scraps to Karl Rove and Bill O’Reilly. . . . Fox News is, after all, a private channel and our presenters are quite open about where they stand on particular stories. That’s our appeal.” See Scott Norvell, *An Aunt with an Attitude*, WALL ST. J. EUR., May 20, 2005, at A6.

326. See, e.g., Howard Kurtz, *MSNBC, Leaning Left and Getting Flak from Both Sides*, WASH. POST, May 28, 2008, at C1 (noting that MSNBC “has clearly gravitated to the left in recent years and often seems to regard itself as the antithesis of Fox News”); William G. Mayer, *Why Talk Radio Is Conservative*, 156 PUB. INT. 86, 86 (2004) (describing Air America as “the creation of a group of wealthy entrepreneurs and venture capitalists who . . . are using their resources to promote a left-wing agenda”).

327. See Mayer, *supra* note 326, at 88–91 (discussing the overwhelming dominance of conservatives on commercial talk radio stations, and acknowledging critics’ view that noncommercial stations affiliated with National Public Radio (NPR) “already provide[] a liberal voice on the airwaves”).

328. See David Finkel, *Dialing for Dittos*, WASH. POST MAG., June 12, 1994, at W9–10 (describing dittohead John Cavallo’s repeated attempts to call in to Rush Limbaugh’s talk radio program and noting that “there’s nothing he and Limbaugh disagree on”).

329. See Michael Calderone, *On the Dial: McCain 570 vs. Obama 1260*, POLITICO.COM, Oct. 2, 2008, [http://www.politico.com/blogs/michaelcalderone/1008/On\\_the\\_dial\\_McCain\\_570\\_vs\\_Obama\\_1260\\_.html](http://www.politico.com/blogs/michaelcalderone/1008/On_the_dial_McCain_570_vs_Obama_1260_.html) (noting that Obama 1260 featured noted liberal personalities Rachel Maddow, Stephanie Miller, and Ed Schultz, while McCain 570’s lineup included conservatives Bill Bennett, Laura Ingraham, and Michael Savage).

330. See generally BILL BISHOP & ROBERT G. CUSHING, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 45–49 (2008). “As Americans have moved over the past three decades, they have clustered in communities of sameness, among people with similar ways of life, beliefs, and, in the end, politics.” *Id.* at 5. President Jimmy Carter won the White House in 1976 with 50.1% of the popular vote, but with only 26.8% of voters residing in “landslide counties,” defined as counties where President Carter won or lost by 20% or more. In 2004, when President George W. Bush

sorting itself into “balkanised communities whose inhabitants find other Americans to be culturally incomprehensible.”<sup>331</sup> Our self-segregation into likeminded groups in both the online and brick-and-mortar worlds exposes us to fewer contrary viewpoints and ultimately makes us more insular and extreme in our views.<sup>332</sup> That, in turn, makes broader public discussions much more polarized and angry at those moments when the fragments reconvene.<sup>333</sup>

## 2. *Beyond Gatekeepers, Beyond Fences—Finding Truth in the Data Smog*

*Wired* Editor in Chief Chris Anderson celebrates the “infinite choice” of content online—what he calls the “long tail”—as providing users with the ability to transition from an “or” culture, which restricts us to a sequence of zero-sum choices from a menu of options compiled by media conglomerates, to an “and” culture that affords us the luxury of having it all (or at least thinking that we do).<sup>334</sup> By transcending “the tyranny of locality” and joining with others online in an appreciative, attentive, and sometimes paying audience, we can satisfy our interests for relatively uncommon or even exotic ideas, books, or music. And as a result, we also make it possible for producers of that material to garner enough attention and income to continue making out-of-the-ordinary contributions to the “paradise of choice” that has taken root online.<sup>335</sup> After all, what may be considered obscure today could, if given an opportunity to survive, earn widespread acclaim in the future.

This is a persuasive perspective especially in light of how broadcasting presents us with a homogenized, narrow, and commercially distorted vision of ourselves and our society, and in so doing marginalizes expression

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won reelection, 48.3% of voters lived in landslide counties. *The Big Sort: Political Segregation*, ECONOMIST.COM, June 19, 2008, [http://www.economist.com/world/unitedstates/displayStory.cfm?source=hptextfeature&story\\_id=11581447](http://www.economist.com/world/unitedstates/displayStory.cfm?source=hptextfeature&story_id=11581447).

331. *The Big Sort: Political Segregation*, *supra* note 330.

332. Bishop warns that “[w]e now live in a giant feedback loop, hearing our own thoughts about what’s right and wrong bounced back to us by the television shows we watch, the newspapers and books we read, the blogs we visit online, the sermons we hear and the neighborhoods we live in.” *Id.*; see also CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at 60–64 (2007) (discussing experiments with homogenous, in-group deliberation, concluding that after such discussions “people are likely to move toward a more extreme point in the direction to which the group’s members were originally inclined”).

333. Professor Sunstein theorizes that the lack of diversity in subgroups of associates generates a pressure to conform and an amplification of common ideologies, whereas exposure to opposing or differing ideas has a dampening effect on ideological rigidity. SUNSTEIN, *supra* note 321, at 4–5 (discussing how judges appointed to ideologically slanted appellate courts tend eventually to conform to the dominant ideology).

334. CHRIS ANDERSON, *THE LONG TAIL* 180 (2006).

335. *Id.* at 17, 162, 168.

outside of the monocultural broadcast norm.<sup>336</sup> The disintermediation of cyberspace counters the agenda-setting power, often illegitimately exercised, of commercial broadcasting. A “symbiosis,” as Professor Glen Reynolds calls it, has emerged between the Internet and mainstream media, with the latter now looking to the former “to decide if something is worth paying attention to.”<sup>337</sup> Consequently, the diversity of online choice may be forcing broadcasting to reflect a broader, more diverse, and more complex society on its airwaves.<sup>338</sup>

Some observers, however, are understandably concerned that such extreme diversity actually has undermined rather than promoted democratic values by drowning democracy-elevating material in an ocean of content that offers little or no political, cultural, or social worth. Whatever their limitations, the editors and other “middlemen” of broadcast and print media play an important journalistic qua democratic role in earning enough public trust and accountability, through time, to direct large-scale attention to important issues of governance and society that audience members would ignore or miss altogether if left to their own devices in digital isolation.<sup>339</sup> Whether bloggers can assume that important attention-focusing role online is in dispute.<sup>340</sup>

Internet polemicist Andrew Keen warns that the “inanity and absurdity” of much online content results in a general mediascape that provides us with “less culture, less reliable news, . . . a chaos of useless information,” and “even disappearance of the truth.”<sup>341</sup> He argues that the “YouTubification of politics is a threat to civic culture” insofar as it “infantilizes the political process, silencing public discourse and leaving

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336. See generally JERRY MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* (1978).

337. Dan Schulman, *Meet the New Bosses*, MOTHER JONES, July–Aug. 2007, at 30.

338. Of course, broadcasters also are desperately looking for new ways to leverage the Internet to shore up their declining business models. David Carr, *Mourning Old Media's Decline*, NYTIMES.COM, Oct. 28, 2008, <http://www.nytimes.com/2008/10/29/business/media/29carr.html> (noting that even as mainstream media *revenue* is rapidly declining, overall media *audiences* are rising, with the *New York Times* employing its website, RSS feeds, and hand-held devices to accommodate the growing preference for alternative news conduits).

339. See ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 187–96 (1999) (arguing that delegating news-filtering duties to “trusted intermediaries” can make consumers “more free” and “more connected to one another”); see also Netanel, *supra* note 152, at 456 (“Whatever their faults, for example, traditional news media have the resources and professional commitment to check facts and verify sources, and we hold them accountable if they do not.”).

340. See Netanel, *supra* note 152, at 456 (“Matt Drudge and other individual online publishers often have neither the financial wherewithal nor the institutional aspiration to meet professional journalistic standards.”).

341. ANDREW KEEN, *THE CULT OF THE AMATEUR* 5, 16 (2007).

the future of the government up to thirty-second video clips shot by camcorder-wielding amateurs with political agendas.”<sup>342</sup> With a paucity of “experts and cultural gatekeepers” online, he quips that “[t]he monkeys take over.”<sup>343</sup> Habermas himself voiced some alarm at the effect the Internet has had on the prominence of public intellectuals in the public sphere: “The price we pay for the growth in egalitarianism offered by the Internet is the decentralized access to unedited stories. In this medium, contributions by intellectuals lose their power to create a focus.”<sup>344</sup>

Not everyone agrees. Political philosopher Dennis Thompson, for example, argues that the Internet’s superabundance of information actually generates more of a demand for experts and mediators to sort through the chaff in search of the wheat. He writes that “[t]he greater the quantity and more variable the quality of information, the greater the demand for authorities who can assess its reliability and relevance.”<sup>345</sup> In addition, there is no shortage of evidence demonstrating how the Internet, and especially the blogosphere, has allowed a diversity of experts to apply their knowledge in a manner sometimes more effective than offline mechanisms for quality control and peer review. For example, in the June 25, 2008 decision of *Kennedy v. Louisiana*, a closely divided Supreme Court banned the death penalty for child rapists.<sup>346</sup> Justice Anthony Kennedy based the majority opinion in part on an assertion that, of the thirty-seven jurisdictions with the death penalty (thirty-six states and the federal government), “only six of those jurisdictions authorize the death penalty for rape of a child,” and the federal government is not among them.<sup>347</sup> Merely three days later, legal blogger Colonel Dwight H. Sullivan revealed in his popular military justice blog that the Court had its facts wrong. The federal government in fact had amended the Uniform Code of Military Justice in 2006 to allow for the death penalty for soldiers convicted of child rape.<sup>348</sup> Justice Kennedy’s majority opinion and Justice Samuel A. Alito, Jr.’s dissent (and apparently the State of Louisiana’s brief) had mistakenly overlooked this relatively new law, as had the mainstream media, including

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342. *Id.* at 68.

343. *Id.* at 9.

344. Jürgen Habermas, Acceptance Speech for the Bruno Kreisky Prize for the Advancement of Human Rights (2007), *quoted in* KEEN, *supra* note 341, at 55.

345. Dennis Thompson, *James Madison on Cyberdemocracy*, in GOVERNANCE.COM, *supra* note 215, at 36–37.

346. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

347. *Id.* at 2653.

348. See Dwight H. Sullivan, *The Supremes Dis the Military Justice System*, CAAFLOG.COM, June 28, 2008, <http://caaflog.blogspot.com/2008/06/supremes-dis-military-justice-system.html> (noting that the National Defense Authorization Act for Fiscal Year 2006 was “right on point”).

their vaunted legal commentators and experts.<sup>349</sup>

Stories similar to Colonel Sullivan's may have promoted Judge Richard Posner to posit in 2005 that, viewed as a journalistic corpus, the blogosphere does a *better* job than traditional media at surfacing and vetting the truth:

The rapidity with which vast masses of information are pooled and sifted leaves the conventional media in the dust. Not only are there millions of blogs, and thousands of bloggers who specialize, but, what is more, readers post comments that augment the blogs, and the information in those comments, as in the blogs themselves, zips around blogland at the speed of electronic transmission. . . . [C]orrections in blogs are also disseminated virtually instantaneously, whereas when a member of the mainstream media catches a mistake, it may take weeks to communicate a retraction to the public.<sup>350</sup>

Judge Posner's argument is a compelling one, and I do not dispute the notion that the blogosphere has valuable self-correcting, truth-vetting tendencies. I am more skeptical, however, of the premise that all or even most visitors to the blogosphere spend enough time and enough focus reading a sufficiently wide array of websites so as to obtain the full benefits of the blogosphere as a "collective enterprise." It is true that many blogs link to the same top stories in rapid succession, and that especially popular blogs attract the attention of both the mainstream media and the rest of the blogosphere. But it is unlikely that a reader of just a handful of websites would get the full benefit of the blogosphere's checks and balances, particularly if the websites on that reader's daily diet of blog reading are especially inured to criticism and correction from bloggers elsewhere on the web. In fact, recent studies have found that despite the Internet's expansive breadth, most users visit a small number of favorite websites, and not necessarily those with high readership and journalistic standards.<sup>351</sup> Professor Matthew Hindman's recent research on the behavior of Internet users notes that the number of websites an average Internet user visits is so

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349. On the basis of Colonel Sullivan's post, the *Washington Post* editorialized in favor of reopening the case in light of the Court's error. See Editorial, *Supreme Slip-Up: A Recent High Court Ruling Is Factually Flawed. The Justices Should Correct It*, WASH. POST, July 5, 2008, at A14.

350. Richard A. Posner, *Bad News*, N.Y. TIMES, July 31, 2005 (book review), at 1, 10. In effect, the blogosphere is a collective enterprise—not 12 million separate enterprises, but one enterprise with 12 million reporters, feature writers and editorialists, yet with almost no costs. It's as if The Associated Press or Reuters had millions of reporters, many of them experts, all working with no salary for free newspapers that carried no advertising.

*Id.* at 11.

351. See, e.g., Matthew Hindman, *A Mile Wide and an Inch Deep: Measuring Media Diversity Online and Offline*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 328 (2007) (discussing the paradoxical nature of online media diversity).

small that “the diversity of media outlets that citizens use many be smaller online than in traditional media.”<sup>352</sup> He cautions that “[i]t may be true that every web site has a voice—but most speak in a whisper and a powerful few have a megaphone.”<sup>353</sup>

While it is widely accepted that the blogosphere has enriched political dialogue and held government and mainstream media accountable, it is also true that the Internet’s destruction of the old twenty-four-hour news cycle has had negative effects. The former daylong cycle afforded media an opportunity to prioritize news items and lead with “headlines.” It allowed readers and viewers an opportunity to analyze and digest the news. And it permitted newsmakers at least some time to craft thoughtful responses for the next day’s news. The “always on” blogosphere today has resulted in an atmosphere of incessant news production in which, as described succinctly by Professor Lili Levi, “blogs can goad mainstream media into sloppy, responsive reporting and create partisan swarms that can distract media coverage and lead to excessive defensiveness on the part of mainstream outlets.”<sup>354</sup> The round-the-clock, incessant oscillation between digital reporting and official government response has left little time for digestion, reflection, and the exercise of journalistic diligence.

The Internet has subverted the edit-then-publish norm of traditional media with a new reliance on the “wisdom of the crowd” to serve as a post hoc editorial check in the new publish-then-edit online culture. This instant publication has allowed the Internet to respond quickly to events and controversies, sometimes in positive ways.<sup>355</sup> But the prevalent lack of editorial control brings new meaning to former British Prime Minister James Callaghan’s famous quip that “[a] lie can be halfway around the world before truth has got its boots on.”<sup>356</sup> On the Internet, a mistruth can circle the world several times and be featured in countless websites, with convincing pictures, text, and discussion, before truth even awakes. Once it does, it will need more than boots to counter online falsity.

The Internet has become a breeding ground for rumor-mongering,

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352. *Id.* at 328; *see also id.* at 337 (“[A]udiences on the World Wide Web appear even more tightly focused than those of more traditional media . . . . Online, a smaller number of outlets have consistently garnered a larger share of the total audience.”).

353. *Id.* at 345.

354. Levi, *supra* note 197, at 692. Professor Levi also observes that “the blogosphere does seem to contain some strikingly partisan, extremist, and caustic rhetoric, which some fear will enhance political polarization and undermine reasoned political debate.” *Id.* at 693 (citing Kenneth Jost & Melissa J. Hipolit, *Blog Explosion*, CQ RESEARCHER, June 9, 2006, at 511).

355. *See supra* notes 197–203 and accompanying text.

356. *Jim Callaghan: A Life in Quotes*, BBCNEWS.COM, Mar. 26, 2005, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/3288907.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/3288907.stm).

defamation, and misinformation.<sup>357</sup> E-mail and websites were used to insist during the 2008 presidential campaign that Barack Obama had radical Muslim ties.<sup>358</sup> Although the Obama campaign used its own website to counter these rumors, as of July 2008, 12% of those surveyed continued to say that they believed Obama to have such ties and 25% of those surveyed said they did not know what Obama's religion is.<sup>359</sup> Similarly, for four months a biographical entry on Wikipedia, the user-generated online encyclopedia that has gained enormous popularity and even status as an authoritative research tool, falsely reported that former Robert F. Kennedy aide John Seigenthaler, Jr. had been involved in the assassinations of both Senator Robert Kennedy and his brother, President John F. Kennedy.<sup>360</sup>

### *E. Localism and Community Building Online*

Despite being available in almost all populated localities of the nation, the Internet is not yet a source of distinctly local political and public affairs content across the nation. In rejecting the "diversity index" the FCC devised in 2003 to facilitate its liberalization of broadcast ownership restrictions, the Third Circuit in *Prometheus Radio Project v. FCC* concluded that the FCC was wrong to rely on what it called "the virtual universe of information sources" available on the Internet as a source of "local news" and "public affairs programming."<sup>361</sup> The court accurately recognized that although there is much local information on the Internet, the great majority is not the sort of political, democracy-elevating information at the heart of the FCC's longstanding localism principle: "Search-engine sponsored pages such as Yahoo! Local and About.com . . . may be useful for finding restaurant reviews and concert schedules, but this is not . . . 'news and public affairs programming.'"<sup>362</sup> Although the Internet has proved to be useful to localities following natural

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357. See generally DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2007) (exploring the tension between protecting privacy and safeguarding free speech).

358. See James Barron, *9 Jewish Leaders Say E-mail Spread Lies About Obama*, N.Y. TIMES, Jan. 16, 2008, at A20 (discussing the anonymous "hateful e-mails" which circulated for months, spreading lies about President Obama's intentions).

359. See FightTheSmears.com, *The Truth About Barack Obama's Faith*, <http://my.barackobama.com/page/invite/Christian> (last visited Sept. 22, 2008) (dispelling the myths behind President Obama's faith); Michael Dimock, *Belief That Obama Is Muslim Is Durable, Bipartisan—but Most Likely to Sway Democratic Votes*, PEW RESEARCH CTR., July 15, 2008, <http://pewresearch.org/pubs/898/belief-that-obama-is-muslim-is-bipartisan-but-most-likely-to-sway-democrats> (noting that the belief that then-Senator Obama was Muslim did not affect the Republican voters, but did affect certain Democratic voters).

360. See JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 138 (2008) (detailing circumstances surrounding Wikipedia incident).

361. 373 F.3d 372, 406–07 (3d Cir. 2004).

362. *Id.*



disasters and other emergencies,<sup>363</sup> the court was correct in observing that there is a paucity of permanent, interactive websites devoted to primarily local or municipal political or other public affairs.<sup>364</sup>

As noted in Part I, the FCC's policymaking in the area of broadcast localism has been murky, but there is general scholarly agreement that localism is an instrumentalist policy—not an end in itself, but a means to the closely linked objectives of political and cultural enrichment.<sup>365</sup> Governance in the United States is atomized and localized by constitutional design. The decentralization of democracy enables citizens to “learn,” personalize, and experiment with democracy at the neighborhood level. Society can thereby respond to the specialized interests of individual citizens while forming a strong foundation and substrate for democratic information and innovation, all for the benefit of state and federal government.<sup>366</sup> Policies promoting media provision of local political and public affairs content support not only these local deliberative democratic efforts, but also the closely related objectives of promoting a sense of local community and culture and a spirit of neighborliness and shared enterprise.<sup>367</sup> By valorizing coverage of local political, educational, commercial, and even agricultural news on commercial broadcasting stations,<sup>368</sup> the FCC endeavored to preserve what was distinct about local

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363. See, e.g., Keith Axline, *Craigslist Versus Katrina*, WIRED.COM, Sept. 1, 2005, <http://www.wired.com/medtech/health/news/2005/09/68720> (discussing how classified advertising website Craigslist provided much-needed help to victims of Hurricane Katrina in the New Orleans area, helping locate missing persons and matching survivors in need of assistance with relief personnel).

364. See *Prometheus Radio*, 373 F.3d at 372 (holding that the FCC inappropriately weighted the Internet as a substitute for local television stations in diversity index); see also, e.g., James E. Scott, “E” the People: Do Municipal Government Web Sites Support Public Involvement?, 66 PUB. ADMIN. REV. 341, 349 (2006), available at [http://www.ppmrn.net/images/resources/scott\\_2006.pdf](http://www.ppmrn.net/images/resources/scott_2006.pdf) (reporting results of survey involving official government websites of 100 largest American cities, and concluding that “[i]n general, our research found very little evidence that U.S. municipal Web sites support significant public involvement”).

365. See NAPOLI, *supra* note 42, at 205 (stating that localism has traditionally been perceived as a way to achieve broader social objectives).

366. See *id.* (noting that localism has figured in the design and functioning of social institutions and has played an important role in “the distribution of governmental control in the United States”); see also Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 394 (1990) (paraphrasing Gerald Frug’s argument that transfer of power to local governments will enhance political participation of individuals); Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1153–54 (1980) (concluding that the concept of community is probably the most significant aspect of the localism principle).

367. See NAPOLI, *supra* note 42, at 219 (concluding that concept of community is probably the most significant aspect of the localism principle).

368. See Varona, *supra* note 7, at 19 (stating that the FRC required initial station applicants to list weekly programming in entertainment, religious, commercial, educational, agricultural, and fraternal areas).

communities across the United States and prevent network broadcasting from homogenizing the nation into one impersonal “mass society.”<sup>369</sup>

*1. Are Online Communities Undermining Local Communities on Terra Firma?*

There is no disputing the Internet’s ability to foster virtual communities. Its wide availability and relatively open architecture enable geographically, culturally, and socially distant people who share common interests or problems to find one another and form relationships online. The Internet allows users to transcend the limitations of physicality not only by bridging distance but also by preempting prejudgments triggered by social and visual cues and the physical manifestations of socioeconomic status. Its egalitarianism can help bring about pure exchanges of ideas, unencumbered by racist, sexist, ethnic, abilist, ageist, or other biases.<sup>370</sup> At times, perhaps, it may even serve as a rooting medium for Aristotelian “perfect” friendships formed on the basis of mutual admiration of mind rather than extrinsic attributes.<sup>371</sup> A number of recent studies conclude that Internet—and especially broadband—use can promote sociality by helping people make connections online that evolve into in-the-flesh friendships and ultimately wider and deeper social networks.<sup>372</sup>

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369. See NAPOLI, *supra* note 42, at 207–08 (recognizing that “mass society” is viewed as a threat to unique aspects of local communities and noting communications policymakers’ action to preserve local culture).

370. As the famous cartoon by Peter Steiner aptly put it, “On the Internet, nobody knows you’re a dog.” Peter Steiner, *NEW YORKER*, July 5, 1993, at 61. It bears noting, however, that in a study of online deliberation, Professor Lincoln Dahlberg found that some demographic distinctions and privileges offline can reemerge in online discussions: “Participation is, in fact, both quantitatively and qualitatively dominated by those already powerful offline (politically active, educated, white, males).” He particularly found that gender distinctions offline replicated themselves online: “Not only are there many more men than women posting . . . but also a masculine, agonistic style of discourse predominates despite the high level of respect fostered.” See Lincoln Dahlberg, *The Internet and Democratic Discourse*, 4 INFO., COMM. & SOC’Y 615, 626 (2001), available at [http://icrib.ir/articles/pdfs/cd1%5CIngenta\\_Sage\\_Articles\\_on\\_194\\_225\\_11\\_89/Ingenta918.pdf](http://icrib.ir/articles/pdfs/cd1%5CIngenta_Sage_Articles_on_194_225_11_89/Ingenta918.pdf) (noting prevailing nature of masculine online activity to emphasize disproportionate amount of Internet activity by different social groups).

371. ARISTOTLE, *NICOMACHEAN ETHICS* 142–44 (H.G. Apostle trans., Peripatetic Press 1984). “Perfect” friendship, according to Aristotle, is that which is based exclusively on mutual admiration and appreciation of intrinsic qualities and character, instead of extrinsic attributes such as wealth (as in the case of “utilitarian” friendships) or beauty (as with friendships rooted in “pleasure”), which are much less apparent in online exchanges. “Perfect friendship is the friendship of men who are good, and alike in virtue; for these wish well alike to each other *qua* good, and they are good in themselves.” *Id.* at 143. Aristotle cautioned, however, that a perfect friendship “require[s] time and familiarity; for, as the proverb says, it is impossible for men to know each other well until ‘they have consumed together much salt.’” *Id.* at 144. So although cyberspace may birth them, perfect friendships may need terra firma to mature.

372. See CHADWICK, *supra* note 185, at 104–05 (summarizing numerous studies finding

The decentralized, geographically untethered communities forged online in some ways may promote rather than undermine deliberative democracy. Although the concerns raised convincingly by Professor Sunstein and others about the harms of fragmentation and polarization of online discourse are convincing, it is not hard to recognize the value that online meeting spaces provide for geographically dispersed communities of common interest. Habermas himself recognized the benefits of decentralized, subgroup deliberation as helping to hone the viewpoints of subgroups, allowing them to be more legitimately and persuasively presented later on in the broader public sphere.<sup>373</sup> In-group discussion also can enable subgroup members to develop better deliberation skills, thereby enriching the quality of the discourse in the wider discussions both in substance as well as form.<sup>374</sup>

Of course, some communities of interest that have formed discussion and mutual support groups online did so to fill the absence of community-building opportunities in members' geographic localities. A Muslim African-American struggling with isolation and discrimination in a predominantly white and Christian rural area can connect with a community of geographically dispersed peers online and tap into resources—including political training materials and religious fellowship—that otherwise would have been out of reach. Similarly, an intellectually precocious teenager living in an economically and culturally impoverished community with no public museum and with a public library starved of resources can feed an avid interest in modern art by connecting to arts communities online.

Yet despite the Internet's ability to conquer the happenstance of physical proximity in fostering disembodied communities of interest, its power to enhance political engagement in local terra firma communities is underutilized. Some studies, in fact, demonstrate that engagement in online social networking can increase isolation and social disconnection by allowing attenuated interpersonal ties online to displace opportunities for the initiation of deeper relationships with in-the-flesh neighbors nearby.<sup>375</sup>

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that the "Net's effects on actual social networks have tended to be quite positive," including one study that found that "Internet users knew three times as many local people as nonusers and were more likely to talk to their neighbors and to invite them round to their homes").

373. See Jürgen Habermas, *Further Reflections on the Public Sphere*, in HABERMAS AND THE PUBLIC SPHERE 422 (Craig Calhoun ed., Thomas Burger trans., 1993) (explaining that the "contemporary scene has changed," shaping new perspectives in social-scientific research); see also Froomkin, *supra* note 33, at 4.

374. See Habermas, *supra* note 373, at 422. Of course, it would be important to prevent the in-group deliberation from venturing into extremism and polarization, by ensuring that the subgroup indeed does engage regularly with the wider, more diverse public sphere.

375. See, e.g., Michael W. Foley & Bob Edwards, *Is It Time to Disinvest in Social Capital?*, 19 J. PUB. POL'Y 141 (1999) (analyzing "social capital"); NORMAN H. NIE & LUTZ ERBRING, STAN. U. INST. FOR THE QUANTITATIVE STUDY OF SOC'Y, INTERNET AND SOCIETY:

Political scientist Richard Davis, for example, has written about how “[t]he demise of geographical boundaries, so touted as a boon of the Internet, also can reduce a sense of physical community to isolated individuals tied virtually to other isolated individuals but unconnected to those who are actually physically proximate.”<sup>376</sup> By enabling us to satisfy our need for community by relating online with distant digital “neighbors,” the Internet can thwart the democratic benefits inherent in learning how to understand and accommodate the beliefs and needs of neighbors very different from ourselves. Professor William A. Galston posits that “[i]n a diverse democratic society, politics requires the ability to deliberate, and to compromise, with individuals unlike oneself. When we find ourselves living cheek by jowl with neighbors with whom we differ but from whose propinquity we cannot easily escape, we have powerful incentives to develop modes of accommodation.”<sup>377</sup> The Internet provides that “easy escape” for citizens who wish to avoid the hard work of engaging with local community by instead forging online communities with the likeminded. Why engage in the shared enterprise of community-building with proximate but different and even difficult neighbors when one can build one’s ideal community online, entering and exiting it at the click of a mouse?

This propensity of the Internet to exacerbate civic disengagement and the dilution of local community identity clearly works against the communitarian, democratic objectives of the media localism principle. The hyperindividualism of cyberspace may not only make it difficult to engender deliberative democratic values online, but also render users so autonomous from both government and their neighbors that it may undermine democracy in the brick-and-mortar world. Professor Michael Sandel has long bemoaned the unraveling of American civic life and our

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A PRELIMINARY REPORT (2000), available at [http://www.stanford.edu/group/siqss/Press\\_Release/Preliminary\\_Report.pdf](http://www.stanford.edu/group/siqss/Press_Release/Preliminary_Report.pdf) (reporting survey results showing that respondents reporting regular Internet use “feel that it has reduced their time with friends and family, or attending events outside the home”); see also CHADWICK, *supra* note 185, at 84–88 (summarizing the results from numerous studies showing the Internet’s negative social effects).

376. DAVIS, *supra* note 5, at 146.

377. William A. Galston, *The Impact of the Internet on Civic Life: An Early Assessment*, in GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE, *supra* note 215, at 47. Galston concludes that “[o]nline groups can fulfill important emotional and utilitarian needs, but they must not be taken as solutions for our current civic ills.” *Id.* at 56. Andrew Shapiro agrees that “[a]lthough choice is a benefit to the Internet, it’s also a weakness” insofar as “happenstance of location, climate, and natural resources . . . creates dependencies between individuals and groups, and thus creates deep long-lasting communal bonds.” Andrew L. Shapiro, *The Internet Discourages Social Interaction*, in THE INFORMATION REVOLUTION 64 (Laura K. Egenorf ed., 2004).

sense of moral duty to the exercise of politically engaged citizenship.<sup>378</sup> Similarly, Professor Robert D. Putnam has argued that the general trend away from civic and local community engagement and toward more individualistic, consumerist endeavors has contributed to a weakening of the “social capital” we need to sustain a strong and vibrant democracy.<sup>379</sup> It is not difficult to see how the Internet has contributed to, and perhaps even accelerated, these disturbing trends.

### III. OPERATIONALIZING A BROADBAND PUBLIC INTEREST STANDARD

In light of the preceding analysis, it would be reasonable to conclude that the Internet’s evolution, left largely to the commercial marketplace, has fallen far short of realizing the goals of universality: exposure to a diversity of viewpoints and speakers, local political and public affairs content, and a vibrant deliberative democracy in an online marketplace of ideas. Despite the expectation of many cyberlibertarians that freedom from government intervention would enable a vibrant democracy-enriching, deliberative culture to flourish online, what is prevalent today on the Internet is fragmentation, censorship, diffusion, very little use of the Internet for local democratic engagement, and more anarchy and autocracy than democracy. The Internet not only may be failing to support democracy online, it also may be subverting democracy on terra firma.

The question before us, however, should not be what the Internet is doing to our democracy as much as what our democracy, and specifically our government, should be doing on the Internet to help realize its fullest potential as an instrument for deliberative democratic engagement and political expression and education.<sup>380</sup> Toward that end, this Part discusses a number of specific interventions the federal government can undertake in adopting a more proactive role in cultivating the Internet as a democratic instrument. Not all of these proposals are novel, and other scholars have advanced many other good and worthy ideas in support of a more proactive governmental role in promoting digital democracy.<sup>381</sup> These proposals are

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378. See generally MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

379. See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

380. I borrow this idea from Professor Putnam, who eloquently wrote, “The most important question is not what the Internet will do to us, but what we will do with it. How can we use the enormous potential of computer-mediated communication to make our investments in social capital more productive?” *Id.* at 180.

381. See generally *DEMOCRACY ONLINE*, *supra* note 33 (presenting many innovative ideas, theorized as well as realized, involving the use of the Internet for democratic engagement and governance); SUNSTEIN, *supra* note 58, at 190–211 (proposing, inter alia, deliberative domains online, self-regulation, and normative and government subsidies); Patricia Aufderheide, *The 1996 Telecommunications Act: Ten Years Later*, 58 FED. COMM.

not a panacea for all that ails democracy—online and on terra firma. Much more can be done. The interventions below, however, would help realize some of the goals of the broadcast public interest standard—a ubiquitous electronic marketplace of ideas presenting a diversity of viewpoints, local political information, and opportunities for deliberative engagement—in a dynamic, interactive, and capacious digital environment much more capable than broadcasting of achieving some of these objectives.

The proposals are arranged in two interrelated parts. The first discusses opportunities for more affirmative, direct government support for universal broadband access. The second discusses government interventions that, presuming access, would help realize broadband's democratic promise while mitigating some of its antidemocratic tendencies.

### *A. Intensified Federal Efforts in Support of Broadband Universality*

#### *1. Assessing the Challenge*

Universal service has been a longtime goal at the core of American communications policy.<sup>382</sup> Its roots can be traced to the establishment of the American postal system, which achieved nearly ubiquitous access by means of the use of subsidies from profitable, heavily-utilized routes to build out post roads and post offices in more remote and underutilized parts of the nation.<sup>383</sup> Universal service programs found enthusiastic support from the academic community in the second half of the twentieth century, with a new awareness of its positive network externalities—the democratic, social, and economic benefits gleaned by society as the size of the

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L.J. 407, 412–13 (2006) (describing ideas currently in circulation by organizations with interests in nonprofits and suggesting approaches such as encouraging entry of new players, government support for standards-setting, and privileging open access zones in spectrum policy); Goodman, *supra* note 8, at 1465–68 (discussing importance of reform proposals that, inter alia, “boost consumption of and critical engagement with” public service content); SHAPIRO, *supra* note 339, at 203 (discussing detailed proposals for a “PublicNet” discussion space online); Gey, *supra* note 268, at 1535 (proposing doctrinal modifications to public forum doctrine to allow more public access to online spaces).

382. See NAPOLI, *supra* note 42, at 177 (discussing the centrality of universal service in communications regulation); see also Milton Mueller, *Universal Service in Telephone History*, 17 TELECOMM. POL’Y 352, 352 (1993) (noting that “‘universal service’ is one of the most commonly cited principles of telecommunications policy”). The universal service ideal in telecommunications can be traced as far back as Alexander Graham Bell, the telephone’s inventor, who is quoted as declaring that the ubiquity of telephone service is so important to the success of the technology that “a telephone in every house would be considered indispensable.” ROBERT W. GARNET, *THE TELEPHONE ENTERPRISE* 12 (1985).

383. See STARR, *supra* note 7, at 88 (describing the development of the postal service network and noting the formation of 2,476 new routes between 1792 and 1828); see also RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 49 (1995) (discussing Congress’s involvement in the expansion of the postal service system).

communications network grows.<sup>384</sup>

Congress articulated the universal service principle as “mak[ing] available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges.”<sup>385</sup> Although criticized for lacking specific requirements,<sup>386</sup> this statutory language served as the basis for numerous FCC interventions aimed at proliferating low-cost telephone service across the nation.<sup>387</sup> That focus has resulted in telephone service penetration that has leveled off at approximately 94% in

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384. One of the earliest and most influential pieces of scholarship detailing the dynamics of positive network externalities in the expansion of communications networks was by Dr. Jeffrey Rohlfs. Jeffrey Rohlfs, *A Theory of Interdependent Demand for a Communications Service*, 5 BELL J. ECON. & MGMT. SCI. 16 (1974); see also Nicholas Economides, *The Economics of Networks*, 14 INT’L J. INDUS. ORG. 673 (1996) (analyzing the major economic features of networks); LESTER D. TAYLOR, TELECOMMUNICATIONS DEMAND IN THEORY AND PRACTICE 9 (1994) (describing two types of demand externalities associated with the telephone—the call externality and the network externality); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985) (analyzing network externalities derived from the consumption of goods).

385. 1934 Communications Act, 47 U.S.C. § 151 (2000).

386. See, e.g., Larry Pressler & Kevin V. Schieffer, *A Proposal for Universal Telecommunications Service*, 40 FED. COMM. L.J. 351, 368 (1988) (noting that “[p]erhaps no other regulatory goal has been so extensively discussed without an established definition as universal service”); see also NAPOLI, *supra* note 42, at 177 (observing that “the universal service principle has frequently been criticized for lacking a precise definition”); Patricia Aufderheide, *Universal Service: Telephone Policy in the Public Interest*, 37 J. COMM. 81 (1987) (asserting that the phrase “universal service” is used at the FCC without an adequate working definition).

387. See Angela J. Campbell, *Universal Service Provisions: The ‘Ugly Duckling’ of the 1996 Act*, 29 CONN. L. REV. 187, 189 (1996) (noting that the 1934 Communications Act’s universal service provision served as the legislative basis for regulations and policies concerning the averaging of interstate toll rates, using long-distance proceeds to subsidize local toll service, the provision of accessibility services to the hearing impaired, and deeply discounted installation and continuing toll service to low-income households).

The first wave of universal service requirements was aimed at having the monopolist AT&T build out the telephone network to rural and remote areas by means of proceeds generated from surcharges on services to more profitable, densely populated areas. See NAPOLI, *supra* note 42, at 178 (noting that universal service is typically associated “with subsidization policies targeted at low-income and high-cost customers”). Later, the FCC’s universal service policies expanded to allow for the subsidization of telephone service to low-income households by means of surcharges on more profitable business and long-distance services. Campbell, *supra* note 387, at 189; see also Allen S. Hammond IV, *The Telecommunications Act of 1996: Codifying the Digital Divide*, 50 FED. COMM. L.J. 179, 194 (1997) (noting that telephone companies “were allowed to subsidize the cost of serving poor, rural, and other less profitable customers with higher margin clients such as downtown businesses”). The “Lifeline Assistance” and “Link-Up America” telephone access subsidy programs, which provide significant discounts to low-income households for initial telephone installation and continuing service, are funded by the Universal Service Fund, which in turn is administered by the Universal Service Administrative Company, a quasi-governmental entity statutorily charged with coordinating the collection of universal service subsidies from telecommunications providers and funding universal service programs with the proceeds. See Christine M. Mason, *Universal Service in the Schools: One Step Too Far?*, 50 FED. COMM. L.J. 237, 239–40 (1997).

the years since 1995.<sup>388</sup> As noted above, Congress and the FCC also applied universal service objectives to broadcasting.

*a. Existing Federal Efforts to Proliferate Internet Access—Lack of Prioritization*

In contrast to its affirmative interventions toward universal service in telephony and broadcasting, the federal government heretofore has not targeted the proliferation of Internet access, and specifically broadband access, with aggressive federal support. Federal resistance to a more proactive approach to broadband proliferation has been rooted, not only in the market *über alles* mindset of the Reagan Revolution and its progeny,<sup>389</sup> but also in the misapprehension that the Internet is a luxury that the government has no legitimate role in promoting. President George W. Bush's first FCC Chairman, Michael Powell, memorably manifested this perspective in discussing the relatively low penetration rate of computer technologies in low income, rural, and of-color communities. He compared such access to owning a luxury automobile: "You know, I think there's a Mercedes divide. I'd like to have one; I can't afford one."<sup>390</sup> Recent statements from the FCC leadership indicate an increased awareness of the importance of universal access to broadband, but the pronouncements have not been supported by a proactive and comprehensive federal effort to catalyze broadband proliferation.<sup>391</sup> In addition, although details of the proposed federal economic stimulus legislation were starting to be released as this article went to press, its components addressing broadband proliferation were criticized as much too modest to be effective.<sup>392</sup>

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388. See JOSEPH S. KRAEMER ET AL., THE PROGRESS & FREEDOM FOUNDATION, THE MYTHS AND REALITIES OF UNIVERSAL SERVICE, REVISITING THE JUSTIFICATION FOR THE CURRENT STUDY STRUCTURE 6 (2005) (indicating that nationwide telephone penetration had stabilized at about 94% by the mid-1990s).

389. See Hammond, *supra* note 253, at 136–38 (tracing the market-driven approach to Internet and telecommunications proliferation).

390. Frank James, *FCC's Powell Makes Clear Contrast with Predecessor*, CHI. TRIB., Feb. 7, 2001, at N1. Professor Cynthia Lanius, Executive Director of the Rice University Center for Excellence and Equity in Education, responded to Chairman Powell by saying that "the issue is not, 'I don't have a Mercedes.' The issue is, 'I don't have a car.'" Robin Clewley, *I Have a (Digital) Dream*, WIRED.COM, Apr. 27, 2001, <http://www.wired.com/politics/law/news/2001/04/43349>.

391. See Leslie Cavley, *Martin Wants Broadband Across USA*, USA TODAY, Aug. 19, 2008, [http://www.usatoday.com/tech/news/techpolicy/2008-08-19-fcc-martin\\_N.htm](http://www.usatoday.com/tech/news/techpolicy/2008-08-19-fcc-martin_N.htm) (quoting Chairman Kevin Martin's statements that "[t]here's a social obligation in making sure everybody can participate in the next generation of broadband services" and that the FCC should "find new ways to address" that obligation).

392. Spencer E. Ante & Arik Hessendahl, *Broadband Bill Disappoints Nearly Everyone*, BUSINESSWEEK.COM, Jan. 17, 2009, [http://www.businessweek.com/technology/content/jan2009/tc20090116\\_733609.htm?campaign\\_id=rss\\_topStories](http://www.businessweek.com/technology/content/jan2009/tc20090116_733609.htm?campaign_id=rss_topStories).



In the years preceding the 1996 Telecom Act, Congress enacted a number of modest legislative efforts to promote computer and Internet access to the underprivileged. In 1994, Congress passed the Star Schools Program Assistance Act, which required the Department of Education (DOE) to award grants to schools and private–public partnership programs supporting computer-aided instruction to needy children.<sup>393</sup> A handful of other legislative programs concerning public education have encompassed the integration of technology in public school curricula as well as training for teachers on the use of computers in the classroom.<sup>394</sup>

Then, in the 1996 Telecom Act, Congress recognized that “[u]niversal service is an evolving level of telecommunications services”<sup>395</sup> and created the Federal–State Joint Board on Universal Service (Joint Board). Congress tasked the Joint Board with making recommendations to the FCC on universal service standards for new services and on how to spend universal service program funds most effectively.<sup>396</sup> Citing the “public interest, convenience, and necessity”<sup>397</sup> standard, Congress also enumerated the principles that should guide the work of the FCC and the Joint Board, including “just, reasonable, and affordable rates,” “access to advanced telecommunications and information services . . . in all regions of the Nation,” and “access in rural and high cost areas.”<sup>398</sup> The Act also contained a number of provisions collectively known as the “E-Rate” program. Those provisions require the FCC to develop mechanisms to subsidize discounted telecommunications and “advanced” information services (including Internet access) to health care providers, educational institutions, and libraries.<sup>399</sup>

In implementing Congress’s directives, the Joint Board focused its recommendations for expanded universal service mechanisms on maximizing access to telephony-based telecommunications services.<sup>400</sup> It concluded that household-level Internet access was not “essential to

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393. 20 U.S.C. §§ 7255–7255f (2006).

394. For an excellent summary of such programs, see Patricia M. Worthy, *Racial Minorities and the Quest to Narrow the Digital Divide: Redefining the Concept of Universal Service*, 26 HASTINGS COMM. & ENT. L.J. 1, 37–38 (2003).

395. Telecommunications Act of 1996, Pub. L. No. 104-104, § 254(c)(1), 110 Stat. 72 (1996).

396. *Id.* § 254(a)(1).

397. *Id.* § 254(b)(7).

398. *Id.* § 254(b)(1)–(6).

399. *Id.* § 254(h). With respect to schools and libraries, the Act required telecommunications carriers upon a request by a qualifying school or library for telecommunications and advanced information services to provide such services “at rates less than the amounts charged for similar services to other parties,” with the amount of the discount to be determined by the FCC as “appropriate and necessary to ensure affordable access to and use of such services by such entities.” *Id.* § 254(h)(1)(B).

400. Federal–State Joint Board on Universal Service, 12 F.C.C.R. 8776 (1997).

education, public health, or public safety,” the guiding principle for universal service set forth in § 254(c)(1) of the 1996 Telecom Act.<sup>401</sup> The FCC adopted the Joint Board’s recommendations, and implemented the 1996 Telecom Act’s E-Rate schools and libraries connectivity programs.<sup>402</sup> Five years later, Congress returned to the technological needs of schools in the No Child Left Behind Act, which in Part D—entitled “Enhancing Education Through the Use of Technology”—provided funding for computer equipment, Internet access, and increased technological training for students and teachers.<sup>403</sup>

*b. Mixed Results in Educational Connectivity Initiatives—Many Children Left Behind and Offline*

In its latest report on Internet penetration into public educational institutions, the DOE claims a progressive increase in the number of public schools and libraries connected to the Internet attributed to the legislative and regulatory connectivity efforts in the 1990s and early 2000s.<sup>404</sup> The DOE reported that by 2005 virtually all American public schools had some sort of Internet access, compared to 3% in 1994.<sup>405</sup> A closer look at the DOE’s statistics, however, paints a much less rosy picture. Although the DOE figures purport to show that virtually all schools have Internet access, the survey data show disparities in the availability of in-classroom Internet access attributed to the predominant racial makeup of the school.<sup>406</sup> Schools with minority enrollment of 21% and higher have 25% fewer

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401. *Id.* at 8823; *see also* Federal–State Joint Board on Universal Service, 18 F.C.C.R. 2947–48 (2002) (declining to find that high-speed or advanced services satisfy the criterion that supported services be essential to education, public health, or public safety). Additionally, the FCC distinguished between the “telecommunications services” addressed by the universal service provisions of the 1996 Telecom Act, and its provisions concerning “information services,” under which Internet services are classified. *Id.* at 2947. This distinction garnered prompt and heated criticism. *See* NAPOLI, *supra* note 42, at 191 (noting that the points of distinction have been hotly contested in policy circles); Sean M. Foley, *The Brewing Controversy over Internet Service Providers and the Universal Service Fund: A Third Generation Interpretation of Section 254*, 6 COMMLAW CONSPECTUS 245, 250 (1998) (contending that the distinction is an unfortunate policy choice based on outdated regulatory terminology).

402. FCC Federal–State Joint Board on Universal Service, 12 F.C.C.R. 8776. For a detailed description of the federal universal service funding programs and mechanisms, *see* NUECHTERLEIN & WEISER, *supra* note 160, at 339–52.

403. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1445, 1623–31, 1646–47, 1671–75 (2001).

404. *See* DEP’T OF EDUC., INTERNET ACCESS IN U.S. PUBLIC SCHOOLS AND CLASSROOMS: 1994–2005, at 1–10 (2006) (presenting key findings from a 2005 survey on Internet access in public schools and selected comparisons with data from previous Fast Response Survey System Internet surveys).

405. *Id.* at 4.

406. *Id.* at 16.

Internet-connected computers for student use than schools with lower than 6% minority enrollment.<sup>407</sup> Access to laptop loans for teacher and student projects also was significantly lower in schools with higher minority enrollments.<sup>408</sup>

In addition, the E-Rate program has been criticized as falling far short of what is necessary to address the lack of broadband connectivity and computer-based instruction in poor urban and rural school districts. For example, the Urban Institute documented that in many rural E-Rate-eligible schools a lack of general technology skills and technical support staff was impeding the incorporation of the Internet-in-the-classroom environment.<sup>409</sup> The Urban Institute concluded that in poor urban schools factors such as weak or nonexistent programs for technology training for teachers, the absence of technical support staff, inadequate electrical connections, and slow and unreliable Internet connections conspire to render E-Rate ineffective in many cases.<sup>410</sup> These conditions in poor schools are especially troubling in light of how poor students living in households with no Internet access often depend on school-based Internet connections for access to online resources.<sup>411</sup> The conditions are also alarming in democratic terms, in light of the Deweyan imperative of public education as vital in the preparation of young people to be politically informed and civically engaged citizens.<sup>412</sup>

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407. *Id.* at 24. Whereas schools with minority enrollment of less than 6% have 3 students per Internet-enabled computer, schools with 21% to 49% minority enrollment have 4 students per such computer, and schools with majority minority enrollment have 4.1 students per computer. *Id.*

408. *Id.* at 16, 30. The Department of Education (DOE) reports that schools with less than 6% minority enrollment were more than twice as likely as schools with 21% or more minority enrollment to lend laptop computers to students for academic projects. *Id.* at 30.

409. See The Urban Institute, *The Integrated Studies of Educational Technology: A Formative Evaluation of the E-Rate Program* viii (2002), [http://www.urban.org/UploadedPDF/410579\\_ERateFinalReport.pdf](http://www.urban.org/UploadedPDF/410579_ERateFinalReport.pdf) (draft).

410. *Id.* The Urban Institute observed that “the mere availability of computers and the Internet does not mean that teachers are making use of what the new technology has to offer.” *Id.* at 5. It cites a number of studies concluding that “it is not simply access to technology that is important for students, but rather how teachers use technology as a tool to enhance learning.” *Id.*; see also *E-Rate Funding Casualties*, TECH. & LEARNING (Apr. 15, 2001), [http://archives.techlearning.com/db\\_area/archives/TL/200104/trendwatch.php](http://archives.techlearning.com/db_area/archives/TL/200104/trendwatch.php) (“Small schools say the 20 to 30 hours of [E-Rate] application time aren’t worth the few thousand dollars they’d receive.”).

411. The National Science Foundation’s 2006 statistics demonstrate that students living in high-income households were about three times as likely than those from poor families to have household-level Internet access (90% versus 32%), and that the same low-income students “were more than twice as likely to use a computer at school than at home . . . while high-income students used computers at only slightly different rates at the two locations.” NAT’L SCI. BD., NAT’L SCI. FOUND., *SCIENCE AND ENGINEERING INDICATORS 2006*, at 1–6 (2006), available at [www.nsf.gov/statistics/seind06](http://www.nsf.gov/statistics/seind06).

412. JOHN DEWEY, *DEMOCRACY & EDUCATION* 1–12 (Macmillan 1916) (arguing that

*c. What Else Is at Stake—Advantages of Household Internet Access Beyond Democratic Engagement*

Although the focus of this Article is on the value of the Internet and particularly broadband access as a tool for expression and democratic engagement, it is important to recognize that household-level access offers very important benefits in closely related areas, including academic achievement, employment, and overall national economic productivity. Michigan State University recently published a two-year study on the academic effects of household Internet access in poor and mostly minority, single-parent families. It concluded that children with Internet at home earned higher standardized reading test scores and higher overall grade point averages than students without Internet access at home.<sup>413</sup> Students' performance improved when they were able to access the Internet at home rather than having to rely on school or library access. Moreover, although the E-Rate program has allowed students whose families cannot afford or otherwise do not have access to household broadband service to use broadband connections at a neighborhood public library, in many cases library hours, location, and crime make it difficult to depend on such access.<sup>414</sup>

Not only is household Internet access important for especially low-income jobseekers, but lack of household access may foreclose some

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education is necessary to build communities and that education consists primarily of communication); see also LAWRENCE K. GROSSMAN, *THE ELECTRONIC REPUBLIC* 247 (1995) (quoting Moses Mather's 1775 declaration that "[t]he strength and spring of every free government is the virtue of the people; virtue grows on knowledge, and knowledge on education"); Jennifer Kathleen Swartz, *Beyond the Schoolhouse Gates: Do Students Shed Their Constitutional Rights When Communicating to a Cyber-Audience?*, 48 *DRAKE L. REV.* 587, 588 (2000) (stating that the Internet has replaced books and letters as the communication device that connects students to the community).

413. Linda A. Jackson et al., *Does Home Internet Use Influence the Academic Performance of Low-Income Children?*, 42 *DEV. PSYCH.* 3 (2006), available at <http://www.apa.org/releases/dev423-jackson.pdf>. The study cohort was comprised of 140 children (average age of 13.8 years), 83% African American, 58% boys and 42% girls, 75% of whom lived in single-parent homes with a median annual income of \$15,000. *Id.* The DOE itself acknowledges that students with home Internet access achieve higher test scores than those who do not. Press Release, Nat'l Ctr. for Educ. Statistics, *The Nations' [sic] Report Card: Science 2000* (Nov. 20, 2001), [http://nces.ed.gov/whatsnew/commissioner/remarks2001/11\\_20\\_2001.asp](http://nces.ed.gov/whatsnew/commissioner/remarks2001/11_20_2001.asp). The DOE studies also demonstrate a strong positive correlation between in-classroom instruction aided by Internet-connected computers and performance in standardized testing. See Worthy, *supra* note 394, at 42–43 (discussing numerous studies correlating instructional computer use with higher academic achievement).

414. See Ian Urbina, *Hopes for Wireless Cities Fade as Internet Providers Pull Out*, *N.Y. TIMES*, Mar. 22, 2008, at A10 (quoting fifteen-year-old Cesar DeLaRosa's statement that "[i]f we don't have Internet, that means I've got to take the bus to the public library after dark, and around here, that's not always real safe").

employment opportunities altogether.<sup>415</sup> The lack of household Internet access also can significantly disadvantage already-employed individuals, since many employers encourage and even expect employees to access the workplace computer servers remotely to do work from home.<sup>416</sup>

In terms of the national competitive consequences, Brookings Institute economist Charles Ferguson warns that the United States' lag in broadband deployment may cause the country to lose \$1 trillion in productivity through 2014.<sup>417</sup> Robert Crandall (also with Brookings) and Charles Jackson estimate that affirmative government promotion of widespread household broadband adoption could generate 1.2 million new jobs and a \$500 billion increase to the U.S. economy.<sup>418</sup> In July 2007, Crandall and several Brookings colleagues published the results of an empirical study on the effects of increases in broadband penetration on economic output and employment.<sup>419</sup> Among many notable findings, the study concluded that with "every one percentage point increase in penetration in a state, employment is projected to increase by 0.2 to 0.3 percent per year," which translates to 300,000 jobs at the national level.<sup>420</sup>

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415. See Worthy, *supra* note 394, at 46 (discussing how "low-income jobseekers are much more likely to rely on the Internet to search for employment than are high-income jobseekers"); see also DEP'T OF COMMERCE, FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION 50 (2000) (finding that the percentage of Internet users searching for jobs on the Internet declines as income increases).

416. New Release, Bureau of Labor Statistics, Work at Home in 2004, at 1, 4 (Sept. 22, 2005), <http://www.bls.gov/news.release/pdf/homey.pdf> (reporting that as of May 2004, 20.7 million people did work at home at least once a week for their primary job and approximately 70% of those people used the Internet).

417. Thomas Bleha, *Down to the Wire*, FOREIGN AFFAIRS, May–June 2005, at 111, 121, available at <http://www.foreignaffairs.org/20050501faessay84311/thomas-bleha/down-to-the-wire.html>.

418. *Id.* ("The large broadband-user markets of Northeast Asia will attract the innovation the United States once enjoyed. Asians will have the first crack at developing the new commercial applications, products, services, and content of the high-speed-broadband era.").

419. ROBERT CRANDALL ET AL., BROOKINGS INSTITUTION, THE EFFECTS OF BROADBAND DEPLOYMENT ON OUTPUT AND EMPLOYMENT: A CROSS-SECTIONAL ANALYSIS OF U.S. DATA (2007), available at [http://www.brookings.edu/reports/2007/06labor\\_crandall.aspx](http://www.brookings.edu/reports/2007/06labor_crandall.aspx).

420. *Id.* at 2. The researchers also concluded that "state output of goods and services is positively associated with broadband use." *Id.* In 2006, Massachusetts Institute of Technology published the results of a study that found that between 1998 and 2002, communities in which broadband service was available by 1999 saw rapid expansion in the number of businesses (i.e., employers) and jobs, particularly in information-technology-specific sectors of the economy. See WILLIAM H. LEHR ET AL., MEASURING BROADBAND'S ECONOMIC IMPACT (2006), available at [http://cfp.mit.edu/publications/CFP\\_Papers/Measuring\\_bb\\_econ\\_impact-final.pdf](http://cfp.mit.edu/publications/CFP_Papers/Measuring_bb_econ_impact-final.pdf). Other commentators have noted that the United States' falling behind other developed nations in broadband penetration will have serious competitive consequences. See, e.g., Bleha, *supra* note 417, at 112 ("By dislodging the United States from the lead it commanded not so long ago, Japan and its neighbors have positioned themselves to be the first states to reap the benefits of the broadband era: economic growth, increased productivity, technological innovation, and an improved quality of life.").

In addition, the nation's lag in broadband penetration and pricing efficiency has inhibited the positive network externalities that come with near-universal broadband availability, such as advances in telemedicine to deliver quality healthcare to more patients (particularly the poor and geographically remote),<sup>421</sup> improved public safety,<sup>422</sup> higher education and distance learning,<sup>423</sup> and employee telecommuting. Telecommuting itself is an important response to traffic congestion, high energy costs, and increased pollution.<sup>424</sup>

President Bush referred to a number of these benefits of universal broadband access in 2004 when he declared that “[w]e ought to have a

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421. See *Broadband Enables Better Health Care at Reduced Cost for More Americans*, HOSP. BUS. WK., Nov. 5, 2007, at 220 (“The expansion of broadband internet service has facilitated the development of telemedicine technologies improving healthcare to more Americans at a reduced cost.”). According to Neil Neuberger, President of Health Tech Strategies, LLC, “[t]he critical prerequisite to success for growing small regional e-health programs into a national healthcare agenda is to bring high-speed broadband to every corner of America.” *Id.*

422. CAL. BROADBAND TASK FORCE, *THE STATE OF CONNECTIVITY: BUILDING INNOVATION THROUGH BROADBAND*, FINAL REPORT 15 (2008), available at [http://www.calink.ca.gov/pdf/CBTF\\_FINAL\\_Report.pdf](http://www.calink.ca.gov/pdf/CBTF_FINAL_Report.pdf) (discussing the effect of ubiquitous broadband on law enforcement and emergency response services in particular).

423. See, e.g., Austan Goolsbee, *Higher Education: Promises for Future Delivery*, in *THE ECONOMIC PAYOFF FROM THE INTERNET REVOLUTION* 269, 269–83 (Robert E. Litan & Alice M. Rivlin eds., 2001) (examining the past and future of the Internet education market).

424. See, e.g., Timothy Karr, *America's Next Moon Shot: Internet for Everyone*, HUFFINGTON POST, June 25, 2008, [http://www.huffingtonpost.com/timothy-karr/americas-next-moon-shot-i\\_b\\_109217.html](http://www.huffingtonpost.com/timothy-karr/americas-next-moon-shot-i_b_109217.html). Karr quotes Robin Chase, the founder of Zipcar, as saying that the Internet “is required for full participation in society today” and is “fundamental to maintaining a high quality of life and for addressing such pressing social problems as America's energy dependency.” *Id.*; see also ROBERT D. ATKINSON, *THE INFORMATION TECHNOLOGY AND INNOVATION FOUND.*, *THE CASE FOR A NATIONAL BROADBAND POLICY* 8 (2007), available at <http://www.itif.org/index.php?id=52> (discussing how widescale broadband deployment increases telecommuting, which is shown to increase individual worker productivity and job satisfaction while reducing traffic congestion, environmental contaminants, and energy use). Brookings Institution economist Robert E. Litan argues that expanded broadband deployment to senior citizens and persons with disabilities would result in cumulative savings and concordant output increases of at least \$927 billion by 2030. ROBERT E. LITAN, *NEW MILLENNIUM RESEARCH COUNCIL*, *GREAT EXPECTATIONS: POTENTIAL ECONOMIC BENEFITS TO THE NATION FROM ACCELERATED BROADBAND DEPLOYMENT TO OLDER AMERICANS AND AMERICANS WITH DISABILITIES* 3 (2005), available at [http://www.newmillenniumresearch.org/archive/Litan\\_FINAL\\_120805.pdf](http://www.newmillenniumresearch.org/archive/Litan_FINAL_120805.pdf). Litan posited that increased broadband penetration in these groups would result in “lower medical costs for both seniors and individuals with disabilities . . . ; lower costs from delayed or avoided institutionalized living arrangements for senior citizens and individuals with disabilities; and additional output made possible by increased labor force participation by individuals in both groups.” *Id.* at 2; see also KRISHNA JAYAKAR & HARMEET SAWHNEY, *BENTON FOUND.*, *UNIVERSAL ACCESS IN THE INFORMATION ECONOMY: TRACKING POLICY INNOVATIONS ABROAD* 10 (2007), available at [http://www.benton.org/benton\\_files/Jayakar\\_Sawhney.doc](http://www.benton.org/benton_files/Jayakar_Sawhney.doc) (concluding that universal broadband access “is not just a social ideal or a redistributive tool, but an economic imperative with consequences for job creation, international competitiveness and individual empowerment”).

universal, affordable access for broadband technology by the year 2007.”<sup>425</sup> But his Administration persisted in relying almost exclusively on marketplace competition to deliver that universality. That reliance was misplaced, as demonstrated by the international household broadband penetration, speed, and pricing comparisons discussed in Part II and the persistent problems in school accessibility discussed in this Part. Professor Lawrence Lessig observes that “[w]hat’s bizarre about where we are in the history of building infrastructure is that this is the first time we have tried to undertake the building of fundamental social infrastructure against the background of a Neanderthal philosophy, which is that you don’t need government to do anything.”<sup>426</sup> As a threshold matter, therefore, the federal government should recognize that broadband access is an essential component of modern infrastructure that not only provides opportunities for democratic engagement and expression, but when universalized, yields significant spillover economic, educational, employment, and other benefits.<sup>427</sup>

## 2. Increasing Direct Federal Subsidies for Broadband Deployment

The government’s efforts at promoting broadband proliferation would not be as modest as they have been if it regarded high-speed Internet as a vital element of the nation’s infrastructure.<sup>428</sup> Faced with a nascent electrical industry that would not extend its networks to less urban areas because of the high costs and low returns associated with nonurban service, President Franklin Roosevelt’s New Deal Administration created a new kind of utility—an electric cooperative—designed to build out electric

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425. Donny Jackson, *President Bush Calls for Universal Broadband*, TELEPHONY ONLINE, Mar. 29, 2004, [http://telephonyonline.com/broadband/web/telecom\\_president\\_bush\\_calls/](http://telephonyonline.com/broadband/web/telecom_president_bush_calls/).

426. Karr, *supra* note 424. Professor Lessig continued:

That Neanderthal philosophy has governed for about the last eight years, and it has allowed us to slide from a leader in this field to an abysmal position. And it’s about time when people recognize that of course the private sector has a role, a central role, maybe the most important role, but it’s never enough.

*Id.*

427. In arguing forcefully in favor of a greater awareness of positive network externalities and the consequences of the far-reaching deleterious digital divide, Professor Allen S. Hammond IV writes that “[t]he network is an evolving national asset critical to our democracy, national defense, education, economic competitiveness, and physical well-being.” Hammond, *supra* note 253, at 156.

428. The discussion in this Article concerning universal broadband service, like the Sections that follow it, focuses on proposals for direct federal intervention. For excellent proposals toward universal service involving regulatory interventions that would entail contributions from telecommunications providers and other cross-subsidies, see Allen S. Hammond IV, *Universal Service: Problems, Solutions, and Responsive Policies*, 57 FED. COMM. L.J. 187, 193–97 (2005).

grids to rural and other underserved areas.<sup>429</sup> The electric cooperatives received significant support from the federal government, including grants, and low- or no-interest loans for the construction of generation plants and distribution towers and lines.<sup>430</sup> Focused, comprehensive, and well-funded federal intervention ensured that all populated areas of the nation were connected to the electric grid.<sup>431</sup> Twenty-five years later, President Dwight D. Eisenhower agreed with Congress to prioritize the construction of an interstate highway system to bridge distances between population centers, spur commerce, and serve the national defense. The federal government allocated \$27 billion in funding over a ten-year period.<sup>432</sup> The economic and social returns on this investment were evident as soon as construction of the 41,000-mile Interstate Highway System commenced.<sup>433</sup>

Despite rhetoric to the contrary, the federal government has not made similar significant investments in helping build out a broadband infrastructure. Although the U.S. Department of Agriculture's (USDA) Rural Utilities Service (RUS) has administered a loan program that has helped fund some local utilities' attempts to build out broadband to underserved areas, the program has been criticized for neglectful management.<sup>434</sup> In addition, experts have criticized the RUS's exclusive reliance on loans—with no agency funds devoted to grants—as counterproductive and woefully inadequate for accelerating broadband deployment in areas neglected by commercial carriers.<sup>435</sup> Testifying before

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429. As Amity Shlaes notes, President Roosevelt had four goals.

The first was to provide electricity to homes and farms—many farms were still without. The second was to increase the use of electricity in all homes, providing Americans with a better standard of living. The third was to reduce the cost of electricity to the average consumer. And there was a fourth, more ephemeral goal: that through the electricity industry the New Deal might create a new and more prosperous form of society.

AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* 175 (2007).

430. Jim Cooper, *Electric Cooperatives: From New Deal to Bad Deal?*, 45 HARV. J. ON LEGIS. 335, 335–45 (2008).

431. See *id.* at 347 (“Electric co-ops eventually reached virtually all potential customers.”).

432. High-Cost Universal Service Support, 23 F.C.C.R. 1539, 1561 (2008) (Copps, Comm’r, approving in part, concurring in part). Commissioner Copps calculated that in 2005 dollars, the \$27 billion allocated in the mid-1950s amounts to \$196 billion. *Id.* at 1561.

433. See Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 313–15 (2000) (noting that the federal government paid 90% of highway construction and maintenance costs).

434. See Dan Morgan & Gilbert Gaul, *Lawmakers May Refocus Rural Internet Financing*, WASH. POST, May 2, 2007, at A5 (noting that despite the program’s mission to help finance broadband deployment in rural areas, the Rural Utilities Service (RUS) has directed more than half of the available loan funds to projects in metropolitan areas).

435. See JOHN WINDHAUSEN, JR., *A BLUEPRINT FOR BIG BROADBAND: AN EDUCAUSE WHITE PAPER* 31 (2008), available at <http://net.educause.edu/ir/library/pdf/EPO0801.pdf>



Congress in October 2007, Curtis Anderson, the USDA's deputy administrator for the RUS, conceded that because companies find it very difficult to craft business models that would ensure repayment of loans used to build out broadband infrastructure in unserved areas, few companies seek the loans, and the RUS often does not exhaust its annual funding.<sup>436</sup>

In addition, the amount of direct subsidies allocated by the federal government for broadband deployment under new funding programs has been roundly criticized as inadequate in light of the enormity of the task, one FCC Commissioner characterizing it as "like fighting a bear with a fly swatter."<sup>437</sup> In November 2007, the Universal Service Joint Board issued a Recommended Decision that addressed federal universal service support for household-level broadband subsidization.<sup>438</sup> The Joint Board recommended that the FCC establish a Broadband Fund charged with "disseminating broadband Internet services to unserved areas" by means of grants for construction of new and upgrading of preexisting but substandard facilities. The Joint Board also recommended that the proposed Broadband Fund be funded by annual federal contributions of \$300 million per year.<sup>439</sup> FCC Commissioner and Joint Board member Michael J. Copps argued that the amount of \$300 million is evidence that "the Joint Board has basically closed its eyes to the level of challenges we

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(positing that this loans-only policy "does not address the needs of high-cost or low-income communities that may desperately need broadband but where the returns may not satisfy traditional commercial criteria"). It bears noting that in 2006 the FCC itself launched a Rural Health Care Pilot Program to provide up to sixty-nine applicants with funding for up to 85% of costs associated with the construction of state or regional broadband networks designed to connect public and private nonprofit health care providers in underserved locations. The pilot program also sought to provide 25% discounts for broadband service to eligible health care providers. See Rural Health Care Support Mechanism, 21 F.C.C.R. 11,111, 11,111–12 (2006) (order); Rural Health Care Support Mechanism, 18 F.C.C.R. 24,546 (2003). None of these funds, however, can be used for residential broadband service.

436. See David Hatch, *Broadband: Rural Internet Program Is Flawed*, *Official Says*, 10 TECH. DAILY 9, Oct. 23, 2007, [http://www.nationaljournal.com/techdaily/tp\\_20071023\\_3.php?related=true&story1=tp\\_20071023\\_3&story2=null&story3=null](http://www.nationaljournal.com/techdaily/tp_20071023_3.php?related=true&story1=tp_20071023_3&story2=null&story3=null).

437. High-Cost Universal Service Support, 23 F.C.C.R. 1539, 1561 (2008) (Copps, Comm'r, approving in part, concurring in part).

438. *Id.* at 1539 (majority opinion).

439. *Id.* at 1543. "Another secondary purpose would be to provide continuing operating subsidies to broadband Internet providers serving areas where low customer density would suggest that a plausible economic case cannot be made to operate broadband facilities, even after receiving a substantial construction subsidy." *Id.* The Joint Board's Recommended Decision also notably recommended that "the Commission revise the current definition of supported services to include broadband Internet service" in order to "effectively declare an explicit national goal of making broadband Internet service available to all Americans" and "legitimize existing support mechanisms that already provide support for broadband-capable facilities." *Id.* at 1553.

face.”<sup>440</sup> For the sake of comparison, the federal budget for Fiscal Year 2009 totals \$3.1 trillion,<sup>441</sup> and Citizens Against Government Waste identified \$380 million in pork barrel spending appropriated to the State of Alaska alone in the last fiscal year.<sup>442</sup>

The current federal financial commitment to broadband proliferation seems especially meager in light of recent predictions that, absent major upgrades to the nation’s broadband infrastructure within the next several years, the domestic broadband network will not be able to satisfy bandwidth demand and Internet service will degrade for most users.<sup>443</sup> Such an outcome would be especially troubling to the nation’s competitive position vis-à-vis other developed countries where national governments’ massive subsidization of broadband deployment has achieved much higher broadband penetration levels at significantly lower prices. For example, the Japanese government subsidized one-third of the cost of building the fiber-optic cable necessary for very-high-speed broadband service to individual homes in Japan (“fiber to the curb”).<sup>444</sup> These direct subsidies were accompanied by significant tax incentives and loans to private carriers deploying fiber to difficult-to-serve locations.<sup>445</sup> For example, the South Korean government prioritized broadband deployment as an economic development strategy and invested \$9.2 billion in subsidies and other direct financial support between 1999 and 2003 alone.<sup>446</sup> Other nations that are significantly ahead of the United States in international broadband

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440. See *id.* at 1561 (Copps, Comm’r, approving in part, concurring in part) (“Bringing broadband to the far corners of the nation is the central infrastructure challenge our country confronts right now” and it is “no different than the challenges previous generations of Americans faced to build the essential infrastructures of *their* times—the roads, turnpikes, bridges, canals, railroads and highways of centuries past.”).

441. OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOV’T, FISCAL YEAR 2009, at 142 (2008), <http://www.whitehouse.gov/omb/budget/fy2009/pdf/budget.pdf>.

442. CITIZENS AGAINST GOV’T WASTE, 2008 CONGRESSIONAL PIG BOOK SUMMARY 2 (2008), available at [http://www.cagw.org/site/DocServer/CAGW-Pig\\_Book\\_08.pdf?docID=3001](http://www.cagw.org/site/DocServer/CAGW-Pig_Book_08.pdf?docID=3001). Citizens Against Government Waste (CAGW) identified a total of \$17.2 billion in what it considered pork barrel spending in the FY2008 federal budget. *Id.* at 1.

443. See WINDHAUSEN, *supra* note 435, at 7 (discussing a November 2007 Nemertes Research study concluding that, in the United States, \$42 billion to \$55 billion in network upgrades would be needed in order to match demand for residential and commercial bandwidth in 2010).

444. *Id.* at 60.

445. See Bleha, *supra* note 417, at 114 (“The [Japanese] government used tax breaks, debt guaranties, and partial subsidies. It allowed companies willing to lay fiber to depreciate about one-third of the cost on first-year taxes, and it guaranteed their debt liabilities.”).

446. See Hannibal Travis, *Wi-Fi Everywhere: Universal Broadband Access as Antitrust and Telecommunications Policy*, 55 AM. U. L. REV. 1697, 1791 (2006) (citing Irene K. Kunii & Moon Ihlwan, *Where Broadband Is Really Booming*, BUS. WK., May 5, 2003, at 88).

proliferation rankings have implemented similar significant government subsidies, including loan and tax supports, far larger than the U.S. federal commitment.<sup>447</sup>

### 3. *Financial, Technical, and Legislative Support for Municipal Broadband and Public–Private Initiatives to Build Out Broadband*

A number of developed nations with significantly wider broadband availability at lower rates than the United States—including France, Japan, and the United Kingdom—have achieved those outcomes as a result of their imposition of common carrier requirements on broadband providers.<sup>448</sup> By contrast, the United States’ deregulatory approach to broadband resulted in the elimination of all common-carrier regulations on broadband services.<sup>449</sup> The classification of both cable modem broadband service and DSL copper-wire-based broadband service as deregulated “information services” under the 1934 Communications Act, as amended, relieved providers of all unbundling, nondiscrimination, and other common carrier requirements.<sup>450</sup>

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447. See WINDHAUSEN, *supra* note 435, at 50–64 (detailing significant direct government supports for broadband deployment in nations such as Canada, the United Kingdom, and France); see also JAMES BALLER & CASEY LIDE, BIGGER VISION, BOLDER ACTION, BRIGHTER FUTURE: CAPTURING THE PROMISE OF BROADBAND FOR NORTH CAROLINA AND AMERICA 45–50 (2008), available at [http://www.e-nc.org/2008/pdf/Broadband\\_report\\_composite.pdf](http://www.e-nc.org/2008/pdf/Broadband_report_composite.pdf) (detailing government financial and other support in Japan, South Korea, China, Sweden, and France, including low-interest or no-interest loans to both private entities and local governments, tax breaks, and grants).

448. See WINDHAUSEN, *supra* note 435, at 47–66 (discussing how many of the nations at the top of the OECD broadband penetration rankings—like France, Japan, and the United Kingdom—had required broadband providers to unbundle their networks and sell component services to competitive resellers in a nondiscriminatory manner).

449. See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 F.C.C.R. 4798, 4802 (2002) (declaratory ruling), *aff’d sub nom.* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2004) (classifying broadband cable-modem services as an “information service” instead of a “telecommunications service” under the 1934 Communications Act, as amended by the 1996 Telecom Act, thereby relieving cable broadband services of common-carrier regulations under Title II); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14,853, 14,858 (2005) (report, order, and notice of proposed rulemaking) (relieving digital subscriber line (DSL) providers of common-carrier obligations); Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, 22 F.C.C.R. 5901, 5914 (2007) (declaratory ruling) (relieving wireless Internet providers of common-carrier regulation); United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, 21 F.C.C.R. 13,281, 13,290 (2006) (opinion and order) (relieving broadband over powerline (BPL) providers of common-carrier obligations).

450. See 1934 Communications Act, 47 U.S.C. §§ 201–203 (2000) (requiring common carriers to provide “just and reasonable” rates and charges, and nondiscriminatory practices).

*a. Cable Modem and DSL Duopoly*

Although Congress and the FCC hoped that this deregulation of broadband services would spur more investment in proprietary networks, interplatform competition, and the proliferation of inexpensive broadband, the result is still “a rigid duopoly that shows few signs of weakening.”<sup>451</sup> In excess of 95% of residential broadband subscribers buy their access from telephone companies (36%) or cable operators (60%).<sup>452</sup> Cable modem and DSL broadband providers have competed minimally in the marketplace, particularly since both cable and telephone companies have profited from entering long-term contracts with upper-income subscribers for “bundled” services that can include local and long-distance telephone service, multichannel video programming, and other services in addition to broadband.<sup>453</sup> And there has been little effective competition from non-wireline broadband providers, such as satellite broadband companies.<sup>454</sup> Initially, broadband over power line (BPL) systems

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451. *Scott Congressional Testimony*, *supra* note 235, at 7. Mr. Scott contended, “While much of the rest of the world has opened up vigorous competition *within* platforms, we have staked our broadband future on competition *between* platforms. So far, it has not worked out . . . .

The lack of price competition between DSL and cable modem is apparent in the marketplace.

*Id.* at 7; *see also* Bleha, *supra* note 417, at 117 (noting that “vigorous multiplatform competition is unlikely to emerge soon”).

452. *See* FED. COMM’NS COMM’N, INDUSTRY ANALYSIS & TECH. DIV., HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF JUNE 30, 2007, at 3 (2008) [hereinafter FCC HIGH-SPEED ACCESS REPORT], *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-280906A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf) (providing data to demonstrate that the majority of broadband subscribers purchase their Internet access from telephone companies or cable operators).

453. *See Scott Congressional Testimony*, *supra* note 235, at 8 (stating that cable and telephone duopolists “have slow rolled deployment, kept prices far above those in other nations, and emphasized bundles of services targeted to upper income Americans built around ‘franchise’ services”); *see also* Aaron Ricadela, *U.S. Broadband Access Slips Further*, *BUS. WK.*, Apr. 25, 2007, *available at* [http://www.businessweek.com/technology/content/apr2007/tc20070424\\_190579.htm](http://www.businessweek.com/technology/content/apr2007/tc20070424_190579.htm) (reporting that the decision not to impose common-carrier obligations on broadband providers “keeps broadband prices high by concentrating delivery in the hands of a few phone and cable companies”).

454. Although satellite Internet services are available in most parts of the country, these services are not considered effective substitutes for terrestrial broadband provision because residents without a clear view of the southern sky or without the ability to affix a receiver dish on the exterior of a household would not be able to use satellite services. *See* GAO 2006 BROADBAND REPORT, *supra* note 243, at 15 & n.15 (stating that although broadband satellite service is deployed, it is not heavily regarded as a strong substitute for other high-speed technologies). Moreover, subscribers who can establish a strong satellite downlink face higher monthly subscription rates than terrestrial broadband for service that is slower than broadband speeds, less reliable, and incapable of accommodating some of the more interactive and innovative bandwidth-intensive Internet services due to the signal delays and interruptions inherent in satellite downlinks. The FCC itself acknowledges that “[w]ith a few exceptions, none of the three most widely subscribed satellite-based Internet access

appeared to be a means to use existing residential wiring to deliver a “third pipe” for broadband service. But initial trials have been disappointing, and obstacles related to interference with radio services, slow speeds, the expense of repeating equipment, and general unreliability have kept BPL from serving as a viable alternative, at least for now.<sup>455</sup>

*b. Municipal Broadband Networks as an Emerging (but Underfunded) Third Option*

Assuming (quite safely) that the wireline broadband market will remain deregulated and that the cable and telephone company duopoly will persist for the foreseeable future, a more proactive governmental approach to promoting broadband proliferation could come in the form of direct financial and other assistance to municipal broadband initiatives. As cable and telephone companies have written off large swaths of the country as unprofitable for broadband deployment, state and local governments have attempted to fill the void by launching low-cost and wide-scale municipal broadband networks—popularly known as “municipal Wi-Fi.”<sup>456</sup> Many of

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services satisfies . . . the Commission’s definition of advanced services, which calls for a minimum transmission speed of in excess of 200 Kbps downstream and upstream.” Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans, 23 F.C.C.R. 9615, 9628 (2008). Similarly, new wireless mobile Internet services for personal communications devices, such as 3G mobile cellular broadband, are not a substitute for high-speed household Internet access for fully functional computing devices. Although these new wireless mobile personal communications devices represent significant progress in Internet connectivity, their connections typically are much slower than residential broadband and often slower than dial-up, carriers impose strict limits on bandwidth use, and they do not enable their users to access many Internet broadband functionalities and utilities (like VoIP). See TIM WU, WIRELESS NET NEUTRALITY: CELLULAR CARTERPHONE AND CUSTOMER CHOICE IN MOBILE BROADBAND 12–14 (2007), [http://www.newamerica.net/publications/policy/wireless\\_net\\_neutrality](http://www.newamerica.net/publications/policy/wireless_net_neutrality) (pointing out the slow speeds and hidden limitations on bandwidth associated with Verizon and AT&T mobile wireless broadband access); see also *Scott Congressional Testimony*, *supra* note 235, at 9 (describing the failure of mobile wireless connections as cable and DSL substitutes due to their slow connections, strict bandwidth caps, and connection limitations).

455. See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 245 (D.C. Cir. 2008) (granting American Radio Relay League’s petition for review and remanding for a new notice-and-comment proceeding of FCC’s 2004 final rule concluding that existing safeguards together with new protective measures would prevent harmful interference from BPL facilities); see also David Coursey, *Why Broadband over Power Lines Is a Bad Idea*, ANCHORDESK, Feb. 27, 2004, available at <http://www.dslreports.com/shownews/Why-broadband-over-power-lines-is-a-bad-idea-39668> (observing that, because BPL relies on radio waves to send signals through the electrical power grid, “[t]he problem with BPL is simple physics: radio waves like to fly off into space” and “[w]hen they do, interference results”); Joe Barr, *Flawed BPL Is No Broadband Panacea*, LINUX.COM, May 17, 2005, <http://www.linux.com/articles/44975> (noting that the major flaw with BPL is the interference it causes with radio communications operating at or near the same frequencies).

456. See generally Craig Dingwall, *Municipal Broadband: Challenges and Perspectives*, 59 FED. COMM. L.J. 67 (2006) (lauding the beneficial aspects of broadband deployment and noting the steps that municipalities can take toward providing accessible

these initial attempts failed because of economic and technical glitches.<sup>457</sup> For example, the City of Philadelphia's 2005 announcement that it would partner with major ISP Earthlink to blanket 135 square miles of metropolitan Philadelphia with free or low-cost broadband prompted many to hope that universal broadband service could be achieved in short order.<sup>458</sup> But the business model for the Earthlink-Philly partnership required the city only to provide free access to municipal rights of way and utility poles while Earthlink bore all of the build-out and maintenance costs with the expectation of realizing profits down the road. That model proved unrealistic, and reception and speed problems discouraged new subscribers.<sup>459</sup> Similar municipal Wi-Fi plans in Chicago, Houston, Miami, and San Francisco find themselves in a predicament similar to Philadelphia's.<sup>460</sup>

The latest iteration of municipal broadband projects appears to be faring better, but these projects require a significant amount of public funding. In Minneapolis and Portland, for example, the ISP partner agreed to build out

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broadband in their regions). Municipal "Wi-Fi," or wireless fidelity, operates by means of wireless transponders located throughout a geographic area that wirelessly connect computer and other digital equipment with compatible digital transceivers—devices that both receive and transmit signals. WiMAX is an emerging technology, sometimes referred to as "Wi-Fi on steroids," which allows a wireless network to be deployed over a large area, such as a neighborhood or subdivision, with fewer transponders and repeater stations than required by standard Wi-Fi deployments. *Id.* at 70–73.

457. See, e.g., Deborah Yao, *Earthlink to Pull Plug on Philly's Wi-Fi*, MSNBC.COM, May 13, 2008, <http://www.msnbc.msn.com/id/24598616/print1/displaymode/1098/> (explaining the economic and technical failures that led to the abandonment of a near-universal Wi-Fi project in Philadelphia); Urbina, *supra* note 414, at A10; Marguerite Reardon, *Facing Economic Realities of Muni Wi-Fi*, CNETNEWS.COM, May 3, 2007, [http://news.cnet.com/Facing-economic-realities-of-muni-wi-fi/2100-7351\\_3-6181058.html](http://news.cnet.com/Facing-economic-realities-of-muni-wi-fi/2100-7351_3-6181058.html) (detailing EarthLink's failure to complete contracts that would have provided municipal Wi-Fi in a number of major American cities).

458. See Yao, *supra* note 457 (reporting EarthLink's failure to adhere to a contract that would have provided municipal Wi-Fi in Philadelphia).

459. See Urbina, *supra* note 414, at 2 (explaining that the failure of EarthLink to continue the municipal Wi-Fi project was due to unforeseen equipment issues, such as requiring more routers than predicted). Among other problems, effective deployment of the network required significantly more equipment than expected, drastically raising the costs for the project and ultimately rendering it unprofitable for Earthlink. *Id.* (explaining that underestimating the amount of routers required for the project was a major flaw in EarthLink's Wi-Fi plan).

460. See *id.* (describing how EarthLink's pullout also affected residents in San Francisco who would have received free citywide wireless); see also Jose Antonio Vargas, *Binary America: Split in Two by a Digital Divide*, WASH. POST, July 23, 2007, at C1 (noting that municipal Wi-Fi projects in Charleston, South Carolina, and San Francisco, California, also have struggled); *Chicago Scraps Plans for Citywide Wi-Fi*, MSNBC.COM, Aug. 28, 2007, <http://www.msnbc.msn.com/id/20482568/> (depicting the shelving of a municipal broadband system in Chicago due to high costs and expected low demand); Reardon, *supra* note 457 (noting that some municipal broadband systems—such as those in Tempe, Arizona; Chaska, Minnesota; and Lompoc, California—have had trouble signing up new subscribers because of indoor coverage problems and other technical impediments).

a citywide broadband Wi-Fi network but only if the city served as an “anchor tenant,” guaranteeing a significant amount of ongoing subscription revenue from municipal departments.<sup>461</sup> Whereas the initial failed Earthlink projects with Philadelphia and other cities demanded no financial commitment from the municipality, the new generation projects require the city to subsidize construction of the network and ensure its ultimate profitability by becoming its largest subscriber.<sup>462</sup> Facing budget deficits and public demands for more expenditures in traditional public safety and education initiatives, many municipalities have not been able to afford these investments in municipal broadband networks despite significant citizen demand.<sup>463</sup> The significantly wealthier suburban municipalities and relatively small cities, like Burbank, California, and Tempe, Arizona, have had more success in establishing their own tax-supported broadband networks.<sup>464</sup> Less wealthy municipalities have not been as fortunate.

In the face of federal inaction, several states have launched initiatives to promote statewide broadband proliferation. For example, in December 2007, the California Public Utilities Commission allocated \$100 million over two years to broadband companies to build out service to underserved and unserved areas in the state.<sup>465</sup> Massachusetts initiated a similar program, committing \$40 million raised through state-bond financing for the direct subsidization of fiber networks, wireless towers, and other broadband infrastructure in areas of the state bypassed by commercial broadband carriers.<sup>466</sup> Several other states, like Georgia, Kentucky, and

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461. See Urbina, *supra* note 414, at A10 (reporting that the ISP in Minneapolis required the city to become an anchor tenant before agreeing to build a city network); see also Reardon, *supra* note 457 (defining the anchor tenant requirement as forcing the city into a contractual obligation to purchase an agreed-upon amount of service in exchange for the city network).

462. Joanne Hovis, President of Columbia Telecommunication Corporation, said of the Minneapolis municipal-broadband project, which involves a residential Wi-Fi network overlay on a public safety network,

[T]he key thing there is that the city is paying a pretty substantial annual fee to the provider for those two networks. I think the difference between that and the models that were not successful is that . . . [i]n the Minneapolis case, the city is financing [buildout] as a tenant on the network.

*The Kojo Nnamdi Show: The Future of Municipal Broadband* (WAMU radio broadcast July 15, 2008) (transcript on file with author).

463. See Travis, *supra* note 446, at 1782–83 (discussing differing outcomes in larger cities versus wealthier and smaller municipalities).

464. *Id.*

465. Press Release, California Public Utilities Commission, CPUC Promotes Broadband Service in Unserved Areas of California to Bridge Digital Divide (Dec. 20, 2007), [http://docs.cpuc.ca.gov/published/news\\_release/76879.htm](http://docs.cpuc.ca.gov/published/news_release/76879.htm). California’s initiative, partly the result of a study of broadband at 10 Mbps upstream and downstream speeds—the minimum speed required for high-quality video, telemedicine, and other emerging bandwidth-dependent technologies. CAL. BROADBAND TASK FORCE, *supra* note 422, at 32.

466. See Scott Stafford, *Their Future Is Broadband*, BERKSHIRE EAGLE, Aug. 8, 2008

Maine, have launched comparable, although less generously funded, initiatives to encourage broadband deployment.<sup>467</sup> As is the case with municipal Wi-Fi networks, most of the proactive state-level broadband proliferation programs are relatively modest in their objectives and scope, focusing on relatively low-speed broadband projects and not entailing the large-scale broadband infrastructure buildout required for universal access.<sup>468</sup> Some broadband is better than no broadband. But the local and state programs have been financially and logistically unable to achieve the deployment of very high-speed and low-cost broadband present in Canada and many Asian and European nations.<sup>469</sup>

*c. Cable and Telephone Company Efforts to Thwart Public Networks*

In at least fifteen states, telephone and cable companies have applied their influence in state legislatures to pass laws that altogether prohibit or hamper local and state governments' efforts in deploying public broadband networks.<sup>470</sup> Take, for example, New Orleans, a city struggling to recover

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(detailing state initiatives in Massachusetts that aim to make it more cost effective for ISP to bring broadband to areas lacking coverage).

467. See WINDHAUSEN, *supra* note 435, at 36–44 (describing, in detail, state initiatives to boost broadband proliferation).

468. See *id.* at 66 (“Unfortunately, the majority of state programs do not address the need to promote big broadband capability that will be necessary in the next few years.”); see also CALIFORNIA EMERGING TECH. FUND, OVERVIEW, available at <http://www.cetfund.org/progress/overview/> (last visited Nov. 30, 2008) (describing relatively modest funding efforts by the state of California given the enormity of the challenge of proliferating broadband in the state).

469. See Travis, *supra* note 446, at 1787–94 (detailing the results of massive national investments in local broadband deployment in Canada, Sweden, South Korea, Japan, and other nations).

470. See Christopher Rhoads, *Cities Start Own Efforts to Speed Up Broadband*, WALL ST. J., May 19, 2008, at A1 (describing telephone and cable company efforts to prevent municipalities from entering the broadband business by claiming improper use of taxpayer funds and unfair competition); see generally Dingwall, *supra* note 456, at 85–87 (providing an excellent overview of state statutes barring municipalities from deploying broadband). Individual state restrictions vary from a complete prohibition on the provision of telecommunications services (including broadband) by political subunits to procedural and substantive requirements that are significant impediments. See ARK. CODE ANN. § 23-17-409 (Supp. 2007) (prohibiting government entities from providing any basic telecommunications services); COLO. REV. STAT. § 29-27-103 (2008) (prohibiting local governments from providing, directly or indirectly, telecommunications services (including broadband) to subscribers of cable television service); FLA. STAT. ANN. § 166.047 (West 2000) (requiring that telecommunications companies controlled by local government entities be subjected to the same local requirements applying to privately owned entities); IOWA CODE ANN. § 388.10 (West 2007) (prohibiting local government entities that provide telecommunications services from using general fund moneys or money generated from public utilities services to support the services, requiring payment of reasonable costs for use of city equipment, and imposing significant recordkeeping and certification requirements); LA. REV. STAT. ANN. §§ 45:844.43, 45:844.47–.49 (2007) (prohibiting the provision of telecommunications and advanced services by any local government unless the



economically and socially from the devastation of Hurricane Katrina, and more recently Hurricane Gustav. Once the local state of emergency is lifted, the city must reduce the already slow 512 Kbps download speed for an under-construction Wi-Fi network to 144 Kbps in compliance with the Louisiana law severely restricting the ability of municipalities to offer broadband services.<sup>471</sup>

Although § 253(a) of the 1996 Telecom Act proscribes state or local law that “may prohibit or have the effect of prohibiting the ability of any entity to provide any . . . telecommunications service,”<sup>472</sup> the FCC has refused to enforce that prohibition against anticompetitive state and local laws advantaging cable and telephone companies.<sup>473</sup> In 2004, the Supreme

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government satisfies numerous conditions, including a comprehensive feasibility study); MO. ANN. REV. STAT. § 392.410 (Supp. 2007) (prohibiting government entities from providing telecommunications services for which a certificate of service authority is required to the public or to telecommunications providers); NEV. REV. STAT. ANN. § 268.086 (2007) (prohibiting the governing body of an incorporated city that has a population of over 25,000 from selling telecommunications services to the public and providing strict conditions for the purchase or construction of telecommunications facilities); PA. CONS. STAT. ANN. § 3014 (2005) (prohibiting political subdivisions of the state from providing telecommunications services to the public for compensation unless the subdivision sends a written request to the local exchange telecommunications company serving the area and it or one of its affiliates has not agreed to provide the services requested within two months); S.C. CODE ANN. § 58-9-2620 (Supp. 2007) (prohibiting the use of non-telecommunications revenue sources to subsidize the cost of providing telecommunications services and requiring the imputation of costs that nongovernmental entities incur in computing the cost of providing services and the rates charged); TENN. CODE ANN. §§ 7-52-401 to -407, -601 to -611 (2005) (noting that any municipality that operates an electric plant can own and operate it for the provision of telecommunications services but cannot provide subsidies for it; however, the municipality cannot provide for telecommunications services within the service area of an existing telephone cooperative with fewer than 100,000 lines, and municipalities that operate electric plants as described in § 7-52-401 may offer cable and Internet services if certain procedures, such as maintaining separate accounting and recordkeeping for such services, are satisfied); TEX. UTIL. CODE ANN. §§ 54.201–02, 54.205 (Vernon 2007) (prohibiting municipalities from offering the public telecommunications services by prohibiting issuance of the requisite certificate to a municipality); UTAH CODE ANN. §§ 10-18-201 to -204 (2007) (requiring that the municipality hold a public hearing, conduct a feasibility study, hold another public hearing, and adopt by resolution the feasibility study before the municipality can provide to anyone cable television services or public telecommunications services); VA. CODE ANN. §§ 15.2-2160, 56-265.4:4 (2008) (requiring that a locality obtain a certificate before it can provide telecommunications services and outlining the factors considered by the municipality before such certificates are granted); WASH. REV. CODE ANN. § 54.16.330 (2006) (allowing public utility districts to own and operate telecommunications facilities for the district’s internal needs but prohibiting the sale of such services to public).

471. See Marguerite Reardon, *New Orleans to Offer Free Wi-Fi*, CNETNEWS.COM, Nov. 29, 2005, [http://news.cnet.com/New-Orleans-to-offer-free-Wi-Fi/2100-7351\\_3-5975845.html](http://news.cnet.com/New-Orleans-to-offer-free-Wi-Fi/2100-7351_3-5975845.html) (describing the need to reduce download and upload speeds in New Orleans to comply with a state law that restricts Internet speeds on services provided by municipalities).

472. 47 U.S.C. § 253(a) (2000). The 1996 Telecom Act authorized the FCC to preempt enforcement of any state or local statute that contravened § 253(a). *Id.* § 253(d).

473. See Public Util. Comm’n of Tex., 13 F.C.C.R. 3460, 3547 (1997) (concluding that the definition of “entity” in § 253 does not encompass a state’s political subdivisions,

Court in *Nixon v. Missouri Municipal League*<sup>474</sup> upheld a Missouri statute, enacted as a result of intensive lobbying by cable and telephone companies that prohibits political subdivisions of the state from providing telecommunications services.<sup>475</sup> The Court ruled that § 253 does not “affect the power of States and localities to restrict their own (or their political inferiors’) delivery of telecommunications services.”<sup>476</sup> This decision emboldened cable and telephone broadband carriers to enforce existing anticompetitive state statutes and pursue new enactments in states without such statutes.<sup>477</sup>

Cable and telephone companies also have started filing lawsuits against municipalities launching public Wi-Fi or wireline broadband networks. Those suits claim that the broadband projects are an improper use of revenue, constituting unfair competition and inappropriate local governmental intervention in an inherently private, commercial enterprise.<sup>478</sup> The companies also have argued that municipalities that own or lease their own broadband networks would easily succumb to the temptation of giving their networks preferential treatment, thereby putting private carriers at a competitive disadvantage.<sup>479</sup>

These arguments are weak in several respects. First, most of the municipalities that opted to build out their own networks did so because

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thereby allowing states to restrict the ability of subordinate government entities to provide telecommunications services).

474. 541 U.S. 125 (2004).

475. See MO. REV. STAT. § 392.410(7) (prohibiting government entities from providing telecommunications services for which a certificate of service authority is required to the public or to telecommunications providers); *Nixon*, 541 U.S. 125 (upholding the statute). For an excellent examination of the constitutional and political context of the *Nixon* case, see Travis, *supra* note 446, at 1728–37.

476. See *Nixon*, 541 U.S. 125. The Court concluded, in part, that “any entity” in § 253(a) did not encompass a state’s subdivisions and that a state therefore could prohibit counties, cities, and other political subordinates from offering telecommunications services. *Id.* at 135–37; see also *Time Warner Telecom of Or., LLC v. City of Portland*, 452 F. Supp. 2d 1084, 1096 (D. Or. 2006) (concluding that § 253(a) of the 1996 Telecom Act did not preempt the city of Portland from selling telecommunications services, including broadband, to public schools and other municipalities).

477. See Travis, *supra* note 446, at 1765–72 (discussing state law restraints on universal broadband).

478. See Rhoads, *supra* note 470 (describing Comcast Cable suit against Chattanooga, Tennessee, alleging improper tax expenditures and unfair competition).

479. *Id.*; Eric Bangeman, *Community Broadband Act Would Overturn Bans on Municipal Broadband*, ARS TECHNICA, Aug. 3, 2007, <http://arstechnica.com/news.ars/post/20070803-community-broadband-act-would-overturn-bans-on-municipal-broadband.html>; see, e.g., *Comcast v. Elec. Power Bd.*, No. 08-0291, slip op. at 1–3 (Tenn. Ch. Ct. July 11, 2008) (notice of appeal), available at [http://media.timesfreepress.com/docs/2008/07/memorandum\\_opinion%20and\\_order.pdf](http://media.timesfreepress.com/docs/2008/07/memorandum_opinion%20and_order.pdf), appeal filed *sub nom.* Notice of Appeal, *Tenn. Cable Telecomms. Ass’n v. Elec. Power Bd. of Chattanooga*, No. 07-2145 (Tenn. Ch. Ct. July 28, 2008), [http://media.timesfreepress.com/docs/2008/07/Stamped\\_Notice\\_of\\_Appeal.pdf](http://media.timesfreepress.com/docs/2008/07/Stamped_Notice_of_Appeal.pdf).

for-profit carriers had refused to offer broadband service to their residents due to concerns about profitability.<sup>480</sup> Additionally, even where a municipal Wi-Fi system would run parallel to a private broadband network (i.e., fiber-optic or coaxial cable), it is most likely that the two services would cater to different segments of the market by delivering materially different products—fiber or cable providing more expensive and higher speed broadband, and Wi-Fi providing very inexpensive or even free Internet access at relatively low speeds. Moreover, there is nothing new with local governments offering services in competition with private providers. If it were inappropriate for government to compete with for-profit enterprises, then the government would need to cease its provision of public variants of healthcare, education, library services, transportation, parking, housing, police, and power generation.<sup>481</sup> In addition, in offering these services, it is well within the public interest to pass along to citizens any cost savings resulting from public ownership of the resource at hand. It is ironic that the telephone and cable companies have been so forcefully pursuing regulatory and judicial restraints on municipal broadband deployment when, in all other contexts, they are vehement opponents of regulatory constraints.<sup>482</sup>

In sum, in addition to significantly increasing its direct financial support for broadband deployment, the federal government should enact legislation lifting all protectionist, anticompetitive state and local legal restrictions on

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480. See Rhoads, *supra* note 470 (discussing experience in Chattanooga, Tennessee, and noting that cable and telecom companies focus most their efforts on larger U.S. cities); see also Arik Hesseldahl, *Bringing Broadband to Rural America*, BUSINESSWEEK.COM, Sept. 18, 2008, [http://www.businessweek.com/print/technology/content/sep2008/tc20080917\\_797892.htm](http://www.businessweek.com/print/technology/content/sep2008/tc20080917_797892.htm) (discussing how lack of profitability has deterred broadband providers from deploying broadband in low-density areas).

481. For expanded versions of these and other arguments against cable and telephone company efforts to thwart municipal broadband projects, see Jon Leibowitz, Comm'r, Fed. Trade Comm'n, Remarks to the National Association of Telecommunications Officers and Advisors (Sept. 22, 2005), *available at* <http://www.ftc.gov/speeches/leibowitz/050922municipalbroadband.pdf>. Memorably, Commissioner Leibowitz said, "To put this in context, imagine if Borders and Barnes & Noble, claiming it was killing their book sales, asked lawmakers to ban cities from building libraries. The legislators would laugh them out of the State House." *Id.*

482. Nevertheless, should neutralizing any competitive advantages of municipalities providing broadband service be necessary, states can adopt legislation designed to ensure fair competition between private and public providers of broadband services instead of implementing statutory bans or severe restrictions on municipal broadband. For example, regulations could be promulgated requiring municipal broadband projects to abide by certain rules preventing below-cost pricing funded by cross-subsidies with other municipal projects, financial reporting and transparency, fair cost imputation for use of public rights of way, and other rules designed to mitigate competitive advantages. For a detailed analysis of options for neutralizing any competitive advantages on municipal broadband projects, see Dingwall, *supra* note 456, at 98–100 (providing a detailed analysis of options for neutralizing any competitive advantages on municipal broadband projects).

the building of broadband networks by municipalities and other government entities.

#### 4. *Supporting Demand-Side Digital Literacy Programs*

Not everyone with access to residential broadband service and enough money to afford it subscribes. In the July 2008 Pew Internet & American Life Project survey of residential broadband adoption, 33% of non-Internet users—with a median age of 61 and more than twice as likely to live in low-income households than Internet users—responded that they are not interested in using the Internet.<sup>483</sup> Among users of low-speed, dial-up Internet access, 19% said that nothing, including residential availability at low subscription rates, would persuade them to migrate from dial-up to broadband service.<sup>484</sup> Vint Cerf, known popularly as the “father of the Internet,” responded to the survey results by theorizing that “[s]ome residential users may not see a need for higher speeds because they don’t know about or don’t have ability to use high speeds.”<sup>485</sup> In other words, some offline Americans do not know what they are missing.

To address the lack of awareness or even fear of new technology in certain population sectors, a number of nations at the top of the OECD broadband rankings have successfully incorporated demand-side promotion of broadband and digital literacy as a key component of proactive national strategies to promote broadband universality. Fourth-ranked South Korea, for example, passed national legislation creating the Korea Agency for Digital Opportunity and Promotion, which in turn devised and implemented a national program to educate South Koreans on the use of broadband Internet service.<sup>486</sup> South Korea’s digital literacy programs aggressively deployed training resources as well as equipment across the nation’s schools to train children from all socioeconomic strata on intelligent broadband use as early in their academic careers as possible.<sup>487</sup> The nation’s programs also deployed training and equipment resources to reach individuals who may be especially prone to isolation and reticence to

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483. PEW 2008 BROADBAND REPORT, *supra* note 233, at iii.

484. *Id.* According to the Pew Report, 62% of dial-up users replied that they are not interested now in switching to broadband, but 35% of those respondents explained that high broadband prices prevent their migration to broadband, and 14% explained that broadband service is not available to their household. *Id.*

485. Anick Jesdanun, *Many Dial-Up Users Don’t Want Broadband*, TIME.COM, July 3, 2008, <http://www.time.com/time/business/article/0,8599,1819972,00.html>. Cerf explained, “My enthusiasm for video conferencing improved dramatically when all family members had MacBook Pros with built-in video cameras, for example.” *Id.*

486. See JAYAKAR & SAWHNEY, *supra* note 424, at 5.

487. *Id.* (noting that South Korea’s demand-side initiatives are so extensive that “as many as 10 million South Koreans may fall into the disadvantaged categories targeted by the digital literacy programs”).

adopt new technologies, including stay-at-home mothers, older citizens, military personnel and veterans, and the disabled.<sup>488</sup> Japan and the United Kingdom also have funded national digital literacy programs to spur broadband proliferation by cultivating awareness and demand.<sup>489</sup>

Other nations' demand-side broadband awareness programs are reminiscent of the United States' own efforts in the 1930s to catalyze demand for electricity. Although much of rural America was left unserved by private electric utilities that viewed service in those areas as economically infeasible, many of these communities remained unconvinced that they needed electric service at all.<sup>490</sup> Regarding electric service as not only a convenience but an imperative for innovation and economic and social growth, President Franklin Roosevelt signed into law the 1936 Rural Electrification Act. That Act created the Rural Electrification Administration, tasked in part with increasing the demand for electricity in unserved areas and administering a heavily subsidized federal loan program for new rural electric cooperatives.<sup>491</sup>

Although a few state-level broadband initiatives in the United States have incorporated modest digital literacy programs to promote more interest in broadband in low-adoption communities, there are no comprehensive digital literacy programs supported by the federal government.<sup>492</sup> Federal demand-side support could be in the form of grants to nonprofit organizations, public schools and libraries, and similar entities, for the creation of localized broadband awareness and digital literacy programs. It also could take the form of a centralized federal effort to educate children and adults on broadband use, especially the resources

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488. *Id.*

489. See ROBERT D. ATKINSON ET AL., INFO. TECH. & INNOVATION FOUND., EXPLAINING INTERNATIONAL BROADBAND LEADERSHIP 37–40 (2008), <http://www.itif.org/files/ExplainingBBLeadership.pdf>.

490. See Joel A. Youngblood, Note, *Alive and Well: The Rural Electrification Act Preempts State Condemnation Law: City of Morgan City v. South Louisiana Electric Coop. Ass'n*, 16 ENERGY L.J. 489, 491–92 (1995) (discussing history and demand-side objectives of federal electrification initiatives during the 1930s).

491. See Rural Electrification Act of 1936, 7 U.S.C. §§ 901–918 (2006); see also SHLAES, *supra* note 429, at 175 (noting that among Roosevelt's goals was “to increase the use of electricity in all homes, providing Americans with a better standard of living” (emphasis added)).

492. For example, the “e-NC Authority” broadband initiatives in North Carolina and the “ConnectKentucky” program in Kentucky encompass plans to educate low-adoption communities in broadband resources and use. See North Carolina e-NC Authority, Who We Are, <http://www.e-nc.org/whoweare.asp>; About ConnectKentucky, [http://www.connectkentucky.org/about\\_us/](http://www.connectkentucky.org/about_us/) (last visited Feb. 20, 2009). ConnectKentucky, and its new national umbrella organization ConnectedNation, have “employees [who] fan out to small towns and rural areas and hold meetings where they demonstrate the benefits of broadband . . . . For instance, they’ll show parents better ways to communicate with teachers and brainstorm ways to use broadband in local institutions.” Hesseldahl, *supra* note 480, at 2.

available through broadband related to political information and democratic involvement. Such efforts can be part of, or run parallel to, information literacy programs already implemented by the National Institute for Literacy. That federal agency—in partnership with the Departments of Education, Labor, and Health and Human Services—promotes the improvement of reading skills of children and adults, with the intention of cultivating a more informed and engaged citizenry.<sup>493</sup>

##### *5. More Federal Research Support, Better Data Collection, and Better Spectrum Management*

A more aggressive federal role in broadband proliferation also should attend to improvements in the interrelated areas of technological research, data collection, and efficient spectrum utilization. Although the United States for many decades was the international leader in public and private telecommunications-oriented research and development, it has fallen behind. For example, the European Union spends upward of \$13.5 billion per year in public and private telecommunications-oriented research and development, whereas the United States now spends between \$250 million and \$350 million.<sup>494</sup> The National Research Council recently issued a report tracking the steep decline in American telecommunications research and development, concluding that “[w]ithout an expanded investment in research, . . . the nation’s position as a leader is at risk.”<sup>495</sup>

As noted above, the failure of the FCC to collect comprehensive and reliable data on broadband penetration throughout the nation has hampered efforts to catalyze the government’s response to delays in broadband proliferation. The FCC’s practice was to treat an entire zip code as broadband-deployed even if it contained only one Internet connection at a speed as slow as 200 Kbps (which is too slow for many current applications). That allowed the FCC to claim that 99% of the nation had broadband availability<sup>496</sup>—a claim that FCC Commissioner Deborah Tate conceded was “something of a running joke.”<sup>497</sup> The FCC in June 2008

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493. National Institute for Literacy, <http://www.nifl.gov>.

494. WINDHAUSEN, *supra* note 435, at 33.

495. COMM. ON TELECOMMS. RESEARCH AND DEV., NAT’L RESEARCH COUNCIL, RENEWING U.S. TELECOMMUNICATIONS RESEARCH 1 (Robert W. Lucky & Jon Eisenberg eds., 2006), [http://www.citi.columbia.edu/conferences/telecomRD/lucky\\_report.pdf](http://www.citi.columbia.edu/conferences/telecomRD/lucky_report.pdf). The National Research Council advises that “[a] strong, effective telecommunications R&D program for the United States will require a greater role for government-sponsored and university research.” *Id.* at 2.

496. See FCC HIGH-SPEED ACCESS REPORT, *supra* note 452.

497. See Matthew Lasar, *Joke’s Over: FCC Adopts New Broadband Penetration Metrics*, ARS TECHNICA, June 15, 2008, <http://arstechnica.com/news.ars/post/20080615-jokes-over-fcc-establishes-new-broadband-measurement-system.html>.

promulgated a new data collection system that will require ISPs to report broadband service on the basis of census tracts, which are typically much smaller than zip code, and to report the speed of broadband service offered according to tiers, with basic broadband defined as between 768 Kbps and 1.5 Mbps.<sup>498</sup> Although these modifications were positive steps and overdue, the data collected under the new system remains thin. For example, the FCC will not collect any pricing data from ISPs. Such data could be compared with census household income figures, as well as the more granular penetration and speed data for detailed examinations of broadband affordability and the tipping points at which specific kinds of households opt to subscribe to broadband.<sup>499</sup>

Finally, a more aggressive federal approach to broadband proliferation should include a comprehensive effort to improve the efficiency of federal spectrum allocations. The FCC currently is exploring the use of unused or “white spaces” between broadcast television channels for unlicensed wireless services, including wireless broadband devices.<sup>500</sup> It also launched an auction in January 2008 for spectrum in the 700 MHz band vacated by broadcasters as part of the transition to digital transmission.<sup>501</sup> Despite these initiatives to render more spectrum for broadband use, the new spectrum locations may still be inadequate to meet the demands of next-

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498. See Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, 23 F.C.C.R. 9691 (2008). Among other reforms, the FCC revised Form 477, through which broadband Internet service providers report the services they make available to the public, to require reporting of broadband service at a much more granular level—census tract instead of zip code—and to report download and upload speeds available in those areas. *Id.* at 9692–93.

499. FCC Commissioner Jonathan Adelstein criticized the exclusion of pricing data in the new data collection scheme in a separate statement: “Particularly given the growing evidence that citizens of other countries are getting a much greater broadband value, in terms of price per megabit, it is regrettable that the Commission misses an opportunity to collect useful information about the actual prices available to American consumers.” *Id.* at 9767 (Adelstein, Comm’r, concurring in part).

500. Unlicensed Operation in the TV Broadcast Bands, 19 F.C.C.R. 10,018 (2004). This still-open proceeding has been delayed by broadcaster-led disputes concerning the potential of interference and broadcast signal degradation as a result of the use of wireless devices in broadcast-adjacent frequencies. See SASCHA D. MEINRATH & MICHAEL CALABRESE, NEW AM. FOUND., UNLICENSED “WHITE SPACE DEVICE” OPERATIONS ON THE TV BAND AND THE MYTH OF HARMFUL INTERFERENCE 3–4 (2008), <http://www.newamerica.net/files/WSDBackgrounder.pdf>; see also Ted Hearn, *Out of the Blue: Vacant Channels Could Fuzz Up Free TV; Broadcasters See Red over White Spaces*, MULTICHANNEL NEWS, Nov. 5, 2007, at 20 (“The NAB insists that sharing the broadcast band would imperil over-the-air television because signal interference would be rampant and unstoppable, as unlicensed users wouldn’t have to answer to anyone—including the FCC.”).

501. See Chloe Albanesius, *Verizon, AT&T Win Spectrum; Google Bluffs*, PCMAG.COM, Mar. 20, 2008, <http://www.pcmag.com/article2/0,2817,2277767,00.asp> (noting that the 700 MHz auction “raised a record \$19.59 billion,” with Verizon and AT&T winning most of the auctioned licenses).

generation broadband, both in their scope and the speed at which devices used on those frequencies could access the Internet.<sup>502</sup>

### *B. Content: Cultivating Digital Democracy*

The government's assumption of a much more proactive role in proliferating broadband to communities that lack it should be the centerpiece of a new federal public interest broadband initiative. As discussed in Part II, access is only part of the challenge. Once online, citizens should be presented with more opportunities for localized democratic discussion and political engagement in public spaces, where the full complement of First Amendment protections applies. Such efforts should be focused on optimizing the democratic and expressive potential of broadband while helping to mitigate some of the civic disengagement, fragmentation, social diffusion, and other harms described in Part II.

#### *1. Building Online Town Squares—Support for Public Fora on Local and State Government Websites*

As noted above, although a small minority of Internet websites are government-controlled, there is a paucity of public discussion fora on those websites. Many municipal, county, and state governments have launched websites that provide important and detailed information about governance, proposed legislation, and community initiatives, but very few public websites in the United States host interactive discussion of issues of public importance by means of discussion fora or community e-mail discussion lists.<sup>503</sup> Moreover, government-controlled websites that do not affirmatively provide public discussion boards or other opportunities for online public discussion are not deemed traditional or designated public fora.<sup>504</sup> In 2003's *United States v. American Library Association*, a

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502. See, e.g., WINDHAUSEN, *supra* note 435, at 29 ("Making more spectrum available for broadband services is certainly worthwhile. The question is whether there is enough spectrum available to provide adequate capacity for big broadband.").

503. See, e.g., Scott, *supra* note 364, at 348 (reporting that a study of municipal websites from the 100 largest U.S. metropolitan areas found "no applications designed to facilitate networking or offline meetings of interest groups, and only two sites facilitated online policy forums or discussion lists").

504. See, e.g., *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000). In *Putnam Pit*, the Sixth Circuit affirmed Cookeville's denial of plaintiff Davidian's demand for a hyperlink on the city's website to Davidian's website, which focused on alleged corruption and incompetence in municipal government and area businesses. *Id.* Davidian argued that by hosting a number of hyperlinks to several nonprofit and for-profit organizations in the area, the city had created a designated public forum on its website and violated his First Amendment rights by refusing to include a hyperlink to his website on the city's website. *Id.* at 841. The court reasoned that because the Internet is such a recent innovation, it could not be classified—like public streets, sidewalks, and parks—as a



plurality of the Supreme Court held that the application of traditional public forum status would not apply to fora that have not “immemorially been held in trust for the use of the public . . . for purposes of assembly, communication of thoughts between citizens, and discussing public questions.”<sup>505</sup> That status prohibits the government from restricting public expression absent a compelling state interest and less restrictive means of restricting such expression. To qualify as a designated public forum in which any government restriction of public expression must satisfy the strictest scrutiny, a space must have been affirmatively opened up by the government for use by the public for expressive purposes.<sup>506</sup> Thus, citizens’ First Amendment right-of-access claims for expressive activity on websites controlled by government entities not expressly willing to provide such a platform are weak at best.<sup>507</sup>

The few jurisdictions that have launched highly interactive municipal websites with discussion boards, and other deliberative features, have done so to good effect. For example, Seattle, Washington, launched a “Democracy Portal” online through which citizens may view city council meetings, comment on proposed legislation, and access archived public-affairs video aired on the city-programmed cable channel.<sup>508</sup> Seattle also encourages citizens to arrange and participate in a variety of e-mail discussion lists (listservs) administered by the city itself through its

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traditional public forum. *Id.* at 842–43. It then asserted that the city’s website also could not be classified as a designated public forum because the city had intended the site “to convey information to the reader” and not to serve as a platform for free public discourse. *Id.* at 844. The court concluded that the city’s website was a nonpublic forum and that its efforts to limit the number of hyperlinks on its site in order to “avoid a cacophony of speakers” was reasonable, but it remanded to the trial court for a determination of whether the city’s requirement that hyperlinks on its website “promote the economic welfare, industry, or tourism of the city” constituted impermissible viewpoint discrimination in a nonpublic government forum. *Id.* at 845–46; *see also* *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (holding that Internet access provided by public libraries is neither a traditional nor designated public forum).

505. 539 U.S. 194, 205 (2003) (quoting *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (internal quotation marks omitted); *see also* Nunziato, *supra* note 266, at 1150–59 (discussing the significance of the case).

506. Nunziato, *supra* note 266, at 1149–50; *see also* *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 802–03 (1985) (“The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”).

507. For a thorough discussion of the futility of using First Amendment public forum right-of-access claims against unwilling government websites, see Schesser, *supra* note 268, at 1813–14 (noting that even cases that would succeed in advancing such arguments would yield less-than-ideal outcomes: “Weak right-to-access claims do not foster the ideal type of public online space because they potentially yield highly restrictive forums”).

508. Seattle.gov, Seattle’s Democracy Portal,  
[http://www.seattle.gov/pan/Seattle\\_Democracy\\_Portal\\_0405.htm](http://www.seattle.gov/pan/Seattle_Democracy_Portal_0405.htm) (last visited Jan. 30, 2009).

website.<sup>509</sup> In addition, a handful of small communities have launched online initiatives encouraging citizens to interact with other citizens and elected officials online.<sup>510</sup> Although these local government initiatives to create localized, democratic public discussion initiatives online are laudable, they are the exception. The great majority of local and state public web spaces are minimally interactive and do not provide opportunities for public discussion and engagement.

*a. Causes of the Shortage of Public Deliberation Spaces Online*

Although the reasons for the paucity of public discussion websites on local- and state-government-controlled websites vary by jurisdiction, some of the principal problems identified have been (1) a lack of available funding for computer services, software, and staff; (2) a lack of expertise in best practices for building and monitoring discussion websites and online interaction with elected officials; and (3) a general lack of leadership and assistance by the federal government in promoting online democratic engagement.<sup>511</sup> In contrast to the absence of federal support in the United States, the governments of Australia, Canada, the European Union, South Korea, and Singapore provide significant funding and technical expertise for online public discussion and e-democracy at the local and regional levels.<sup>512</sup> In the United Kingdom, the government's "UK Online" website provides visitors with proposed laws and regulatory materials and hosts public discussions concerning those proposals and other issues concerning

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509. Seattle.gov Discussion Lists, [http://www.seattle.gov/tech/get\\_involved/discussions.htm](http://www.seattle.gov/tech/get_involved/discussions.htm) (last visited Jan. 30, 2009).

510. See, e.g., CHADWICK, *supra* note 185, at 93–96 (describing government-supported online communities in Blacksburg, Virginia (hometown of Virginia Tech), and Roxbury, Massachusetts (funded in part by Massachusetts Institute of Technology)); Schesser, *supra* note 268, at 1819 (describing the Federal Heights, Colorado, practice of facilitating online chats between citizens and the city's mayor). The city of Winona, Minnesota, is known for an especially successful resident-run website designed "to empower, inform, and engage the citizenry by creating an ongoing community-wide discussion of local public issues." Winona Online Democracy, <http://forums.e-democracy.org/groups/winona/> (last visited Jan. 30, 2009). The state of Minnesota itself has encouraged the development of the Minnesota E-Democracy project, which, although not on a government website but instead one controlled by a nonprofit organization, hosts online discussions and debates about state politics and regional public affairs. CHADWICK, *supra* note 185, at 98–99.

511. Scott, *supra* note 364, at 349; see also CHADWICK, *supra* note 185, at 102 (attributing lack of public deliberative sites to "a combination of poor funding, unrealistic expectations, inappropriate technology, internal disputes, and lack of clear objectives"); Dahlberg, *supra* note 370, at 629 (noting that nonprofit, nongovernmental online democratic deliberation projects, such as Minnesota E-Democracy, are severely limited in their effectiveness because of the lack of funding, particularly from government: "funding is required to enable deliberative initiatives to resist incorporation by commercial and non-deliberative interests and to expand, multiply and improve").

512. Scott, *supra* note 364, at 349.

governance and public affairs.<sup>513</sup>

In his 2006 study of the resources for public involvement made available on the websites of the 100 largest cities, Professor James K. Scott notes that in addition to lack of funding, expertise, and federal leadership, another reason state and local governments have opted against opening public discussion fora online is that they may “want to avoid the political—and possibly legal—risks of opening up such communication channels” and may “lack the capacity to monitor, manage, mediate, or otherwise respond to such public discussions.”<sup>514</sup> These are reasonable concerns, of course, especially because of the very little experience local governments have had in opening spaces online for public discussion. Nevertheless, all levels of government already have extensive experience in opening government spaces for public discussion and debate.

Government-sponsored outdoor protest zones, town hall meetings, public meetings of lawmaking bodies, regulatory agency comment proceedings, school board hearings, and an array of other public brick-and-mortar fora provide helpful analogues for how governments could open space online for the exchange of public views while exercising reasonable controls to preserve the purpose of the space and mitigate disruption. The same First Amendment principles and doctrines that apply to public expression in government-controlled spaces on terra firma would apply to government-provided public spaces online. In addition, it is worth noting that for several years the federal government itself has been hosting a form of detailed public discussion online by way of its electronic administrative rulemaking proceedings.<sup>515</sup> In these proceedings, any member of the general public with an Internet connection is able to read initial regulatory proposals, file electronic comments, and then respond to other commentators in subsequent rounds.

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513. Froomkin, *supra* note 33, at 15–17. Both England and Scotland also permit citizens to propose new laws by means of government websites. *Id.*

514. Scott, *supra* note 364, at 349.

515. The federal government launched its Regulations.gov website in 2003 to provide centralized online access to every rulemaking proceeding open for comment at more than 160 federal agencies, enabling users to view open proceedings, including already-filed comments, and file comments and replies electronically. General Information on Regulations.gov, <http://www.regulations.gov/search/footer/faq.jsp#27> (last visited Nov. 30, 2008). These new online tools for accessing rulemaking proceedings are an important step toward more public awareness and participation in governance, but the rulemaking proceedings themselves are quite formal with very limited opportunity for dynamic discussions. See Shane, *supra* note 174, at 73 (“The structure of [federal] rule making . . . in at least a modest way, positions the agency in deliberative dialogue with citizens that links direct citizen input to official government decisionmaking.”). In addition, some individual federal agencies have experimented with electronic alternatives to physical public hearings, such as the Environmental Protection Agency’s National Dialogue on Public Involvement project, which entailed online threaded discussions, electronic briefing books, and other innovations. See Thomas C. Beierle, *Digital Deliberation: Engaging the Public Through Online Policy Dialogues*, in DEMOCRACY ONLINE, *supra* note 33, at 155, 156–59.

*b. Parameters for Online Public Fora*

As with the opening of any government-provided public meeting and discussion space, state and local governments would be wise to proceed carefully in opening public discussion spaces online to avoid running afoul of the First Amendment. At minimum, a local or state government opening an online public forum should (1) make clear through widely accessible announcements and the website's ToS that the discussion area is one where First Amendment protections apply with no content- or viewpoint-based restrictions; (2) announce that the website is open to, and welcomes the participation of, the general public, similar to an open-air public gathering space or public hearing (e.g., city council or school board meeting); and (3) adopt reasonable time, place, and manner restrictions designed to keep individual discussions flowing without disruptive activities, such as repeated identical postings, obscene postings, or other material that would not be consistent with the purpose of individual discussions.<sup>516</sup>

Government websites also could implement innovations that have worked well in private online discussion fora for keeping discussions on track while mitigating vandalism, such as the use of automated obscenity filtration and user-based "flagging" and reporting systems, like those used on YouTube and other websites, which depend on users to report individual members' violations of the ToS. The few existing public discussion websites hosted by or with the support of state and local governments have developed guidelines and practices to support productive discussions while mitigating nuisances.<sup>517</sup>

One potential point of contention may arise from attempts by government hosts of online public fora to limit the ability of forum participants to express themselves anonymously or pseudonymously in the hopes of discouraging incivility, vandalism, and disruptive personal attacks. Although such restrictions are permissible on privately controlled websites, on government websites they may run afoul of the First Amendment. The Supreme Court has consistently adhered to the view that anonymous speech is constitutionally protected.<sup>518</sup> Nevertheless, as noted

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516. See Schesser, *supra* note 268, at 1818–21 (providing excellent, detailed recommendations (much more extensive than what I can provide here) for the creation of government-hosted public fora for online public discussion).

517. For example, Minnesota's E-Democracy project enforces a set of complex rules developed in part by users themselves. See E-Democracy Forum Rules, <http://e-democracy.org/rules/> (last visited Nov. 30, 2008) (displaying the rules for E-Democracy citizen-to-citizen discussion fora).

518. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("Anonymity is a shield from the tyranny of the majority. . . . The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse."); *Talley v. California*, 362 U.S. 60, 64 (1960) ("Anonymous pamphlets, leaflets, brochures and even

above, some studies show that anonymous discussions online have a disinhibiting effect on discussants, at times making it more likely that discussions will disintegrate into “shouting” matches or exchanges of abusive personal attacks, causing other participants to stay silent or flee the space altogether.<sup>519</sup> These negative effects can be mitigated by the implementation of practices refined on private websites that have proved effective at promoting civility in fora permitting anonymous and pseudonymous contributions. For example, websites may require registration (with e-mail address known only to a website moderator) and discussion moderation (which can be done by volunteer discussion leaders). In addition, there now is research indicating that, as a normative development, discussion participants increasingly are opting to identify themselves in posts as a means of making their contributions more credible and persuasive.<sup>520</sup>

Some of the benefits of public deliberative fora on government-owned websites have been achieved on a small number of websites controlled by nonprofit organizations interested in promoting public deliberation and democratic discussion online.<sup>521</sup> If operated with the objectives of promoting true, censorship-free democratic deliberation, a privately controlled website can provide many of the advantages of a government-controlled forum, with two advantages of private control. First, complete independence from the government would ensure the autonomy of the discussions and freedom from any potential interference or manipulation by the government. Second, private website operators could implement website moderation practices designed to preserve civility and the

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books have played an important role in the progress of mankind.”). There is a limit to the protection of anonymity, however. For example, courts have been willing to unmask anonymous and pseudonymous Internet speakers accused of misappropriation of trade secrets and defamation. *See Apple Computer, Inc. v. Doe 1*, No. 1-04-CV-032178, 2005 WL 578641, at \*8 (Cal. Super. Ct. Mar. 11, 2005) (ordering an ISP to disclose identities of Internet users accused of misappropriating Apple trade secrets); *In re Richard L. Baxter*, No. 01-00026-M, 2001 U.S. Dist. LEXIS 26001, at \*1, \*52–53 (W.D. La. Dec. 19, 2001) (holding that “a reasonable probability of a finding of defamation” justified compelling an ISP to disclose the identity of an anonymous website contributor accused of making defamatory statements).

519. *See Witschge, supra* note 296, at 115 (summarizing research findings on negative effects of online anonymity).

520. *See id.* at 117 (noting that “[u]sers are sometimes not even interested in exploiting the potential for anonymous interaction” because “[t]he use of one’s real name can give more weight to a posting”).

521. For example, the Minnesota E-Democracy project, whose original aims were “to strengthen, expand, and diversify citizen engagement through effective and meaningful online discussions and two-way information exchange on public issues,” was not a government-hosted website, but an online discussion service originating as an e-mail discussion listserv controlled by a nonprofit corporation with the endorsement of government entities. CHADWICK, *supra* note 185, at 98.

seriousness of purpose of the discussions, such as barring anonymous postings, which likely would be challenged under the First Amendment if the website were hosted by the government.

The disadvantages of private website control, however, are significant. A number of experiments in nongovernmental online deliberative fora have suffered from the inability to raise enough funds to sustain operation without having to resort to advertising and the pressures of commercialization.<sup>522</sup> In addition, public discussion fora hosted on municipal or state websites are believed to generate higher levels of traffic, and therefore much more vibrant discussions, due to their proximity to public information and materials relating to governance (e.g., proposed legislation, archived hearing materials, and regulatory proposals).<sup>523</sup> To drive traffic to government-controlled public websites, elected officials could affirmatively request community discussion on a particular proposal (e.g., a new recycling policy) or challenge (e.g., juvenile crime). Citizens should be empowered to open their own discussions on topics important to them but neglected by elected officials. For example, a citizen concerned about pollution from a neighborhood industrial facility who has an especially friendly relationship with the municipality's elected officials could open a discussion thread to engage neighbors in how to address the problem.

In sum, a broadband public interest standard should encompass proactive federal support for public discussion spaces on local municipal and state websites. These fora would be censorship-free areas that would engage a diversity of citizens in discussion of issues of local public importance and that would foster locally oriented community identity and shared experience online in ways that would buttress community-building and democratic engagement efforts on terra firma. Support can come in the form of federal grants to help fund the efforts of local and state initiatives to provide public fora online, and fund technical assistance in the form of proven templates and best practices models for the establishment and maintenance of such websites.

## *2. Linking Public Broadcasting with Public Broadband—A New Corporation for Public Broadband?*

The proactive role for government sketched out so far in the creation of public, noncommercial, localized spaces in electronic media has a strong

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522. See Dahlberg, *supra* note 370, at 627–29 (noting that “Minnesota E-Democracy itself has not completely sidestepped the Web’s commercialization,” having had to accept advertising on each post in order to stay afloat).

523. *Id.*

and relatively successful precedent in the American public broadcasting system. In fact, perhaps a new Corporation for Public Broadband, modeled after the Corporation for Public Broadcasting (CPB), could serve as a centralized government entity responsible for coordinating and funding some of these efforts as a sister agency to the CPB.

The American system of public broadcasting was created largely in response to concerns that—like the almost entirely privatized, commercial Internet today—commercial, private broadcasting was failing to live up to the expectation that it would “realize the vast potentialities”<sup>524</sup> of the medium. It was the brainchild of the Carnegie Commission on Educational Television, which in a 1967 report urged the government to assume a much more aggressive role in bringing about “a well-financed and well-directed educational television system” in order to serve the commercially unsatisfied needs of the American public for diverse, locally oriented educational and cultural programming.<sup>525</sup> Quoting E.B. White, the Carnegie Commission concluded that noncommercial broadcasting would serve as “our Lyceum, our Chautauqua, our Minsky’s, and our Camelot.”<sup>526</sup>

At the Carnegie Commission’s behest, Congress enacted the Public Broadcasting Act of 1967 and, in so doing, created the CPB.<sup>527</sup> The CPB was designed to act as a fiscal agent through which significant federal budget appropriations would flow to the public broadcasting licensees themselves, as well as a “heat shield” to absorb political fallout from specific programming choices.<sup>528</sup> In creating the CPB, Congress emphasized the importance of federal support for noncommercial media “for instructional, educational, and cultural purposes” that is “responsive to the interests of people both in particular localities and the United States,” that will “constitute an expression of diversity and excellence,” and that “addresses the needs of unserved and underserved audiences, particularly children and minorities.”<sup>529</sup>

The American noncommercial broadcasting system has had its controversies and dysfunctions, and it suffers from the same insoluble structural impediments as commercial broadcasting in serving as an

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524. *NBC, Inc. v. United States*, 319 U.S. 190, 217 (1943).

525. CARNEGIE COMM’N ON EDUC. TELEVISION, *PUBLIC TELEVISION: A PROGRAM FOR ACTION SUMMARY* (1967), available at <http://www.current.org/pbpb/carnegie/CarnegieISummary.html>.

526. Letter from E.B. White to the Carnegie Comm’n (Sept. 26, 1966), available at <http://www.current.org/pbpb/carnegie/EBWhiteLetter.html>; see also Weinberg, *supra* note 8, at 1200 n.458 (discussing the origins of the Corporation for Public Broadcasting (CPB)).

527. Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified as amended at 47 U.S.C. § 396 (2000)).

528. JEROLD M. STARR, *AIR WARS* 25–26 (2000). The CPB’s ten-member governing board, which is appointed by the President with Senate confirmation, must be bipartisan, with no more than five members belonging to the same party. 47 U.S.C. § 396(c)(1).

529. 47 U.S.C. § 396(a)(1), (5)–(6).

electronic marketplace of ideas.<sup>530</sup> In light of their dependence on tax dollars, public broadcasters at times have had to avoid politically controversial subject matter in favor of more bland material.<sup>531</sup> Nevertheless, public broadcasting has succeeded at delivering some of the locally oriented political and public affairs, children's educational, and cultural programming that is virtually absent from the commercial airwaves. As Professor Patricia Aufderheide notes, public broadcasters' service to their local communities earns them "the highest trust ratings of any media in the [United States]."<sup>532</sup> The value of public educational television for minority immigrant communities is especially underreported. For many immigrant children in non-English-speaking households, free educational broadcasting is the only reliable source of English language instruction and acculturation outside of school.<sup>533</sup> This was certainly true for me.<sup>534</sup>

In addition to serving as a fiscal agent for funds and technical expertise to support the creation of locally oriented online public fora, a Corporation for Public Broadband, like its broadcast counterpart, could serve as a source of grants to promote innovative noncommercial uses of the

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530. Professor Aufderheide posits that although public broadcasting "provides some opportunities for people to learn about each other and their problems, and to share a common cultural experience," it is limited by its nature "as a mass medium." She writes that "[t]he [commercial] broadcasters, at one point, speak to the many, who then talk to each other. The [public] broadcasters have to stand in the place of the public, and act on their behalf, and hope they guessed right." Pat Aufderheide, *Vlogs, iPods and Beyond: Public Media's Terrifying Opportunities*, AM. UNIV. CTR. FOR SOC. MEDIA 3-4 (Nov. 2006), available at [http://www.centerforsocialmedia.org/files/pdf/vlogs\\_ipods\\_beyond.pdf](http://www.centerforsocialmedia.org/files/pdf/vlogs_ipods_beyond.pdf).

531. See, e.g., John Briggs, *Same-Sex Parents Angry at PBS*, BURLINGTON FREE PRESS, Jan. 27, 2005, at 1A (discussing the PBS decision not to distribute an episode of "Postcards from Buster," the educational children's program, after Secretary of Education Margaret Spellings denounced the episode as inappropriate for children because it featured, incidentally, the children of two families headed by same-sex parents); see also Aufderheide, *supra* note 530, at 2 (noting that public broadcasters "need to maintain their relatively bland reputation for uncontroversial quality, to maintain the broad support they have won"); ROGER P. SMITH, *THE OTHER FACE OF PUBLIC TV: CENSORING THE AMERICAN DREAM* (2002) (detailing numerous problems associated with encroaching commercial and governmental interests in public broadcasting content).

532. Aufderheide, *supra* note 530, at 2.

533. Milton Chen, *Myths About Instructional Television: A Riposte*, EDUC. WK., May 24, 1989, available at <http://www.edweek.org/ew/articles/1989/05/24/08310012.h08.html> (discussing how instructional children's television, including programs like "The Electric Company," has been shown by the Educational Testing Service to be effective at teaching beginning reading skills, and how "instructional television can play an especially important role in providing new immigrant children with the cultural and linguistic background for interpreting lessons in the humanities and sciences").

534. Born in Cuba, I was brought to the United States at the age of three by my parents, who did not speak English. Not being able to learn English from my family, I was administered a steady diet of *Sesame Street*, *Mister Rogers' Neighborhood*, and *The Electric Company*, as prescribed by my first-grade teacher.



technology for locally oriented political and democratic engagement.<sup>535</sup> A more proactive government orientation to broadband also could encompass significantly more funding for local public broadcasting stations' ventures online. Although public radio stations have had some success in streaming and podcasting select programming by means of their websites, for the most part, public broadcasters have been unable to establish much of a dynamic, locally oriented presence online due to funding shortages.<sup>536</sup> Helping local public broadcasting stations establish a more substantively rich and interactive presence online would help to create more locally and community oriented points of common focus online, in harmony with the goal of providing local, public online deliberation websites described above. In fact, because the transition to digital television has made the programming of public television broadcasters fully compatible with the digital Internet, public television station programming concerning local public affairs can be linked to local public online discussion fora, thereby forming the basis for discussions on local issues of democratic importance and driving participation to the fora. Because many public broadcasting stations are licensed to state and local government entities,<sup>537</sup> such cross-utilization may be viewed as mutually beneficial by both the station licensees and the hosts of the local discussion websites.

Finally, although the federal government provides significant financial support for children's educational programming on public television,<sup>538</sup> it has made no comparable investment in noncommercial educational broadband content for children despite their high levels of Internet use. In fact, PBS has resorted to selling advertising on its PBSKids.org and related websites—commercialization of the sort prohibited on public broadcasting stations—to raise revenue to support its online endeavors.<sup>539</sup> A more

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535. See, e.g., Press Release, Corp. for Pub. Broad., CPB Announces Recipients of the Station-Based Election Programming Initiative (Aug. 8, 2008), <http://www.cpb.org/pressroom/release.php?prn=675>.

536. See CORP. FOR PUB. BROAD., CORPORATION FOR PUBLIC BROADCASTING 2007 ANNUAL REPORT 14–15 (2007), [http://www.cpb.org/aboutcpb/reports/annual/cpb\\_2007\\_annualreport.pdf](http://www.cpb.org/aboutcpb/reports/annual/cpb_2007_annualreport.pdf) (describing modest forays into funding online initiatives beyond the archiving and podcasting of select broadcast material). Professor Aufderheide observes that “[i]t’s been hard for most public broadcasters even to recognize the power of this new [digital] environment,” but documents a number of very modest projects initiated by public broadcasters themselves featuring original, interactive online media. Aufderheide, *supra* note 530, at 11–12.

537. See *Barnstone v. Univ. of Houston*, 514 F. Supp. 670, 683 (S.D. Tex. 1980) (noting that, of 285 public television stations in the United States, 132 are licensed to government entities and an additional 77 are licensed to colleges and universities, many of which are public).

538. See CORP. FOR PUB. BROAD., *supra* note 536, at 36–38, 42 (detailing 2007 CPB expenditures for children's educational programming).

539. Dinesh Kumar, *PBS to Resume Online Ads to Exploit Market Demand*, COMM. DAILY, Aug. 24, 2006, available at <http://www.commercialalert.org/issues/culture/pbs/pbs->

proactive federal commitment to public interest broadband should encompass efforts to support children's educational and informational services on the Internet.

### 3. *Network Neutrality*

A broadband public interest standard calling for affirmative government interventions to promote locally oriented, noncommercial, diverse democratic expression and discussion online also could inform and elevate the unfolding debate on network neutrality (net neutrality). The net neutrality controversy has focused almost entirely on the logical- and application-layer implications of net neutrality on innovation, competition, and market power. Not enough attention has been devoted to how the absence of net neutrality would ramify across the content layer in ways that would undermine the Internet's emergence as a platform for political, social, and cultural engagement. A full discussion of the legal and technical complexities of net neutrality is far beyond the scope of this Article, but a brief foray into the controversy will help show how the Internet's value as a democratic and expressive instrument is due to, and dependent upon, the neutrality of the network.

At the heart of network neutrality is the norm that Internet carriers must transport data packets using "best efforts," from one end of their network to the other, without discriminating against any particular classes of packets.<sup>540</sup> Advocates of net neutrality regulation have argued that the neutrality norm has been the innovation most responsible for the Internet's success.<sup>541</sup> Congress, however, has resisted codifying network neutrality principles partly because major ISPs and their supporters, and some

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to-resume-online-ads-to-exploit-market-demand.

540. See Sascha D. Meinrath & Victor W. Pickard, *The New Network Neutrality: Criteria for Internet Freedom*, 12 INT'L J. COMM. L. & POL'Y 225, 226 (2008) (defining network neutrality as the "nondiscriminatory interconnectedness among data communication networks that allows users to access the content, and run the services, applications, and devices of their choices"); see also Crawford, *supra* note 167, at 395 (explaining that a nonneutral network would allow Internet connection and transport providers to "monetize these connections by discriminating against particular packets"). See generally Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003) (comparing network neutrality to open access for all users).

541. See Lessig, *supra* note 163, at 2 (noting that the neutral network, end-to-end "philosophy ranked humility above omniscience and anticipated that network designers would have no clear idea about all the ways the network could be used" and thus "counseled a design that built little into the network itself, leaving the network free to develop as the ends (the applications) wanted"); see also Meinrath & Pickard, *supra* note 540, at 227 ("This best effort entails packets being delivered in a 'first-in first-out' method at the maximum speed possible given network constraints. Under network neutrality, network operators do not decide what content users can access and cannot impede the flow or give preferential treatment to particular kinds of content.").

respected scholars, have insisted that prohibitions on “network management” would, inter alia, slow innovation and hinder carriers’ efforts to respond nimbly to competitive pressures and consumer demand.<sup>542</sup>

Public demands for network neutrality regulation have grown louder in recent years, especially in the wake of reports revealing that Internet carriers were degrading or blocking packets associated with certain applications or expressive content.<sup>543</sup> As discussed in Part II.2.B, there have been numerous verified reports in recent years of broadband providers censoring political content, or messages critical of the providers themselves, over their networks.

There also have been high profile incidents of violations of the net neutrality principle associated with carriers’ discrimination against data packets associated with certain software applications. For example, in 2005, Madison River Communications, LLC, a broadband service provider in North Carolina that also offers telephone services, entered a consent decree with the FCC assessing a \$15,000 “voluntary payment” for having blocked packets associated with VoIP telephony applications offered by competitors.<sup>544</sup> More recently, in August 2008, the FCC found that Comcast Corporation—a major cable television provider—had “broadly and arbitrarily” blocked packets associated with certain file-sharing

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542. See, e.g., Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 7 (2005); see also *Net Neutrality, Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 109th Cong. (2006) (testimony of Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association), available at <http://commerce.senate.gov/pdf/mcslarrow-020706.pdf> (“Congress should . . . allow the marketplace to continue to grow and change so network and applications providers can offer consumers the fullest range of innovative service options.”).

Broadband providers have argued that originators of bandwidth-intensive content and applications, like Google and MSN, should pay a premium for the transport of their packets. For example, SBC Communications, Inc. Chairman Edward E. Whitacre, Jr. expounded in an interview that “what they would like to do is use my pipes free, but I ain’t going to let them do that because we have spent this capital and we have to have a return on it.” Arshad Mohammed, *SBC Head Ignites Access Debate*, WASH. POST, Nov. 4, 2005, at D1. Mr. Whitacre apparently failed to account for the fact that broadband carriers in fact are compensated for carrying bandwidth-intensive traffic by means of large access fees paid by originators as well as end-users, who pay a premium for high-speed access. Professor Phillip Weiser called Mr. Whitacre’s comment “bizarre on many levels” and noted that “Google does not use much bandwidth for its search application” and “has added enormous value to—and demand for” broadband service. Philip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN. L. REV. 273, 283 (2008).

543. For numerous examples of net neutrality violations in North America, see JOHN WINDHAUSEN, JR., *GOOD FENCES MAKE BAD BROADBAND: PRESERVING AN OPEN INTERNET THROUGH NET NEUTRALITY*, PUBLIC KNOWLEDGE WHITE PAPER 16–23 (2006), <http://www.publicknowledge.org/pdf/pk-net-neutrality-whitep-20060206.pdf>.

544. Madison River Commc’ns, LLC, 20 F.C.C.R. 4295, 4297 (2005) (consent decree); see Jonathan Krim, *Phone Company Settles in Blocking of Internet Calls*, WASH. POST, Mar. 4, 2005, at E2 (reporting that the company’s blocking of calls resulted in a complete inability for some consumers to use their VoIP services).

applications, such as BitTorrent, thereby denying subscribers online video, music, and other content of their choice.<sup>545</sup> The FCC rejected Comcast's argument that the blocked traffic merely was the result of "reasonable network management," noting that the record showed that Comcast was blocking these packets even at times when there was no network congestion, and that its actions had an anticompetitive motive since peer-to-peer file-sharing applications "including those relying on BitTorrent, provide Internet users with the opportunity to view high-quality video that they might otherwise watch (and pay for) on cable television."<sup>546</sup> Comcast's appeal of the FCC's order is pending.

While proponents of net neutrality praised the FCC's Comcast Order,<sup>547</sup> the action was not a model of administrative clarity and coherence. In his statement supporting it, then-FCC Chairman Kevin J. Martin said that by "tell[ing] Comcast to stop" blocking and delaying certain traffic, the FCC had taken "another important step to ensure that all consumers have unfettered access to the Internet."<sup>548</sup> But in the same statement, Martin declared that "[o]ur action today is not about regulating the Internet" and that he has "consistently opposed calls for legislation or rules to impose network neutrality."<sup>549</sup> This contradiction caused some observers to question the FCC Comcast Order's validity and longevity.<sup>550</sup>

The lack of clarity in the FCC Comcast Order may be attributable, in part, to uncertainty surrounding the FCC's authority to hold carriers accountable for violations of net neutrality. As noted in Part III, the FCC deregulated cable-modem broadband service in 2002 and DSL broadband service in 2005 by removing them from the scope of Title II's common-carrier requirements and reclassifying them as unregulated "information

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545. Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13,028 (2008) [hereinafter Formal Complaint Against Comcast] (opinion and order).

546. Press Release, Fed. Comm'n's Comm'n, Commission Orders Comcast to End Discriminatory Network Management Practices (Aug. 1, 2008), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-284286A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284286A1.pdf). The Commission concluded that "[s]uch video distribution poses a potential competitive threat to Comcast's video-on-demand ('VOD') service." *Id.*

547. For example, Commissioner Michael J. Copps called it "a landmark decision" and "a meaningful stride forward on the road to guaranteed openness of the Internet." Formal Complaint Against Comcast, 23 F.C.C.R. at 13,078.

548. *Id.* at 13,065.

549. *Id.* at 13,067.

550. See, e.g., Charles Cooper, *The FCC on Comcast: Confusion in Spades*, Coop's Corner, CNETNEWS.COM, [http://news.cnet.com/8301-10787\\_3-10005350-60.html](http://news.cnet.com/8301-10787_3-10005350-60.html) (Aug. 2, 2008); Posting of Olga Kharif to BusinessWeek.com, *FCC's Comcast Ruling Opens a Can of Worms*, [http://www.businessweek.com/the\\_thread/techbeat/archives/2008/08/fccs\\_comcast\\_ru.html?campaign\\_id=rss\\_blog\\_techbeat](http://www.businessweek.com/the_thread/techbeat/archives/2008/08/fccs_comcast_ru.html?campaign_id=rss_blog_techbeat) (Aug. 1, 2008) (suggesting the FCC Comcast Order will "likely open a whole new can of worms" in regard to the "net neutrality debate").

services” under Title I of the Communications Act.<sup>551</sup> Although the Supreme Court in *Brand X* noted that the FCC could still “impose special regulatory duties” on cable-modem broadband providers “under its Title I ancillary jurisdiction,”<sup>552</sup> the FCC has promulgated no regulations addressing net neutrality in cable broadband or any other Internet service. In addition, scholars disagree about whether Title I ancillary authority would, in fact, support FCC regulation of broadband providers of the sort that net neutrality proponents demand, absent new authorizing legislation.<sup>553</sup> Even if the FCC were to promulgate regulations mandating network neutrality, those regulations likely would be challenged promptly as inconsistent with the overarching policy objective Congress articulated in § 230 of the 1996 Telecom Act, namely to preserve “the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>554</sup>

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551. See *supra* note 449 and accompanying text.

552. Nat’l Cable & Telecomms. Ass’n v. *Brand X* Internet Servs., 545 U.S. 967, 996 (2005).

553. Professor James B. Speta, for example, has written that “the FCC’s authority under Title I is, at best, uncertain” and that with broadband services under Title I of the Act it is “unlikely that the courts would permit the FCC to regulate the Internet in any significant fashion.” James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 22 (2003); see also Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 517–19 (2002). Professors Merrill and Watts argue that the legislative intent of Title I, § 4(i) of the Communications Act, as amended—which states that “the Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions”—is not a grant of legislative rulemaking authority but merely the grant of authority to make procedural rules and undertake other internal “housekeeping” functions. *Id.* They posit that Congress expressly conferred legislative rulemaking authority to the FCC only in the areas of common carriers (Title II), broadcasting (Title III), and cablecasting (Title VI). Thus the Communications Act’s rulemaking language in Title I, if interpreted as conferring blanket legislative rulemaking authority to the FCC, would render superfluous the latter substantive grants of rulemaking authority. *Id.* Professor Weiser disagrees, arguing that the FCC does have adequate authority under Title I to promulgate regulations imposing substantive duties on broadband providers. See Weiser, *supra* note 542, at 289; see also Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 48–67 (2003) (conceding that the FCC “will face serious questions as to whether Title I authorizes the FCC to regulate broadband platforms” but concluding that the FCC could promulgate legislative regulations using its Title I ancillary authority if, *inter alia*, it were to articulate “a limiting standard to contain the reach of its authority over the Internet”).

554. Telecommunications Act of 1996, 47 U.S.C. § 230(b)(2) (2000); see also Editorial, *FCC politics.gov*, WALL ST. J., July 30, 2008, at A14 (“It’s also not clear that the FCC even has the authority to enforce net neutrality, because Congress has never passed a law establishing such a policy.”). The FCC responded to this argument in the Comcast Order, arguing in part that “the policy embodied in this provision cannot reasonably be read to prevent *any* governmental oversight” of broadband providers since, when the provision was enacted, Internet providers were subjected to “extensive common carrier regulation.” Formal Complaint Against Comcast, 23 F.C.C.R. 13,028, 13,042 (2008) (opinion and order). Although this characterization of the regulatory status of Internet services at the time of the 1996 Telecom Act’s enactment is accurate, it does not go far in resolving the

Given the FCC's uncertain legislative authority, it is not surprising that the agency assessed no fine and merely required Comcast to comply with its 2005 Internet Policy Statement. In that nonbinding statement, the FCC declared that it "has a duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age."<sup>555</sup> It also adopted a number of principles central to the net neutrality norm, including consumers' right to access the "lawful Internet content of their choice," "to run applications and use [legal] services of their choice," and "to connect their choice of legal devices that do not harm the network."<sup>556</sup>

*a. Net Neutrality and Democracy Online*

The focus of many of the arguments in favor of legislation mandating net neutrality has been on application-layer competition and innovation. Professor Lessig, for example, convincingly argues that instead of hindering innovation, a neutral Internet respecting the nondiscriminatory end-to-end principle has been "an engine of innovation" by decentralizing "[t]he power, and hence the right, to innovate."<sup>557</sup> Similarly, Professor Tim Wu has posited that a neutral Internet has engendered a much more competitive marketplace for Internet applications than would have resulted from a non-neutral net.<sup>558</sup>

Telephone and cable companies, intent on exploiting their duopoly control by churning more profit out of their broadband networks, can attempt to do so by further commoditizing the Internet to the detriment of end users and third-party content providers. This threat reasonably has generated legislative proposals and scholarly theorizing focused on the economic, commercial marketplace threats posed by violations of the net neutrality norm. For example, in introducing a bill seeking to codify net neutrality, Senator Ron Wyden (D-OR) argued that allowing broadband intermediaries to create and charge premium rates for prioritized carriage

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uncertainty concerning whether the FCC currently has the statutory authority to enforce net neutrality, especially given the deregulatory impetus of the statute.

555. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14,986, 14,988 (2005).

556. *Id.*

557. Lessig, *supra* note 162, at 61.

558. See Wu, *supra* note 540, at 151; see also Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. ON TELECOMM. & HIGH TECH. L. 15 (2006) (arguing that network neutrality encourages competitors to enter the market and compete for business); WINDHAUSEN, *supra* note 543, at 39 (explaining that net neutrality has spurred, instead of hindered, broadband deployment by "provid[ing] certainty to innovators and entrepreneurs who will be more willing to invest to develop new services if they have confidence that, once developed, access to the network will be available").

of traffic “could have a chilling effect on small mom-and-pop businesses that can’t afford the priority lane, leaving these smaller businesses no hope of competing against the Wal-Marts of the world.”<sup>559</sup> Other proponents similarly speak in terms of “design[ing] rules that explicitly forbid network operators and ISPs to use their power over the transmission technology to negatively affect competition” and thereby harm consumers in the broadband marketplace.<sup>560</sup>

Allowing broadband carriers such as Comcast to commoditize the transport of data packets, charging a premium for faster transport, or to degrade surreptitiously or block competitors’ traffic, triggers serious concerns involving unfair competition and antitrust generally. With the prospect of optimizing profit from prioritized “extra charge” traffic, broadband providers would have an incentive to sell as much of that ultra-high-speed transport to providers that can pay the premiums. They also would have the incentive to reserve much of that prioritized “fast lane” for their own affiliated applications and services.

This antitrust lens, however important, does not encompass the totality of the harm a nonneutral Internet would cause to diverse political expression, noncommercial content, and democratic engagement generally on the Internet. Although the conditions for political engagement and discussion online are less than ideal, the significant value that the Internet delivers today as an instrument of democratic expression is attributable largely to the ability of citizens to use free applications, such as YouTube, blogging and social networking websites, or low-cost website-hosting services, to engage other citizens online. The absence of net neutrality in favor of tiered, premium pricing for packet transport could threaten the viability of these free websites, as well as that of the noncommercial, local public discussion websites proposed above. A non-neutral Internet also would threaten the economic viability of print journalism (i.e., newspapers), as it continues to make the already precarious transition from broadsheets to broadband.<sup>561</sup>

Absent net neutrality, the Internet would become a variation of a private shopping mall or, perhaps more analogously, a homogenized cable

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559. Press Release, Senator Ron Wyden (D-OR), Wyden Moves to Ensure Fairness of Internet Usage with New Net Neutrality Bill (Mar. 2, 2006), <http://wyden.senate.gov/newsroom/record.cfm?id=266467>.

560. See Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483, 486–87 (2006) (providing helpful summary of policy and academic arguments advanced in support of net neutrality, almost all focusing on antitrust and marketplace concerns).

561. See ROBERT W. MCCHESENEY, *THE POLITICAL ECONOMY OF MEDIA* 145–46 (2008) (noting that the successful transition of print journalism “from ink and paper to bits” is dependent on net neutrality, inter alia, and the inability of broadband carriers to “demand a ransom for the newspaper to have access to the public”).

television service with a preponderance of subscription and other pay channels and a paucity of noncommercial, public space (e.g., public, educational, and governmental “channels”) for diverse, localized community dialogue and expression.<sup>562</sup> Much of the generative agency on the Internet would shift from the masses of users to the carriers themselves and to those corporate customers that can afford premium transport pricing. Moreover, these carriers’ senior executives have made clear in public statements that they are interested in the ability to prioritize packets not only as a way to gain competitive advantage, but also as a way to control content. For example, IDT Corp. founder and CEO Howard Jonas proclaimed that he not only “want[s] to be the biggest telecom company in the world” but also wants “to be able to form opinion,” noting that “[b]y controlling the pipe, you can eventually get control of the content.”<sup>563</sup>

Professor Susan Crawford correctly recognizes that, to date, the application-layer focus of regulatory, industrial, and scholarly thinking around the Internet, and particularly net neutrality, has “see[n] the Internet as a content-delivery supply chain—much like a railroad” and thus “does not capture what is valuable about the Internet to people.”<sup>564</sup> I very much agree with her assessment that “[o]nline communications are not just like any other form of economic activity. Ideas are not like goods; they are potentially far more valuable.”<sup>565</sup> Accordingly, calls for net neutrality should be broadened to encompass not only competitive and antitrust considerations but also the effects commoditization of bit transport would have on opportunities for noncommercial, local political and democratic engagement online.<sup>566</sup> The Internet is not

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562. See Susan P. Crawford, *Cultural Environmentalism @ 10: Network Rules*, 70 LAW & CONTEMP. PROBS. 51, 59 (2007) (noting that cable and telephone company efforts against the codification of net neutrality requirements are “part of a global attempt by many broadband providers to turn their networks into something much more like what cable companies and mobile phone carriers already have—wholly monetized ‘services,’ with vertically integrated networks built to allow deep packet inspection and the possibility of blocking or degrading undesirable services”).

563. Ann Wozencraft, *For IDT, the Bid Flameouts Light Its Fire*, N.Y. TIMES, Jan. 28, 2002, at C4.

564. Crawford, *supra* note 167, at 361, 381.

565. *Id.* at 391. Professor Crawford further argues that “communications law can no longer afford to ignore” how the Internet is “creating opportunities for the development of new ideas and new ways of making a living” that are key “to our future economic growth.” *Id.* at 391.

566. Leadership Conference on Civil Rights Vice President Mark Lloyd has characterized net neutrality as a civil rights issue because, “[f]or communities of color, the Internet offers a critical opportunity to build a more equitable media system [by] provid[ing] all Americans with the potential to speak for themselves without having to convince large media conglomerates that their voices are worthy of being heard.” Mark Lloyd & Joseph Torres, *Net Neutrality Is a Civil Rights Issue*, COMMONDREAMS.ORG, Feb. 21, 2008, <http://www.commondreams.org/archive/2008/02/21/7210/>.



merely a platform for commerce. Net neutrality is both a democratic and economic imperative.

#### IV. OLD WINE IN A NEW (DIGITAL) BOTTLE? HOW A BROADBAND PUBLIC INTEREST STANDARD WOULD BE MORE EFFECTIVE THAN ITS BROADCAST PROGENITOR

The broadband public interest standard components discussed in Part III would assign the federal government a much more proactive role in promoting important democratic and expressive principles on the Internet. These principles have been at the heart of the broadcast public interest standard for seven decades but have not been fully achieved as a consequence of the broadcast medium's inherent limitations. These proposals, however, may beg a number of important questions. First, how would a *broadband* public interest standard, comprised of the interrelated interventions detailed above, avoid some of the same shortcomings that compromised the effectiveness of the broadcast standard and failed to engender a diverse, deliberative, locally oriented, and democracy-enriching free marketplace of ideas on the nation's airwaves? Would these proposals encounter the same First Amendment frustrations as the broadcast standard? How might a broadband public interest standard actually be more effective than the broadcast standard in delivering the long-promised electronic marketplace of ideas? Finally, why should it be up to the federal government in particular to assume a more interventionist posture in the broadband sphere?

##### A. Avoiding Content Regulation Quagmires

As discussed in Part I, the tension inherent in the government's having to walk the line between avoiding excessive interference with broadcasters' free speech on the one hand and championing the public interest in scarce spectrum on the other has undermined the broadcast public interest standard since its inception. Congress's failure to provide a durable and coherent definition of *public interest broadcasting* further frustrated the success of the broadcast standard. Although significant content-related programming requirements are in place today, the broadcast public interest standard's components have varied so extensively throughout the history of broadcast regulation—in sometimes conflicting ways—that the standard has been described as “the epitome of analytical emptiness.”<sup>567</sup> Moreover, with the transition to digital broadcasting delivering innovative ways to

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567. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 256 (2003).

share spectrum efficiently, the scarcity rationale that served as a premise for broadcast content regulation for most of the twentieth century is now on its weakest footing ever.

I agree with Professor Levi's assessment that we need "to find a practical middle ground" in what has become a polarized media policy debate with, at one end, those who are overconfident about the ability of commercial marketplace competition and content abundance to best realize the democratic benefits of new technology and, at the other end, those who discount the manifold disadvantages and inefficiencies of content-based command-and-control regulation.<sup>568</sup> The middle ground charted in Part III attempts to reconcile those two competing visions by cabining the orientation of government toward the Internet to that of facilitator and convener, much like how the government proactively supports civil society on terra firma. The proposals do not harken back to troubling broadcast-standard-like content regulation, which would be inapposite in the private, post-scarcity digital sphere. They also move away from the Internet exceptionalism that, especially since the 1996 Telecom Act, has kept the government from assuming a more affirmative role in realizing the Internet's democratic potential. They depend principally on subsidies and the provision of access, leaving the content of the resulting online communications up to the individual beneficiaries. Many of the First Amendment conflicts inherent in command-and-control broadcast regulation are thus avoided by this more modest yet still proactive approach to public-interest-minded, governmental intervention into the online marketplace of ideas. All of the affirmative interventions above can be implemented by means of comprehensive legislation, which would avoid the impediments awaiting broad and ill-defined delegations of regulatory authority at the captured and excessively politicized FCC.

In addition, it is unlikely that net neutrality regulation would constitute content regulation or other interference with speech that may run afoul of the First Amendment, despite the arguments that have begun to be made by a small number of neutrality opponents. For example, Randolph J. May claims that a net neutrality regulation would "implicate[] ISPs' free speech rights" since "it is as much a free speech infringement to compel a speaker to convey messages against the speaker's wishes as it is to prevent a speaker from conveying messages."<sup>569</sup>

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568. Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321, 1366 (2007).

569. Randolph J. May, *Communications Policy Pirouettes*, WASH. TIMES, Jan. 21, 2007, at B4; see also Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1905–07 (2006) (arguing that network neutrality mandates would interfere with Internet carriers' editorial discretion).

But such reliance on the First Amendment by net neutrality opponents is misplaced, even assuming the far-fetched proposition that broadband providers are First Amendment speakers as a function of their carriage of Internet data packets. The Supreme Court's validation of the cable television must-carry regulatory regime in *Turner Broadcasting System, Inc. v. FCC* provides a fitting analogy. The Cable Television Consumer Protection and Competition Act of 1992 generally required cable television operators to carry signals of local broadcast stations on their cable systems.<sup>570</sup> Rejecting the cable operators' First Amendment claims, the Court conceded that cable operators "engage in and transmit speech" and thus "are entitled to the protection . . . of the First Amendment"<sup>571</sup> as a result of their legitimate editorial role in composing channel lineups and in producing and transmitting original programming.<sup>572</sup> Nevertheless, the Court concluded that any burden on the cable operators' speech was justified in light of the important government interests in "prevent[ing] cable operators from exploiting their economic power to the detriment of broadcasters." The Court emphasized the importance of "ensur[ing] that all Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content."<sup>573</sup> Because a cable operator's network is connected directly to subscribers' television sets, it can "prevent . . . subscribers from obtaining access to programming it chooses to exclude" and "can thus silence the voice of competing speakers with a mere flick of the switch."<sup>574</sup> Relying on *Associated Press v. United States*,<sup>575</sup> the Court reasoned that "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."<sup>576</sup>

Like cable television operators, the telephone company and cable modem duopolists in the broadband marketplace in almost all cases provide the sole interactive "data pipe" into subscribers' homes. They thus have the incentive, given their integration with broadband content providers, to act as "gatekeepers" who can "flick the switch" on competitors or any other

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570. 47 U.S.C. §§ 534–535 (2000).

571. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

572. *Id.* at 643. The Court also concluded that the must-carry rules were content-neutral because they "are unrelated to the content of the speech." *Id.* at 647.

573. *Id.* at 649.

574. *Id.* at 656.

575. 326 U.S. 1, 20 (1945).

576. *Turner*, 512 U.S. at 657. See Baker, *supra* note 8, at 59 (claiming that the Supreme Court relied on *Associated Press* in order to "assert the legitimacy of broad governmental power over cable").

online speakers whom they disfavor.<sup>577</sup> With online content rivaling and perhaps soon exceeding the importance and centrality of broadcasting in the public sphere, it would not be inconceivable that an assertion by broadband carriers that net neutrality regulations violate their free speech rights would meet the same fate as the similar argument cable operators advanced in *Turner*.<sup>578</sup>

Moreover, broadband providers may find it difficult to overcome the inconsistency in arguing that they—as carriers—are First Amendment speakers whose free speech rights are infringed by net neutrality mandates, while continuing to insist that they deserve the broad immunity granted them under § 230 of the Communications Decency Act from liability for privacy, reputational, and other torts committed over their systems.<sup>579</sup> Courts have upheld such immunity for broadband providers because, to borrow the words of the New York Court of Appeals, the provider “is merely a conduit.”<sup>580</sup> It is unlikely that broadband providers will succeed at having it both ways, forestalling net neutrality mandates by insisting that their carriage of data packets renders them First Amendment speakers, while at the same time continuing to disclaim tort liability as mere conduits.

### B. Subsidies as a Constitutional Alternative to Regulation

Most of the proposals discussed in Part III rely on subsidies in contrast to the broadcast public interest standard’s mandates, which largely have entailed content regulation justified by the increasingly unstable scarcity and public ownership rationales. Whereas the regulation of even content-neutral speech is presumptively unconstitutional, the government’s subsidization of speech is presumptively valid even where it poses an incidental burden on the facilitated speech.<sup>581</sup>

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577. See Crawford, *supra* note 167, at 403 (arguing that, in the absence of net neutrality, broadband providers would “cease to be commodity-transport providers, and will instead become gatekeepers,” causing the “diversity of online experiences, and thus the range of freedom of human connection, human relationships, and the diverse generation of new ideas [to] diminish”).

578. See ZITTRAIN, *supra* note 360, at 181–82 (drawing a parallel between broadband net neutrality norms and the cable television must-carry regulations); see also Sunstein, *supra* note 185, at 1774 (positing that *Turner* supported government regulation of “new speech sources” by “invoking such democratic goals as the need to ensure ‘an outlet for exchange on matters of local concern’ and ‘access to a multiplicity of information sources’” (citing *Turner*, 512 U.S. at 663)).

579. See 47 U.S.C. § 230 (2000); see also *supra* note 266 (describing the liability-limiting effect of § 230 of the 1996 Communications Decency Act).

580. *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 542 (N.Y. 1999).

581. See *Turner*, 512 U.S. at 680 (O’Connor, J., concurring in part and dissenting in part) (recognizing that “the government may subsidize speakers that it thinks provide novel points of view”); see also Ellen P. Goodman, *Bargains in the Information Marketplace: The*

Contrary to the widely held misconception that the government has prioritized an autonomy-based, noninterventionist approach to the First Amendment, the government has in fact historically exercised its prerogative to use public monies to promote civic engagement and enhance political communication among the people.<sup>582</sup> As Professor Richard C. Levin has argued, the federal government has intervened especially when private commercial forces have caused inequality of access to democratic and political mechanisms or distortions in the speech marketplace.<sup>583</sup> John Rawls warned that “[t]he liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantage to control the course of public debate.”<sup>584</sup> Government, and especially the federal government, has long intervened to level the playing field and preserve the free speech and other democratic rights and liberties of the less powerful.

For example, Professor Baker has noted that the framers themselves advocated government subsidization of journalism and the democratization of “political intelligence and information.”<sup>585</sup> One of the first tasks of the first Congress was to devise a system for richly subsidizing newspapers by means of deep discounts on postal rates, free postal delivery of newspapers to members of the press, and the building of a network of post roads, both for the distribution of news and political information and for

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*Use of Government Subsidies to Regulate New Media*, 1 J. ON TELECOMM. & HIGH TECH. L. 217, 219–20 (2002) (positing that “[s]peech regulations, even if they are content neutral, are presumptively invalid under the First Amendment” whereas “burdens on speech that are part of a discretionary speech benefit may be treated as presumptively valid exercises of government largesse” (citing *Rust v. Sullivan*, 500 U.S. 173 (1991))); *see also Rust*, 500 U.S. at 202–03 (upholding ability of government to deny Public Health Service Act funds to recipients who engage in any activities advocating abortion as “a method of family planning”).

582. *See, e.g., Bd. of Regents of the Univ. of Wis. v. Southworth*, 529 U.S. 217, 234 (2000) (holding that a public university, like other government entities, has an interest in encouraging engagement and participation in civic, social, and community affairs); *see also Netanel*, *supra* note 152, at 472 (affirming that the government has the privilege of utilizing public funds, not only to promote civic goals, but to advance its own policies).

583. *See* Richard C. Levin, President, Yale Univ., *Democracy and the Market*, Speech for Democratic Vistas: The William Clyde DeVane Lecture Series 15 (Feb. 6, 2001), transcript available at <http://www.yale.edu/terc/democracy/media/feb6text.pdf> (“Our American democracy appears willing to tolerate a substantial degree of inequality, but we nonetheless used political means, acts of government, to temper the tendency to inequality that market forces produce.”). Professor Owen M. Fiss has made a similar argument, reasoning that “[t]he state should be allowed to intervene, and [is] sometimes even required to do so, . . . to correct for the market.” Fiss, *supra* note 19, at 791.

584. RAWLS, *supra* note 183, at 225.

585. Baker, *supra* note 8, at 99 (quoting President George Washington). Madison also argued that in a democracy like the United States “easy and prompt circulation of public proceedings is peculiarly essential.” *Id.*; *see also* ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 696–99 (Archon Books 1965) (1947) (discussing government subsidies as valid and useful media reform measure).

communication among the citizenry.<sup>586</sup> The U.S. Postal Service, whose creation required a massive commitment of federal revenue soon after the birth of the Republic, was founded in part to facilitate the exchange of political communication among and between citizens and their representatives in Washington.<sup>587</sup> In addition, Professor Jack Balkin refers to the government's creation of a free public education system and a network of free public libraries as components in the federal government's proactive promotion of speech and democratic values.<sup>588</sup> The CPB itself is a contemporary example of the federal government's direct subsidization of speech on electronic media for civic elevation and democratic engagement. Commercial broadcasters themselves enjoy an implicit subsidy by virtue of their free use of public spectrum. The proposals discussed in Part III are wholly in harmony with this long tradition of government—and specifically federal government—subsidization of public spaces, speech opportunities, and democratically and socially valuable content.

Although government speech subsidies are not presumptively invalid, as speech restrictions would be, the government must exercise care in opening and subsidizing online speech fora in order not to violate the First Amendment rights of participants. The Supreme Court in *Rosenberger v. Rector & Visitors of the University of Virginia* underscored the importance of the government's not engaging in viewpoint discrimination when it designates limited public fora.<sup>589</sup> There, the Court concluded that the University of Virginia's student activities fund constituted a limited public forum, and that the University—a state institution—violated the First Amendment by discriminating against the viewpoints of religious student groups who were denied funds.<sup>590</sup> The Court reasoned that “when the government appropriates public funds to promote a particular policy of its own,” as in the case of *Rust v. Sullivan*, “it is entitled to say what it wishes.”<sup>591</sup> Viewpoint-based restrictions are not valid, however, when the state “expends funds to encourage a diversity of views from private speakers”—as would be the case with government-hosted or government-subsidized online fora.<sup>592</sup> Nevertheless, in designating public fora online, the government would be free to articulate a purpose for a particular

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586. See Netanel, *supra* note 152, at 472.

587. See LLOYD, *supra* note 6, at 15–16 (“Madison helped to enable all Americans to communicate . . . by supporting legislation that simultaneously subsidized the spread of popular information and advanced what would become the largest part of our early federal government—the Post Office.”).

588. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 50–51 (2004).

589. 515 U.S. 819, 828, 845–46 (1995).

590. *Id.* at 834–37.

591. *Id.* at 833.

592. *Id.* at 834.

discussion website and exercise editorial control in excluding and limiting individual speakers when “reasonable in light of the purpose served by the forum.”<sup>593</sup> For example, as in the case of already successful local public discussion websites, a public website facilitator may set up an online community discussion on a particular topic—for example, a proposal to merge two schools or build a new library—and limit discussion to what would be germane to that topic.<sup>594</sup>

Attention also must be paid to ensuring that in subsidizing online public spaces and speech, officials implementing these interventions are not permitted to manipulate the content of the speech for partisan political advantage or other illegitimate ends. Of course, this is a risk inherent in the government’s subsidization of any speech or public fora, both online and on terra firma. Nevertheless, as in the context of federal subsidization of public broadcasting, there must be safeguards in place to ensure that the government’s subsidies in support of online fora and speech are distributed in a manner free from partisan or other inappropriate influence. In the case of the Corporation for Public Broadcasting, Congress assigned a “nonpolitical nature”<sup>595</sup> to the organization, and requires that its board of directors be comprised of a politically balanced and professionally and geographically diverse membership.<sup>596</sup> The CPB also is required to adhere to strict grant- and financial-reporting guidelines in order to ensure fairness and transparency.<sup>597</sup> As noted in Part III.B.2, the American public broadcasting model has not been without political controversies, but on balance, the system has delivered democratically and socially valuable content not otherwise available to citizens. A new fiscal agent to administer federal funds in support of affirmative government interventions online, such as the Corporation for Public Broadband proposed above, should be required to comply with CPB-like requirements ensuring transparency, accountability, and the filtering out of partisan or other inappropriate political pressures.

In addition, in an era of unprecedented federal budget deficits and widespread criticism of federal spending, significant federal subsidies in support of the proposals in Part III will probably meet with opposition. An effective response should, of course, acknowledge the longstanding

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593. *Id.* at 829 (citation omitted).

594. See Goodman, *supra* note 581, at 243 n.83 (discussing the germaneness principle as applied in *Rosenberger*).

595. 47 U.S.C. § 396(f) (2000).

596. See *id.* § 396(c)(1)–(2) (requiring that no more than five of the nine board members be from the President’s political party and that they “be selected so as to provide as nearly as practicable a broad representation of the various regions . . . , various professions and occupations, . . . talent and experience appropriate to the functions” of the CPB).

597. See *id.* § 396(i)(1)–(2) (detailing annual reporting requirements); *id.* § 396(k)(1)(A)–(1)(D) (providing financial disclosure, auditing, and open records and meetings requirements).

government commitment to the subsidization of public, noncommercial spaces for democratic engagement. Just as so much human interaction has migrated from terra firma to cyberspace, so too should the government's interventions in support of the creation and maintenance of accessible, noncommercial public discussion spaces expand into the digital realm. The nature of direct federal financial support for broadband proliferation as a vital and necessary investment in the nation's economic future is also important. As noted above, some estimates place the cost of the nation's lag in broadband proliferation at \$1 trillion in economic growth.<sup>598</sup> Delays in providing broadband service to large areas of the nation significantly impeding the ability of businesses in underserved or unserved areas from competing successfully against broadband-connected companies elsewhere in the United States and around the globe.<sup>599</sup> The federal government's massive investments in the building out of key elements of the nation's infrastructure—the electric grid, the interstate highway system, railroads, and post roads—were repaid many times over by means of increased tax revenues generated by the economic growth spurred by the proliferation of the power and transportation networks. So too should the government's subsidization of broadband proliferation be repaid in increased economic activity, and resulting tax revenue, down the road.<sup>600</sup>

### *C. Bridging Autonomy with Civic Republicanism*

Political scientist Alan Wolfe postulates that the core dilemma vexing Americans today is “how to be an autonomous person and tied together with others at the same time.”<sup>601</sup> Professor Wolfe's assessment echoes Tocqueville's warning that the autonomy and individualism so defining American democracy in its adolescence are at once its strength and its weakness.<sup>602</sup> The American Experiment survives, and can thrive, if we

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598. See DEP'T OF EDUC., *supra* note 404, at 1–10, 16; see also Travis, *supra* note 446, at 1699 (“As much as \$1 trillion in economic growth may be delayed due to structural and legal limitations on U.S. broadband access.”).

599. See Hesseldahl, *supra* note 480 (reporting that businesses in nonbroadband areas of the nation are at a disadvantage in attracting new clients, and that counties across the nation are finding that “a broadband blackout can also hobble economic development”).

600. See Crawford, *supra* note 167, at 390 (“Our national economic policy, which looks for opportunities for increased economic growth, should be closely tied to communications policy that facilitates the interactive, group-forming attributes of the Internet.”).

601. Galston, *supra* note 377, at 42.

602. See ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 482 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (describing American individualism as “a reflective and peaceable sentiment that disposes each citizen to isolate himself from the mass of those like him and to withdraw to one side . . . so that after having thus created a little society for his own use, he willingly abandons society at large to itself”); see also DAVID R. HILEY, DOUBT AND THE DEMANDS OF DEMOCRATIC CITIZENSHIP 26 (2006) (noting scholars' reception of Tocqueville's observations about individualism in American



manage to reconcile our individuality with our membership in a republic dependent on engaged, deliberative civic participation. It withers when our individualism overtakes our civic identity.<sup>603</sup>

The regulation of broadcasting was rooted in an administrative impetus to build local, democratic civic life—to use the public airwaves to promote a civic republican, communitarian vision of the First Amendment. By contrast, the Internet, by both technological design and regulatory forbearance, has evolved into an instrument of hyperindividualism and personal autonomy. While broadcasting convenes and focuses, the Internet atomizes and fragments. Broadcasting was to promote democracy, and the Internet was to promote autonomy. But, as illustrated in Parts I and II, neither regulatory paradigm has fully realized its aspirations. While technological, commercial, and legal impediments make it impossible for broadcasting to deliver an electronic platform for deliberative democracy, the atomistic nature of the Internet, the prevalence of private censorship, and the lack of localized civic spaces online have made it impossible for the Internet to deliver an electronic free marketplace of ideas.

The Internet provides an unprecedented opportunity for government to assume an interventionist, supportive role in promoting electronic democratic engagement while avoiding the hazards that bedeviled the broadcast public interest standard since its inception. Professor Robert Post has written that the problem with government forays into the promotion of democratic engagement and debate is that they tend to “permit the state to define the agenda and parameters of public debate” as if “to presuppose an Archimedean point that stands outside of the process of self-determination.”<sup>604</sup> He argues that putting the government in the position of “pedagogical state” would be “incompatible with democratic self-governance” since “citizens engaged in collective self-determination through participation in public discourse are not students to be taught, but autonomous masters of their fate. They are adults, not pupils.”<sup>605</sup> By aggressively proliferating broadband access and making it possible for more locally oriented, public spaces for democratic deliberation to exist online, the government acts more as a facilitator than paternalistic arbiter. It acts more like a convener than teacher. The proposals in Part III avoid a

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culture).

603. Political philosopher Jean Bethke Elshtain suggested in 1995 that we had already reached a point of disequilibrium. She wrote that “our American democracy is faltering” with “exhaustion, cynicism, opportunism, and despair.” JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* 1 (1995).

604. Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1538 (1997) (reviewing OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996)).

605. *Id.*

paternalistic, pedagogical role for government by respecting the autonomy of Internet speakers while providing more, noncoercive opportunities for local democratic engagement.

In addition, the proposals do not entail the subordination of the First Amendment rights of one set of private speakers to the rights of others, as is the case with the floundering public trusteeship model in broadcasting. Although the Internet is far from an embodiment of a fully accessible and inclusive free marketplace of ideas, it at least has the potential for delivering that vision, unlike broadcasting, which is structurally incapable of serving as a platform for popular democratic engagement and deliberation. Moreover, the Internet has demonstrated its ability to serve as a check on government as well as the dominant media. Much of the broadcast public interest standard's requirements, on the other hand, were eliminated by an FCC captured by the extraordinarily influential broadcast lobby, with the acquiescence of a Congress chastened by the power of local broadcasters to shape the path of political careers.

At the same time, the proposals in Part III acknowledge that the autonomy and civic republican views of the First Amendment are not mutually exclusive. To the contrary, the Internet is uniquely positioned as a medium that, unlike broadcasting, can reconcile the dialectic tension between autonomy and civic republicanism. Autonomy, after all, should be seen not as an end in itself but as a means to freedom and enlightenment. While Justice Brandeis's concurrence in *Whitney v. California* often is cited as support for an autonomy-rooted view of the First Amendment, in fact Brandeis reasoned that autonomy was a prerequisite for a deliberative democracy: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary."<sup>606</sup>

This view of autonomy as a means toward—instead of a counterweight against—civic engagement and communitarianism is in harmony with the conceptions of the First Amendment of many prominent free speech scholars and is the dominant paradigm in contemporary free speech philosophy. Professor Alexander Meiklejohn valorized personal autonomy in the speech marketplace as a necessary conduit for civic engagement and collective self-government.<sup>607</sup> Professor Owen Fiss wrote that "[t]he

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606. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Justice Brandeis continued: "They valued liberty both as an end and as a means." *Id.*; see also Rainey, *supra* note 12, at 317–23 (discussing the tensions between "individualist and communitarian" views of liberty and *Whitney v. California*).

607. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410–11 (1986) ("Autonomy is not valued by Meiklejohn and his followers because of what it does for a person's development (self-actualization), but rather because of the contribution it makes to our political life.").

autonomy protected by the First Amendment and rightly enjoyed by individuals and the press is not an end in itself, as it might be in some moral code, but is rather a means to further the democratic values underlying the Bill of Rights.”<sup>608</sup> Professor Fiss argues that “the state may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech.”<sup>609</sup>

Other notable scholars have theorized that the proper role of government in the speech marketplace is a proactive one that optimizes access and promotes civic engagement, in ways that resonate with the proposals in Part III. Professor Zechariah Chafee, Jr., for example, argued that “affirmative action by the government” is required to ensure that the marketplace of ideas functions optimally, just as the government intervenes in commercial marketplaces to ensure access, fairness, and a wide and dynamic trade.<sup>610</sup> Professor Sunstein has long recognized an affirmative government obligation to provide speech opportunities—a “New Deal” for speech in which the government proactively facilitates more deliberative democracy.<sup>611</sup> He argues that the public forum doctrine not only creates a right of speakers to access public spaces for expressive activities, but more essentially “creates a right, not to avoid governmentally imposed penalties on speech, but to ensure government subsidies for speech.”<sup>612</sup> Similarly, Professor Jack Balkin theorizes that the purpose of freedom of speech is not merely autonomous self-actualization but individual development *through* civic engagement. He argues that the objective of free speech is the promotion of a “democratic culture” that is “about individual liberty as well as collective self-governance.”<sup>613</sup> Other scholars hold harmonious views.<sup>614</sup>

Finally, the proposals in Part III that aim to create more opportunities for shared experiences online, and the presentation of valuable democratic,

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608. OWEN M. FISS, *THE IRONY OF FREE SPEECH* 83 (1996).

609. *Id.* at 3–4.

610. ZECHARIAH CHAFEE, JR., 2 *GOVERNMENT AND MASS COMMUNICATIONS* 471–77 (1947). Professor Chafee wrote that “a free market requires regulation, just as a free market for goods needs law against monopoly.” *Id.* at 475.

611. SUNSTEIN, *supra* note 214, at 241.

612. CASS R. SUNSTEIN, *REPUBLIC.COM* 28 (2001); *see also id.* (“There is no question that taxpayers are required to support . . . expressive activity.”).

613. Balkin, *supra* note 588, at 3. Professor Charles Fried has written that “this fundamental liberty [of speech] is one that must to some extent be designed and engineered by the state after all.” CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* 107 (2007).

614. Professor Baker has taught, “Although the First Amendment ought to restrict purposeful suppression of speech, it should not and has not restricted structural interventions designed to improve the quality of the press.” C. EDWIN BAKER, *MEDIA, MARKETS AND DEMOCRACY* 4 (2002). Professor Fried similarly acknowledges that the fundamental liberty of speech in public spaces “is one that must to some extent be designed and engineered by the state after all.” FRIED, *supra* note 613, at 107.

noncommercial content that citizens otherwise would not seek out on their own, are very much in harmony with recent scholarship on the importance of affirmative government measures to enhance exposure diversity in today's atomized digital marketplace. Professor Ellen Goodman's work in particular underscores the need for proactive media policy to address actual consumption of valuable content instead of access alone.<sup>615</sup> The digital communications ecology has reversed the broadcast paradigm of scarce spectrum and abundant attention into one in which content is abundant but attention scarce. As a result, Professor Goodman argues that "[t]he appropriate policy response" to the failure of the digital marketplace to provide local, democratic content "is proactive[] in that it seeks to expose people to content that they do not, at least initially, demand" and that "influence[s] demand, cultivating public tastes in ways that support democratic ideals."<sup>616</sup> This is an especially important function of government in the digital realm insofar as the marketplace of ideas, when left to the devices of commercial actors alone, tends not only to privilege commercial expression but also to manipulate and form the audience's tastes and preferences for content.<sup>617</sup>

In the broadcast regime, the government's promotion of viewpoint, source, and content diversity by promulgating production-side regulations took for granted that its efforts would result in a diversity of exposure.<sup>618</sup> Because broadcast channels were limited, any affirmative interventions by government to promote local, public interest programming, or noncommercial fare on public stations, were assured of an audience of viewers and listeners who would seek out the programming or stumble upon it in surfing the dial to see "what's on." These serendipitous encounters with democratically valuable and noncommercial content are much rarer in the atomized, fragmented Internet. The proposals in Part III would promote online exposure diversity by boosting access, creating new common spaces online, and, most importantly, drawing localized attention to public interest, noncommercial content online that citizens otherwise may not seek on their own. In addition, they would help counteract the Internet's propensity to accelerate the deterioration of American civic engagement and communitarianism bemoaned by Professors Sandel and Putnam.

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615. See Goodman, *supra* note 58, at 364 ("If media policies are to effectuate proactive goals in the digital era, what is required is a new emphasis on content consumption, as opposed to mere content availability.").

616. *Id.* at 364, 366.

617. BAKER, *supra* note 614, at 87–95.

618. See Goodman, *supra* note 58, at 370 ("When public television broadcast a documentary or when commercial stations held political debates, a good number of viewers who did not initially demand the content would nonetheless stumble across it.").

## CONCLUSION

Initial overoptimism about the power of emerging communications technologies to transform the world is nothing new. Likewise, there is nothing novel about the concern that a new technology harms rather than helps society. In Plato's *Phaedrus*, Socrates expressed alarm at how the spread of literacy would undermine wisdom and the value of firsthand observation, allowing readers to appear "very knowledgeable when they are for the most part quite ignorant."<sup>619</sup> The invention of the printing press in the fifteenth century led some to bemoan its effects on memory and intellect.<sup>620</sup> And the advent of the recording industry in the late nineteenth century caused composer John Philip Sousa to warn that "talking machines are going to ruin the artistic development of music in this country" and cause the "vocal chords [to] be eliminated by a process of evolution."<sup>621</sup>

In more modern times, the power of broadcasting to provide a point of common focus in homes across the nation instilled both awe at the medium's promise to transform democracy and fear at the power the medium gave the entities that controlled it to shape public tastes and the content of our discussion.<sup>622</sup> Today, as detailed in Part II, the Internet is seen as both enhancing and harming democracy and society in significant ways.

The modern state has played an important role in promoting the democratic and social benefits of emerging technologies while dampening their perceived harms. In broadcasting, the broadcast public interest standard has been government's affirmative effort, still underway, to "promote and realize the vast potentialities"<sup>623</sup> of the powerful, pervasive, and central broadcast medium. It endeavored to realize broadcasting's potential as a democracy-enhancing instrument while mitigating its antidemocratic effects. As discussed in Part I, the broadcast regulatory

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619. PLATO, *PHAEDRUS AND THE SEVENTH AND EIGHTH LETTERS* 96 (Walter Hamilton trans., Penguin Classics 1973). Socrates feared that "because [readers] are filled with the conceit of wisdom instead of real wisdom they will be a burden to society." *Id.* at 96–97.

620. See generally Nicholas Carr, *Is Google Making Us Stupid?*, ATLANTIC, July–Aug. 2008, at 56 (referencing Socrates and literacy, as well as the alarm caused by the arrival of the printing press).

621. *Arguments Before the Comms. on Patents of the S. & H.R., Conjointly, on the Bills S. 6330 and H.R. 19,853, to Amend and Consolidate the Acts Respecting Copyright*, 59th Cong. 24 (1906) (statement of John Philip Sousa). Mr. Sousa testified, "When I was a boy . . . in front of every house in the summer evenings you would find young people together singing the songs of the day or the old songs. Today you hear these infernal machines going night and day. We will not have a vocal chord left." *Id.*

622. See BOLLINGER, *supra* note 12, at 63 (noting that American broadcasting regulation was premised both on the concern that broadcasters would "control the content of public discussion" and that the marketplace alone would be unable to keep that power in check).

623. *NBC, Inc. v. United States*, 319 U.S. 190, 217 (1943).

regime has been far from a model of regulatory effectiveness. Although it has had some success at promoting universality of broadcast service, localism, competition, and diversity on the broadcast medium, command-and-control broadcast regulation has failed to deliver the electronic free marketplace of ideas envisioned by regulatory optimists at the dawn of broadcasting.

The failure of the broadcast public interest standard to achieve its laudable and lofty objectives, however, should not argue against affirmative government interventions into the broadband realm to “promote and realize the vast potentialities” of the technology for civic republican and communitarian ends. Quite to the contrary, the current state of the Internet as a platform for expression and democratic engagement calls for significantly more, and not less, proactive government intervention.

Whereas there is a scarcity of true democratic deliberation and localized public fora online, private censorship, fragmentation, and atomization of attention abound. Although the broadband realm has enabled millions to create and receive democratic and other forms of expression and information, broadband remains out of reach for many Americans, especially minority, rural, and economically disadvantaged communities. As a result, the digital divide has become a democratic divide, with Americans living in radically different information environments depending on their ability to access and use high-speed Internet service. Hannah Arendt wrote that “political freedom, generally speaking, means the right ‘to be a participator in government,’ or it means nothing.”<sup>624</sup> As the broadband realm becomes even more of a forum for democratic expression, political engagement, and self-governance, those without access to broadband will be without an opportunity for full political participation. In addition, as with broadcasting, the Internet—and especially broadband—offers significant economic, educational, and other benefits that make universality of access all the more important to the nation.

The broadcast public interest standard failed to achieve its objectives fully, not because those objectives were invalid or because a proactive government role was inappropriate, but because the structural, constitutional, and technological particularities of the broadcast medium were incompatible with the standard’s objectives. By contrast, the Internet presents the government with a unique opportunity to pursue and achieve the overarching objectives of the broadcast public interest standard without many of the significant constitutional, structural, and other impediments that bedeviled the broadcast standard. Broadband provides a technological

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624. HANNAH ARENDT, *ON REVOLUTION* 221 (1965).

platform that would accommodate, and is very much in need of, government intervention in support of localism, noncommercial fora, and democratic deliberation in a universally accessible, diverse, and competitive online marketplace of ideas.

The proposals for a broadband public interest standard discussed in Part III would enable the federal government to address, in a substantial way, the failure of the commercial marketplace to realize the democratic promise of broadband. The proposals recognize that, in today's converging media ecology, broadband Internet has emerged as a central medium for human interaction and engagement, rendering the Internet exceptionalism at the heart of the government's noninterventionist disposition obsolete and counterproductive. The United States needs a new affirmative orientation toward broadband that sees it as more than just another widget in a regulatorily unbridled commercial marketplace. A policy that valorizes broadband—as the government has valorized broadcasting since the 1920s—is a vital tool for enhancing democracy; for enfranchising, engaging, and informing a diverse electorate; and for enriching civic life.

Broadband can deliver the electronic free marketplace of ideas that was the elusive, and perhaps impossible, dream of the broadcast regulatory regime. But it will not be able to do so without the significant and proactive involvement of the federal government. The commercial marketplace alone will not deliver the democracy-enriching and ubiquitous electronic free marketplace of ideas we have long sought and that, finally, is within reach.

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# PUBLIC AGENCIES AND INVESTOR COMPENSATION: EXAMPLES FROM THE SEC AND CFTC

VERITY WINSHIP\*

## TABLE OF CONTENTS

Introduction .....	137
I. Proposals to Consolidate the SEC and CFTC .....	139
II. The SEC's Compensatory Function .....	145
III. The CFTC's Compensatory Function .....	147
IV. The Information Advantages of the Agency as Judge .....	152
Conclusion .....	161

## INTRODUCTION

When financial regulators get positive press, it is often when they open investigations or recover large sums of money—in other words, when the regulators are acting in their prosecutorial or counsel role. Similarly, compensation by these regulators hits the headlines when the agency has been the white knight, recovering and distributing funds to injured investors. Rarely do the papers laud financial regulators when they provide the judges in the financial market equivalent of small claims court. This Essay suggests revisiting the unglamorous business of resolving disputes between customers and brokers and recasting it as a potentially valuable source of industry information to the agencies tasked with enforcing securities and commodities laws.

Renewed discussion of regulatory consolidation provides an opportunity to reshape the agencies' involvement in investor compensation. In March 2008, the Department of the Treasury (Treasury) proposed a restructuring

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of U.S. financial regulators in its *Blueprint for a Modernized Financial Regulatory Structure (Blueprint)*.<sup>1</sup> One aim of this proposal is to eliminate distinctions between securities and futures regulation—the regulatory domains of the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC), respectively. In this respect, the Treasury plan is the latest in a series of proposals to consolidate the two agencies and thus resolve a longstanding problem of their overlapping jurisdictions.

Renewed discussion about consolidation of financial regulators presents an opportunity to ask how (and whether) a combined CFTC and SEC should compensate injured investors. The agencies' two very different approaches to investor compensation provide a concrete way of thinking about public agencies' involvement in the often private domain of compensatory remedies.<sup>2</sup> The SEC's ability to return large, headline-grabbing sums to investors has been enhanced by the Sarbanes–Oxley Federal Account for Investor Restitution Fund (Fair Fund) provision, which allows the SEC to distribute money-penalty amounts to injured investors.<sup>3</sup> The SEC's Enforcement Division obtains this compensation in its role as “public class counsel” to injured investors.<sup>4</sup> In contrast, the CFTC's longstanding Reparations Program resolves disputes between private parties (individual shareholders and financial professionals) in a role akin to that of an arbitrator or judge.<sup>5</sup>

This Essay suggests that designers of a consolidated system consider as part of the cost–benefit mix the fact that, unlike the Fair Fund approach, the Reparations Program has the potential to generate information for financial regulators. In terms of the judge–lawyer divide, when the agency acts as counsel it must draw on its traditional sources of information, such as its own compliance inspections and the financial press, to investigate and develop a case. By providing a forum and decisionmaker, it has the potential to draw out information about industry practices or conduct that would not otherwise be available.

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1. See generally DEP'T OF THE TREASURY, THE DEP'T OF THE TREASURY BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE (2008) [hereinafter BLUEPRINT], available at <http://www.ustreas.gov/press/releases/reports/Blueprint.pdf> (recommending immediate regulatory action in response to the recent credit and mortgage crises, proposing the reorganization of regulatory functions, and outlining a model of responsive market regulation).

2. Whether consolidation is a good idea in general, or whether the Department of the Treasury's (Treasury) ambitious proposal for reorganization is viable, is beyond the scope of this Essay.

3. Sarbanes–Oxley Act of 2002 § 308, 15 U.S.C. § 7246 (2006).

4. See generally Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103 (2008) (introducing the concept of “public class counsel”).

5. See *infra* Part III.

Part I examines proposals to consolidate the SEC and the CFTC, including the Treasury's recent *Blueprint*. Parts II and III detail how the SEC and the CFTC, respectively, compensate investors, focusing on the SEC's use of Fair Funds to distribute penalty amounts to injured investors and the CFTC's Reparations Program. Part IV proposes that the two approaches should be unified in a way that maximizes information generation.

# I. PROPOSALS TO CONSOLIDATE THE SEC AND CFTC

The *Blueprint* released by Treasury included proposals to redraw the lines between the SEC and the CFTC.<sup>6</sup> This Part describes the jurisdictions of the two agencies and puts the Treasury *Blueprint* in the context of recurring attempts to consolidate the regulation of futures and securities.

The SEC has jurisdiction to regulate securities and options on securities. One court proposed this working definition of *security*: “an undivided interest in a common venture the value of which is subject to uncertainty.”<sup>7</sup> So far, so good; however, the definition of *security* in the securities acts is deliberately broad and inclusive, reaching “any note” or “stock,” but also reaching an “investment contract”—a much-litigated term—and, helpfully, “any interest or instrument commonly known as a ‘security.’”<sup>8</sup> Instruments labeled “stock” and that have “characteristics usually associated with

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6. See BLUEPRINT, *supra* note 1, at 11–13 (recommending a merger of the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) “to provide unified oversight and regulation of the futures and securities industries” while “preserv[ing] the market benefits achieved in the futures area”).

7. *Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 543 (7th Cir. 1989).

8. The Securities Act of 1933, as amended, defines “security” as any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. Securities Act of 1933 § 1, 15 U.S.C. § 77b(a)(1) (2006). The definition of *security* in the Securities Exchange Act of 1934 is so similar that the Supreme Court has announced that it will interpret them together. Securities Exchange Act of 1934 § 3(a)(10), 15 U.S.C. § 78c(a)(10) (2006) (defining security); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 n.1 (1985) (stating the definition of *security* in both the 1933 and 1934 Acts are “virtually identical and will be treated as such in our decisions dealing with the scope of the term”); LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, 2 SECURITIES REGULATION 856–57 (4th ed. 2006) (discussing the Court’s interpretation of the word *security* in *Landreth*).

common stock”<sup>9</sup> provide an example of a relatively obvious security—an easy case. But the definition also reaches “[n]ovel, uncommon, or irregular devices” such as assignments of oil leasehold subdivisions<sup>10</sup> and rights in orange groves.<sup>11</sup>

The CFTC’s jurisdiction can similarly be stated simply but is complex in practice. The CFTC is an independent federal agency created in 1974 through the Commodity Futures Trading Commission Act (CFTCA),<sup>12</sup> which gave the agency exclusive jurisdiction over futures and options on futures.<sup>13</sup> The CFTCA moved responsibility from the Commodity Exchange Authority—which had been an agency within the Department of Agriculture chaired by the Secretary of Agriculture—to the CFTC.<sup>14</sup> Interestingly, given later territorial disputes, the SEC was reportedly offered the responsibility of regulating futures, but rejected it.<sup>15</sup>

Two points complicate the CFTC’s jurisdictional picture. First, “futures,” like securities, are not always straightforwardly defined. A futures contract can be described as an agreement to buy or sell a commodity for delivery in the future.<sup>16</sup> It grows from agricultural roots in

9. According to the Supreme Court, the characteristics of common stock are “(i) the right to receive dividends contingent upon an apportionment of profits; (ii) negotiability; (iii) the ability to be pledged or hypothecated; (iv) the conferring of voting rights in proportion to the number of shares owned; and (v) the capacity to appreciate in value.” *Landreth Timber Co.*, 471 U.S. at 686 (citing *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 851 (1975)).

10. *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 345, 351 (1943).

11. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 294 (1946).

12. 7 U.S.C. §§ 1–22 (2006). The Commodity Futures Trading Commission Act (CFTCA) amended the Commodity Exchange Act (CEA), ch. 545, 49 Stat. 1491 (1936) (current version at 7 U.S.C. §§ 1–22 (2006)). See generally Egon Guttman, *The Futures Trading Act of 1978: The Reaffirmation of CFTC–SEC Coordinated Jurisdiction over Security/Commodities*, 28 AM. U. L. REV. 1 (1978) (discussing the creation of the CFTC, analyzing the overlapping statutory delegations of jurisdiction to the SEC and CFTC, and arguing for a shared power structure to resolve the confusion).

13. 7 U.S.C. § 2(a)(1)(A) (2006) provides that

[t]he Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an “option”, “privilege”, “indemnity”, “bid”, “offer”, “put”, “call”, “advance guaranty”, or “decline guaranty”), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated or derivatives transaction execution facility registered pursuant to section 7 or 7a of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title.

14. Abelardo Lopez Valdez, *Modernizing the Regulation of the Commodity Futures Markets*, 13 HARV. J. ON LEGIS. 35, 42–43 & n.43 (1975).

15. John D. Benson, Comment, *Ending the Turf Wars: Support for a CFTC/SEC Consolidation*, 36 VILL. L. REV. 1175, 1175 (1991) (describing the SEC Chairman’s decision in 1974 to decline an offer by the White House that would have given the agency jurisdiction over the commodity futures industry).

16. See Commodity Futures Trading Comm’n, *CFTC Glossary: A Guide to the Language of the Futures Industry*,

which a typical agreement was for delivery of wheat or corn, for example, at some future date at an agreed-upon price.<sup>17</sup> “Commodity,” however, reaches beyond physical or agricultural commodities to include “all other goods and articles, except onions . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.”<sup>18</sup> Moreover, although delivery is an alternative, most futures contracts are resolved by cash payout (offset): one party pays the other the difference between contract and market price.<sup>19</sup>

The second complication in interpreting the CFTC’s jurisdiction is that it was granted “exclusive” jurisdiction over futures.<sup>20</sup> This provision can be a tiebreaker in disputes with the SEC: an instrument reasonably characterized as either a security or future will fall into the jurisdiction of the CFTC because that jurisdiction is exclusive.<sup>21</sup>

As noted above, both securities and futures have an “easy case” or paradigmatic example, but as instruments move away from these examples, distinguishing between futures and securities becomes more difficult. Judge Easterbrook described the task of categorizing one such novel instrument as a future or a security as “decid[ing] whether tetrahedrons belong in square or round holes.”<sup>22</sup> Moreover, the target is moving:

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[http://www.cftc.gov/educationcenter/glossary/glossary\\_f.htm](http://www.cftc.gov/educationcenter/glossary/glossary_f.htm) (last visited Nov. 17, 2008) (defining the term *futures contract* and providing the following qualifications: the agreement must be “(1) at a price that is determined at initiation of the contract; (2) that obligates each party to the contract to fulfill the contract at the specified price; (3) that is used to assume or shift price risk; and (4) that may be satisfied by delivery or offset”).

17. For early U.S. examples of futures contracts, see the Supreme Court’s decisions in *Hansen v. Boyd*, 161 U.S. 397 (1896), which considered a wheat futures contract, and *Embrey v. Jemison*, 131 U.S. 336 (1889), which considered a cotton futures contract. See also Elliot R. Wolff, *Comparative Federal Regulation of the Commodities Exchanges and the National Securities Exchanges*, 38 GEO. WASH. L. REV. 223, 229 (1969) (noting active trading in physical or agricultural commodities such as “wool tops . . . live hogs and frozen pork bellies”).

18. 7 U.S.C. § 1a(4) (2006). The onion lobbyists apparently successfully argued that trading in onion futures adversely affected the price of onions. See *Bd. of Trade of Chi. v. SEC*, 677 F.2d 1137, 1142 n.9 (7th Cir. 1982) (discussing the exemption of onions from the CFTC’s reach following enactment of the CFTCA).

19. See 13 JERRY W. MARKHAM, *COMMODITIES REGULATION: FRAUD, MANIPULATION AND OTHER CLAIMS* § 11:5 (2008) (“Rarely is delivery taken. Instead, most contracts are liquidated by offset.”).

20. 7 U.S.C. § 2(a)(1)(A) (2006). As noted below, the Commodity Futures Modernization Act of 2000 (CFMA), Pub. L. No. 106-554 app. E, 114 Stat. 2763, 2763A-365 (2000), created certain exceptions to this grant of exclusivity. See *infra* notes 28–30 and accompanying text (discussing relevant exclusions under the CFMA).

21. See *Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 539 (7th Cir. 1989) (“If an instrument is both a security and a futures contract, the CFTC is the sole regulator because” of the exclusive jurisdiction clause). See generally Thomas A. Russo & Edwin L. Lyon, *The Exclusive Jurisdiction of the Commodity Futures Trading Commission*, 6 HOFSTRA L. REV. 57 (1977) (discussing the competition between the two agencies for jurisdiction over financial instruments with aspects of both securities and futures).

22. *Chi. Mercantile Exch.*, 883 F.2d at 539.

financial products are continually introduced with, as their very purpose, innovation and difference from the existing products.<sup>23</sup>

Stemming in part from the difficulties in determining the line between futures and securities, the agencies have battled over their jurisdictions almost since the CFTC was created.<sup>24</sup> Even before the CFTC began operations, the SEC proposed a competing exclusivity clause that would give the SEC exclusive jurisdiction over all “transactions involving a ‘security.’”<sup>25</sup> The SEC and the CFTC clashed in court over jurisdiction over novel products (Government National Mortgage Association options and index participations); the CFTC, aided by its exclusivity clause, prevailed.<sup>26</sup> The Commodity Futures Modernization Act of 2000 (CFMA)<sup>27</sup> partially addressed this jurisdictional uncertainty by exempting certain products from the Commodity Exchange Act (CEA),<sup>28</sup> excluding certain products from the definition of *security*,<sup>29</sup> and allowing futures contracts on individual securities, which are acknowledged to be both a security and a futures contract and are thus jointly regulated by the two agencies.<sup>30</sup> This legislative change, however, did not resolve all jurisdictional issues. Fast forward to 2008, when the Treasury *Blueprint* blamed these “jurisdictional disputes” for “often hindering the introduction of new products, slowing innovation, and compelling migration of financial services and products to more adaptive foreign markets.”<sup>31</sup> While coordinated efforts such as the President’s Working Group on Financial

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23. *Id.* at 544.

24. See generally 2 EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS § 14.07 (8th ed. 2006) (tracing the history of the jurisdictional uncertainty and the implications for the marketplace).

25. Benson, *supra* note 15, at 1185–86 (citation omitted).

26. See *Bd. of Trade of Chi. v. SEC*, 677 F.2d 1137, 1138 (7th Cir. 1982), *cert. granted, vacated, and remanded*, 459 U.S. 1026 (1982) (Government National Mortgage Association options); *Chi. Mercantile Exch.*, 883 F.2d at 539 (index participations). See generally Benson, *supra* note 15, at 1185–86 (tracing the history of the CFTC–SEC jurisdictional dispute).

27. Pub. L. No. 106-554 app. E, 114 Stat. 2763, 2763A-365 (2000).

28. See GREENE, *supra* note 24, § 14.01:

[T]he CFMA excluded from regulation under the CEA, and accordingly from the prohibition on the trading of products outside a CFTC-regulated trading facility, a wide range of [over-the-counter (OTC)] derivatives transactions between qualifying counterparties and so-called ‘hybrid instruments’ (that is, securities or banking products that incorporate the economic features of a futures contract or commodity option).

29. See *id.* (noting that the CFMA introduced “individual, and narrow-based indices of, ‘nonexempt’ securities, a new category of product that is both a security and a futures contract and that is subject to a unique dual regulatory regime under both the securities laws and the CEA”). Some “individually negotiated swap agreements and other derivatives entered into by qualifying counterparties” were also excluded from the definition of *security*. *Id.*

30. *Id.*

31. BLUEPRINT, *supra* note 1, at 4.

Markets do exist,<sup>32</sup> proponents of consolidation can point to significant evidence of conflict.

In sum, the line between securities and futures has become increasingly difficult to draw as innovative products are introduced that erode their differences. Moreover, because of the difficulty of drawing the jurisdictional line, territorial overlap and conflict have characterized the relationship between the agencies.<sup>33</sup> In response to these interrelated problems, consolidation of the two agencies has been repeatedly proposed.<sup>34</sup> The Markets and Trading Reorganization and Reform Act was a bill introduced in 1990<sup>35</sup> and reintroduced in 1995<sup>36</sup> that proposed merging the two agencies and “establish[ing] a single Federal regulatory body with jurisdiction over securities, options, futures, and related markets and instruments.”<sup>37</sup>

Consolidation of the SEC and the CFTC has also been suggested as part of a larger consolidation of financial regulators. At one end of the spectrum of possible reorganizations is a proposed single financial regulator.<sup>38</sup> Commentators and policymakers have one eye on the British experience with the Financial Services Authority (FSA), a single regulator of all financial services established after a review of the United Kingdom’s financial regulators in the late 1990s.<sup>39</sup>

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32. Exec. Order No. 12,631, 53 Fed. Reg. 9421 (Mar. 22, 1988).

33. See, e.g., Alan R. Bromberg, *Securities Law—Relationship to Commodities Law*, 35 BUS. LAW. 787, 788–89 (1980) (“The CFTC generally follows the SEC . . . in trying to stretch its jurisdiction. ‘Every investment is a security’ is what they believe at the SEC. At the CFTC, that is translated into: ‘Every contract is a futures contract,’ or: ‘Every contract is a commodity option.’”).

34. See Benson, *supra* note 15, at 1175 (indicating that the SEC itself has advocated for a merger of the two agencies); see also *Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 544 (7th Cir. 1989) (“Only merger of the agencies or functional separation in the statute can avoid continual conflict.”).

35. See H.R. 4477, 101st Cong. (1990) (proposing the creation of a new agency called the Markets and Trading Commission).

36. H.R. 718, 104th Cong. (1995).

37. *Id.* § 2(1); H.R. 4477 § 2(1).

38. See, e.g., Elizabeth F. Brown, *E Pluribus Unum—Out of Many, One: Why the United States Needs a Single Financial Services Agency*, 14 U. MIAMI BUS. L. REV. 1 (2005). The author argues that the United States should consolidate the more than 115 financial regulatory organizations into a single agency because

[a] single, federal financial regulator would be able to anticipate and plan for future financial crises, more carefully monitor and regulate financial conglomerates, provide better protection for consumers, operate more effectively in international negotiations, quickly adapt to market innovations and developments, be accountable for market failures, eliminate the duplicative regulations and regulatory gaps, harmonize regulations for financial products and firms competing in the market, and avoid being captured by narrow segments within the financial services industry.

*Id.* at 100–01.

39. See BLUEPRINT, *supra* note 1, at 3 (describing the United Kingdom’s creation of a tripartite system composed of the central bank, the finance ministry, and one national

While the recent Treasury proposal does not call for a single financial regulator, it does suggest more than a simple merger of the SEC and CFTC. The *Blueprint* calls for three regulators “focused exclusively on financial institutions” as well as a “federal insurance guarantee corporation” and a “corporate finance regulator.”<sup>40</sup> One of the three new regulators focused exclusively on financial institutions would be the “Conduct of Business Regulatory Agency” (CBRA), which would regulate “all financial products,” including those currently within CFTC and SEC jurisdiction.<sup>41</sup> The “corporate finance regulator” would be responsible for “general issues related to corporate oversight in public securities markets” including “corporate disclosures, corporate governance, accounting and auditing oversight, and other similar issues”<sup>42</sup>—part of the SEC’s current role.

Although framed as a response to recent front-page concerns with foreign competition and the subprime mortgage crisis, the Treasury’s *Blueprint* is typical of SEC–CFTC merger proposals in that it asks in its request for comments whether “a continued rationale” exists for “distinguishing between securities and futures products and their respective intermediaries” and “having separate regulators for these types of financial products and institutions.”<sup>43</sup> The Treasury’s response was a clear no to both questions.<sup>44</sup>

Many of the proposals for consolidating the SEC and CFTC conclude not only that consolidation makes sense, but also that the similarities between the legislation governing commodities and securities would enable it.<sup>45</sup> After all, many of the CEA’s provisions were modeled on securities legislation, and securities cases have been used as precedent in the CFTC context.<sup>46</sup> Nonetheless, in at least a few areas the legislative powers and tasks of the two agencies significantly diverge.<sup>47</sup> The rest of this Essay

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financial regulatory agency that oversees all financial services).

40. *Id.* at 137.

41. *Id.* at 138.

42. *Id.*

43. *Id.* at 194.

44. The *Blueprint* points out that the “bifurcation between securities and futures regulation[] was largely established over seventy years ago when the two industries were clearly distinct.” *Id.* at 2. It pointed to this bifurcation as part of an old-fashioned system “grappling to keep pace with market evolutions and, facing increasing difficulties, at times, in preventing and anticipating financial crises.” *Id.* at 4.

45. See generally, e.g., Wolff, *supra* note 17 (tracking similarities between legislation governing commodities and securities).

46. See Benson, *supra* note 15, at 1194 (arguing that regulatory similarities would facilitate consolidation); Bromberg, *supra* note 33, at 789 (noting that courts have drawn on securities cases as precedent for deciding issues under the CEA, including in the areas of “the elements of fraud, the standards for granting an injunction, disgorgement remedies, and aiding and abetting”).

47. Differences that would have to be resolved on consolidation are not limited to the agencies’ compensatory roles, but also include such issues as the approach to preemption



focuses on one of these areas. The two agencies have taken very different routes to the same end: investor compensation. As described below, the SEC has a tool that places the Enforcement Division in the position of counsel to injured investors, seeking penalties which then may be distributed to investors. In contrast, the CFTC's longstanding Reparations Program uses the CFTC to resolve disputes between private parties (individual shareholders and financial professionals) in a role akin to that of an arbitrator or judge.

## II. THE SEC'S COMPENSATORY FUNCTION

The SEC has three main methods of compensating injured investors: distributions by receivers put in place by the SEC, distribution of disgorged profits, and distribution of money collected as civil penalties. These three techniques have in common the SEC's posture in the cases that obtain the relief: it acts as counsel, chooses to bring the suit, pursues certain remedies, and negotiates settlement as an opposing party.

First, the SEC may put in place receivers as part of the flexible relief that it can obtain through adjudication or settlement of matters brought by the agency's Enforcement Division. These receivers often are tasked with distributing money to investors. They may be used simply to implement some of the other mechanisms of investor compensation, distributing disgorgement or penalty amounts.<sup>48</sup> Even without such an order of monetary relief, they may be appointed at any point in the process to identify and recover assets.<sup>49</sup>

Second, disgorgement has long been available to the SEC as a remedy in judicial or administrative proceedings brought by the Enforcement Division.<sup>50</sup> The basic idea is that the remedy prevents unjust enrichment by forcing the disgorgement of profits (sometimes defined broadly) from

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and state regulation. For instance, the CEA preempted state regulation of futures, but, on reauthorization, was revised to allow state attorneys general or other state administrators of securities laws to pursue violators of the CEA as *parens patriae* for their citizens. See Futures Trading Act of 1978 § 15, 7 U.S.C. § 13(a)(2) (2006) (1978 reauthorization of the CFTC); Guttman, *supra* note 12, at 3 n.11, 4.

48. See GOV'T ACCOUNTABILITY OFFICE, GAO-05-670, SEC AND CFTC PENALTIES: CONTINUED PROGRESS MADE IN COLLECTION EFFORTS, BUT GREATER SEC MANAGEMENT ATTENTION IS NEEDED 8 n.8 (2005) [hereinafter SEC & CFTC PENALTIES], available at <http://www.gao.gov/new.items/d05670.pdf> (describing the duties of SEC-appointed receivers).

49. *Id.*

50. See SEC v. Fischbach Corp., 133 F.3d 170, 175 (2d Cir. 1997) (citing securities cases in which disgorgement was ordered); SEC v. Tex. Gulf Sulphur Co., 312 F. Supp. 77, 89, 91 (S.D.N.Y. 1970) (establishing the SEC's power to seek and obtain the ancillary relief of disgorgement in federal court); see also 15 U.S.C. § 80a-9(e) (2006) ("In any proceeding in which the Commission may impose a penalty under this section, the Commission may enter an order requiring accounting and disgorgement, including reasonable interest.").

violations of securities laws.<sup>51</sup> Disgorged funds may be distributed to injured investors, although they do not have to be, and courts have emphasized that neither identification of harmed investors nor distribution is a prerequisite for imposing the remedy.<sup>52</sup> Likewise, the appropriate measure is the amount of profit to the violator and not the amount of harm to the investors.<sup>53</sup>

Finally, since the passage of the Sarbanes–Oxley Act of 2002, the SEC may distribute money penalty amounts to injured investors through Fair Funds.<sup>54</sup> Until 2002, any civil money penalties (fines) collected by the SEC had to be paid into the United States Treasury.<sup>55</sup> The Fair Fund provision of Sarbanes–Oxley allows penalties paid in enforcement actions to be added—at the SEC’s discretion—to disgorgement funds, which then may be distributed to injured investors.<sup>56</sup> The provision does not distinguish between individuals and groups or between financial institutions and public company misstatements. Time will tell how the SEC chooses to exercise its discretion but, to date, the most obvious effect has been in high-profile stock-drop cases (Enron, WorldCom) because of large investor harm and correspondingly large penalties.

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51. See, e.g., *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985) (“The purpose of disgorgement is to force ‘a defendant to give up the amount by which he was unjustly enriched’ rather than to compensate the victims of fraud.” (citation omitted)).

52. See *id.* (“Once the Commission has established that a defendant has violated the securities laws, the district court possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private parties have been damaged by [defendant’s] fraud.”); 3 THOMAS LEE HAZEN, *TREATISE ON THE LAW OF SECURITIES REGULATION* § 16.2[4][B] (4th ed. 2002 & Supp. 2004) (citing cases).

53. See HAZEN, *supra* note 52, § 16.2[4][B] (suggesting that disgorgement serves the purpose of assuring that violators do not profit from their wrongdoings).

54. Sarbanes–Oxley Act of 2002 § 308, 15 U.S.C. § 7246 (2006); see Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317, 318 (2008) (describing the Fair Fund provision and the SEC’s new role in investor compensation); Winship, *supra* note 4 (tracing the development of the SEC’s power to compensate injured investors).

55. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub L. No. 101-429, § 101(3), 104 Stat. 931, 933 (1990) (codified as amended in scattered sections of 15 U.S.C.).

56. 15 U.S.C. § 7246(a) (2006) provides that

[i]f in any judicial or administrative action brought by the Commission under the securities laws . . . the Commission obtains an order requiring disgorgement against any person for a violation of such laws or the rules or regulations thereunder, or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains pursuant to such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of the disgorgement fund for the benefit of the victims of such violation.

### III. THE CFTC'S COMPENSATORY FUNCTION

The CFTC is home to its own experiment in investor compensation, the Reparations Program.<sup>57</sup> Through the Reparations Program, the agency provides a forum for resolving disputes between “futures customers and commodity futures trading professionals.”<sup>58</sup> In contrast to the SEC's compensatory function described above, the CFTC provides the decisionmaker, akin to a judge or arbitrator, for disputes between private parties.

The Reparations Program grew out of the CFTC's agricultural roots: before the CFTC came into being, futures regulation was under the auspices of the Department of Agriculture.<sup>59</sup> The Reparations Program is modeled on the Packers and Stockyards Program and agricultural legislation.<sup>60</sup> Some commentators have suggested that the Program persisted because of perceived problems with arbitration.<sup>61</sup>

For a claim to be eligible for resolution through the CFTC's Reparations Program, a few prerequisites must be met. The Reparations Program is designed for the resolution of disputes between customers and futures trading professionals, whether firms or individuals. The violation alleged must be a violation of the Commodity Exchange Act or the CFTC rules, such as an allegation of fraud, breach of fiduciary duty, unauthorized trading, misappropriation of funds, or churning (excessive trading in an account in order to generate fees).<sup>62</sup> Moreover, the professional must be registered with the CFTC at the time of the violation or at the time the complaint is filed.<sup>63</sup> Finally, a statute of limitations applies: the complaint

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57. See 7 U.S.C. § 18 (2006); Rules Relating to Reparations, 17 C.F.R. § 12 (2008) (describing the Reparations Program).

58. Commodity Futures Trading Comm'n, Reparations Program, <http://www.cftc.gov/customerprotection/redressandreparations/reparationsprogram/index.htm> (last visited Oct. 23, 2008).

59. See Marianne K. Smythe, *The Reparations Program of the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudication*, 2 ADMIN. L.J. AM. U. 39, 42 (1988) (relating some of the history behind the CFTC and U.S. Department of Agriculture (USDA) Reparations Programs).

60. See *id.* (tracing the CFTC's Reparations Program to the CFTC's roots in the USDA, which administered the Packers and Stockyards Act that contained a reparations program); see also Packers and Stockyards Act, 1921, ch. 64, § 309, 42 Stat. 159, 165 (1921) (allowing violators of the Act to avoid liability by “mak[ing] reparation” for the alleged injury); Lopez Valdez, *supra* note 14, at 60 (comparing the CFTC's Reparations Program to that in the Perishable Agricultural Commodities Act (PACA)).

61. Smythe, *supra* note 59, at 52–53 (noting that exchange arbitration was mistrusted and underutilized).

62. See Commodity Futures Trading Comm'n, *supra* note 58 (describing the criteria for filing a complaint with the CFTC).

63. Previous versions of the rule allowed the Reparations Program to reach professionals who were not registered but should have been. The rule was revised to require registration, at least in part as a pragmatic limit to the agency's caseload.

must be filed within two years of the date the investor knew or should have known of the activity.<sup>64</sup>

The program provides three routes for aggrieved investors with qualifying claims: the “voluntary proceeding,” the “summary proceeding,” and the “formal proceeding.”<sup>65</sup> The voluntary proceeding may be elected for any size of claim, provided all participants consent.<sup>66</sup> Evidence is submitted in writing, and no oral hearing is held.<sup>67</sup> Perhaps most significantly, the decision issued by the Judgment Officer—a CFTC employee, who may or may not be a lawyer<sup>68</sup>—is final and unappealable.<sup>69</sup>

An eligible investor who does not elect the voluntary procedure pursues either summary or formal proceedings, depending on the size of the claim. If the claim (or counterclaim) is \$30,000 or less, the investor may choose the summary proceeding.<sup>70</sup> Evidence is submitted in writing, but with the possibility of a telephonic oral hearing.<sup>71</sup> Unlike the voluntary proceeding, the Judgment Officer’s decision may be appealed to the Commission and ultimately to a United States Court of Appeals.<sup>72</sup> Despite their name, summary proceedings often take longer than formal proceedings, in part because more investors in summary proceedings are pro se.<sup>73</sup>

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64. Other prerequisites also apply: foreign residents must file bonds and respondents must not be in insolvency proceedings. Moreover, the Reparations forum may not be available if the claims are also the subject of other investor-initiated proceedings. *See infra* notes 81–83 and accompanying text (discussing and defining parallel proceedings that preclude use of the Reparations forum).

65. *See generally* Kenneth M. Raisler & Edward S. Geldermann, *The CFTC’s New Reparation Rules: In Search of a Fair, Responsive, and Practical Forum for Resolving Commodity-Related Disputes*, 40 BUS. LAW. 537, 554 (1985) (reviewing rule revisions drafted by the authors—the CFTC General Counsel and an attorney for the General Counsel’s office).

66. 17 C.F.R. § 12.26(a) (2008); *see also id.* §§ 12.100–.106 (describing the rules for voluntary proceedings).

67. *Id.* §§ 12.100–.106.

68. *See* Smythe, *supra* note 59, at 57–58 (noting that the Judgment Officer is not necessarily a lawyer). The Judgment Officer also may be—but is likely not—an administrative law judge. *See* 17 C.F.R. § 12.2 (“Judgment Officer means an employee of the Commission who is authorized to conduct the proceeding and render a decision in a summary decisional proceeding or a voluntary decisional proceeding. In appropriate circumstances, the functions of a Judgment Officer may be performed by an Administrative Law Judge.”).

69. 17 C.F.R. § 12.106(d). Challenges under the Seventh Amendment have not succeeded. *See* Myron v. Hauser, 673 F.2d 994, 1008 (8th Cir. 1982) (denying petition for judicial review of a CFTC order in part because the “Seventh Amendment does not require jury trial upon demand in reparation proceedings before” the CFTC).

70. 17 C.F.R. § 12.26(b); *see id.* §§ 12.200–.210 (describing summary proceedings).

71. *Id.* § 12.206.

72. *See id.* § 12.210 (stating that the “timely filing . . . of an appeal to the Commission . . . is mandatory as a prerequisite to appellate judicial review of a final decision and order”).

73. COMMODITY FUTURES TRADING COMM’N, PERFORMANCE AND ACCOUNTABILITY REPORT 70 (2007).

Finally, if the amount claimed in either the complaint or counterclaim is greater than \$30,000, the investor may select a formal proceeding, which is heard by an administrative law judge (ALJ) and accompanied by additional procedural protections and steps, including an oral hearing.<sup>74</sup> As in a summary proceeding, this decision is appealable to the Commission and ultimately to a United States Court of Appeals.<sup>75</sup>

Regardless of the label, all of these proceedings are voluntary in that the investor chooses to pursue a claim through the Reparations Program rather than by other avenues. Injured investors have the option of pursuing a private law suit; a private right of action was implied in *Merrill Lynch v. Curran*<sup>76</sup> and later codified in the CEA.<sup>77</sup> Moreover, investors may participate in arbitration. The signing of a predispute arbitration agreement cannot be made a condition to the opening of a futures account.<sup>78</sup> If a customer does enter such an agreement, however, CFTC rules require that the agreement include a notice that the customer agrees to forgo private litigation but will still have a forty-five-day window in which to elect a reparations proceeding.<sup>79</sup> Additionally, the rules provide that institutional customers may enter predispute agreements to waive the right to file a reparations claim.<sup>80</sup> To reduce duplicative actions, the reparations rules prohibit parallel proceedings that involve claims (or counterclaims) concerning allegations against any of the same respondents based on the

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74. See 17 C.F.R. § 12.26(c) (2008) (identifying the disputes that qualify for formal proceedings); see also *id.* §§ 12.300–.315 (describing formal proceedings).

75. See *id.* § 12.314 (providing that initial decisions do not become final if a party files a timely appeal, and stating that an appeal to the Commission is a prerequisite for judicial review).

76. 456 U.S. 353, 387–88 (1982).

77. See Futures Trading Act of 1982, Pub. L. No. 97-444, § 235, 96 Stat. 2294, 2322 (codified at 7 U.S.C. § 25) (2006) (explicitly permitting a private right of action for violation of the statute).

78. 17 C.F.R. § 166.5(c)(1) (2008).

79. *Id.* § 166.5(c)(7) provides that predispute arbitration agreements must include the following language:

By signing this agreement, you: (1) May be waiving your right to sue in a court of law; and (2) are agreeing to be bound by arbitration of any claims or counterclaims which you or [name] may submit to arbitration under this agreement. You are not, however, waiving your right to elect instead to petition the CFTC to institute reparations proceedings under Section 14 of the Commodity Exchange Act with respect to any dispute that may be arbitrated pursuant to this agreement. In the event a dispute arises, you will be notified if [name] intends to submit the dispute to arbitration. If you believe a violation of the Commodity Exchange Act is involved and if you prefer to request a section 14 “Reparations” proceeding before the CFTC, you will have 45 days from the date of such notice in which to make that election.

*Id.* § 166.5(c)(7).

80. See 7 U.S.C. § 18(g) (2006) (“Nothing in this section prohibits a registered futures commission merchant from requiring a customer that is an eligible contract participant, as a condition to the commission merchant’s conducting a transaction for the customer, to enter into an agreement waiving the right to file a claim under this section.”).

same facts.<sup>81</sup> To qualify as a parallel proceeding and thus to foreclose reparations proceedings, the arbitration or court case must be initiated by the investor<sup>82</sup> and be pending when the reparations complaint is filed. Insolvency proceedings concerning respondents may also qualify as parallel proceedings.<sup>83</sup>

The Reparations Program is focused on individual litigation. In the 1990s, in response to a directive from Congress, the CFTC considered and sought comments on whether it should permit class actions in the reparations forum. However, the CFTC ultimately decided against this expansion.<sup>84</sup> In fact, even modifications to the Reparations Program that intensify third-party practice have been rejected because of the need to keep the program simple.<sup>85</sup>

The remedies in reparations proceedings include actual damages caused by the violation.<sup>86</sup> Punitive damages of up to twice the amount of actual damages are also available in summary and formal proceedings where the actions arise from a “willful and intentional violation in the execution of an order on the floor of a contract market.”<sup>87</sup> An investor must claim actual

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81. A counterclaim in which the investor alleges violations of the CEA or its regulations would also qualify as a parallel proceeding, as would a claim—whether asserted or not—that must be brought or lost under the compulsory counterclaim rules of federal civil procedure. *See* 17 C.F.R. § 12.24(a)(1) (2008).

82. *Id.*

83. *Id.* § 12.24(a)(3).

84. *See* Complaints Against Registered Persons; Class Action Suits, 58 Fed. Reg. 17,369 (proposed Apr. 2, 1993) (requesting comments on the appropriateness of class actions in reparations proceedings); MARKHAM, *supra* note 19, § 17:8 n.1 (noting that the CFTC requested comments on whether it should allow class actions in reparation proceedings and describing case law relating to the use of class actions in such proceedings). The enabling legislation allows for reparations proceedings brought by “any one or more persons . . . for and in behalf of such person or persons and other persons similarly situated, if the Commission permits such actions pursuant to a final rule issued by the Commission.” Futures Trading Practices Act of 1992, Pub. L. No. 102-546, § 224, 106 Stat. 3590, 3617 (codified at 7 U.S.C. § 18(2)(A) (2006)).

85. *See generally* Rules Relating to Reparation Proceedings, 59 Fed. Reg. 9631 (Mar. 1, 1994) (codified at 17 C.F.R. pt. 12) (declining to allow class action suits in the Reparations forum because it would slow proceedings and impose costs on litigants and on the Commission).

86. 7 U.S.C. § 18(a)(1) provides that in a petition for actual damages [a]ny person complaining of any violation of any provision of this chapter, or any rule, regulation, or order issued pursuant to this chapter, by any person who is registered under this chapter may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding . . . actual damages proximately caused by such violation.  
7 U.S.C. § 18(a)(1) (2006).

87. 17 C.F.R. § 12.2 (2008); *see also id.* §§ 12.106(b)(3), 12.210(b)(4), 12.314(b)(4); 7 U.S.C. § 18(a)(1)(B) (providing for an award of, “in the case of any action arising from a willful and intentional violation in the execution of an order on the floor of a registered entity, punitive or exemplary damages equal to no more than two times the amount of such actual damages”).

and punitive damages in the reparations complaint, prove the actual damages, and show that the punitive damages are appropriate.<sup>88</sup> In keeping with the CFTC's role as decisionmaker rather than lawyer, the parties bear the costs of collection. This allocation of costs contrasts with the SEC's practice under Fair Funds in which the SEC bears the burden of collecting what are, at least nominally, civil fines rather than damages.<sup>89</sup>

The CFTC's involvement in investor compensation is not limited to the Reparations Program or its decisionmaking role. It also pursues enforcement actions in a way similar to the SEC, either in administrative or judicial proceedings, in which it acts in place of counsel to injured investors. Like the SEC, among the available remedies in adjudicated actions or in settlement are civil penalties and disgorgement. Furthermore, the CFTC may seek the equitable remedy of restitution.<sup>90</sup>

The CFTC, like the SEC, has the power to seek penalties. The CEA granted the CFTC the power to impose civil penalties of \$100,000 per "violation."<sup>91</sup> The \$100,000 figure does not necessarily capture the potential scope of these penalties. For instance, the CFTC's post-Enron investigations into misconduct in the energy markets resulted in \$130 million in money penalties.<sup>92</sup> These penalties are assessed according to the "gravity of the violation"<sup>93</sup> and are directed to the U.S. Treasury. Unlike the SEC, the CFTC has no statutory authority to distribute funds that were collected as penalties to injured investors; that is, the statute has not been amended by the equivalent of the Fair Fund provision.<sup>94</sup>

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88. See 17 C.F.R. § 12.2 (2008) (defining "punitive damages" and explaining when such damages may be awarded in a reparations proceeding).

89. See SEC & CFTC PENALTIES, *supra* note 48, at 8 (describing collection processes used by the SEC and CFTC).

90. See *id.* at 5, 43.

91. See 7 U.S.C. § 9 (2006) (noting that available remedies are not limited to monetary remedies such as penalties; the CFTC also can seek injunctive relief and suspend or revoke registration and prohibit people from trading on contract markets); 7 U.S.C. § 13a-1 (2006) (granting the CFTC the authority to enjoin an act or practice, enforce compliance with regulations, or issue injunctions for violations). See generally Jerry W. Markham, *Investigations Under the Commodity Exchange Act*, 31 ADMIN. L. REV. 285, 287 (1979) (discussing the CFTC's investigative and enforcement authority).

92. See COMMODITY FUTURES TRADING COMM'N, KEEPING PACE WITH CHANGE: COMMODITY FUTURES TRADING COMMISSION STRATEGIC PLAN 2004-2009, at 9 (2004), available at <http://www.cftc.gov/stellent/groups/public/@aboutcftc/documents/file/2009strategicplan.pdf> (noting that eight of ten energy market matters filed by the CFTC have been settled and have resulted in both civil monetary penalties and other sanctions).

93. 7 U.S.C. § 9a (2006); see also *Brenner v. CFTC*, 338 F.3d 713, 722-23 (7th Cir. 2003) (tracing the history of 7 U.S.C. § 9a and affirming civil money penalties of \$300,000 and \$100,000 where the CFTC had considered the gravity of the offense); A Study of CFTC and Futures Self-Regulatory Organization Penalties, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,264, at 42,220 (Nov. 1994) (outlining the three-step process the CFTC has developed to assess the gravity of an offense).

94. See SEC & CFTC PENALTIES, *supra* note 48, at 5 tbl.1 (listing the types of remedies

Use of the disgorgement remedy by the CFTC and the SEC is very similar; in fact, securities law precedents have been used in the futures context to determine remedies.<sup>95</sup> Again, disgorgement is aimed at preventing unjust enrichment by extracting any profits from the violation. Disgorgement funds either go to the U.S. Treasury or may be distributed to injured investors through a disgorgement fund created by the CFTC (like the SEC) or a court.<sup>96</sup>

Disgorgement is aimed at depriving violators of profit and is measured by the profit. In contrast, the remedy of restitution focuses on the victims and is measured by the harm caused.<sup>97</sup> So, for instance, restitution of almost \$10 million was ordered where customers lost at least \$10 million due to misrepresentations—brokers had used lines like “How does it feel to be making money?” to a customer whose account was actually losing money.<sup>98</sup> Relief is not necessarily limited to only one type; in addition to combining monetary and nonmonetary relief, restitution and money penalties might both be ordered. In fact, the \$10 million restitution order described above was combined with a \$6 million penalty.<sup>99</sup> The CFTC ordered more than \$179 million in restitution in 2003 and 2004 combined.<sup>100</sup> Interestingly, although the remedy of restitution is also available to the SEC, restitution has not played a large role in the SEC’s practices; instead it typically imposes money penalties and disgorgement.<sup>101</sup> The Fair Fund provision has a restitutionary function—after all, the “FAIR” in Fair Funds stands for “Federal Account for Investor *Restitution*.” Unlike restitution, however, investor harm is not the measure for amounts collected and distributed under this provision or through the disgorgement remedy.

#### IV. THE INFORMATION ADVANTAGES OF THE AGENCY AS JUDGE

Drawing on the existing Fair Funds and Reparations Programs, this Part suggests how a consolidated CFTC and SEC might obtain compensation for injured investors. It suggests that a Reparations Program benefits one

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available for SEC and CFTC violations).

95. See Bromberg, *supra* note 33, at 789 (explaining that courts have used securities cases as precedent when reviewing disgorgement remedies in commodities enforcement actions).

96. SEC & CFTC PENALTIES, *supra* note 48, at 5 tbl.1.

97. See, e.g., SEC v. Huffman, 996 F.2d 800, 802 (5th Cir. 1993) (“[D]isgorgement is not precisely restitution. . . . Disgorgement does not aim to compensate the victims of wrongful acts, as restitution does.”).

98. See CFTC v. Liberty Fin. Trading Corp., Inc., No. 04-61235, at 7 (S.D. Fla. Apr. 24, 2007) (consent order granting permanent injunction and other equitable relief).

99. *Id.* at 14.

100. SEC & CFTC PENALTIES, *supra* note 48, at 43 tbl.6.

101. *Id.* at 5 tbl.1.



or both agencies by generating information in two ways: eliciting facts about industry practices and conduct (input) and developing law (output). This Part concludes that this information-generation function should be weighed heavily when considering how limited resources should be allocated between a judicial (Reparations Program) and counsel (Fair Funds) role. It is also potentially advantageous to pursue compensation through agency action rather than through other avenues to investor compensation.

The threshold question—before reaching what a compensatory mechanism might look like—is, Why have any compensatory mechanism at all? The primary objection to investor compensation can be summed up as a concern with circularity. Investors already harmed by the conduct may be harmed again by a penalty against a corporation in which they own stock. Moreover, diversified investors may be on both sides of a transaction so that “compensation” for them involves shifting money from one pocket to another, minus administrative costs.<sup>102</sup>

For a number of reasons, this concern should not foreclose consideration of which compensatory mechanism makes sense. First, commentators have challenged the circularity argument head-on by, for instance, pointing out that downside losses often exceed upside.<sup>103</sup> Second, the category that raises the circularity concern—investors in the secondary market—does not include all possible injured investors and compensatory relief might target the other categories.<sup>104</sup> The type of individual cases between brokers and customers covered by the Reparations Program does not raise such concerns. SEC penalties against individuals also potentially avoid the critique, although indemnification and insurance often pass costs along to corporations and thus to the shareholders. Finally, compensation is likely a political reality, so it makes sense to consider how to go about it, even if one is critical of it as an independent goal.<sup>105</sup>

Because the two approaches—judge and lawyer—are not mutually exclusive, a consolidated agency could combine them.<sup>106</sup> As described

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102. See John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1558 (2006) (noting that “diversified investors are largely making wealth transfers among themselves as the result of contemporary securities litigation”).

103. See Alicia Davis Evans, *The Investor Compensation Fund*, 33 J. CORP. L. 223, 229 (2007) (noting that “losses of the investors on the losing side of trades tainted by fraud are more likely to exceed the gains of the investors on the winning side of such trades”).

104. See Winship, *supra* note 4, at 1130 (describing limits to the circularity critique).

105. See *id.*; Evans, *supra* note 103, at 225–26 (contending that “as a practical matter, political exigencies make achieving the end of shareholder compensation in the post-Enron era unlikely” so that “an exploration of ways to provide compensation more effectively and efficiently” is appropriate).

106. Although this Essay focuses on proposed consolidation, existing agencies could

above, like the SEC, the CFTC has the statutory authority to seek civil penalties. A provision like the Fair Fund provision could reach the CFTC's money penalties. Likewise, eligibility for the Reparations Program could be enlarged to include matters within the SEC's current jurisdiction. As things stand, the different approaches track the SEC-CFTC jurisdictional division: Fair Funds applies to matters within the SEC's jurisdiction and the Reparations forum is available for CFTC matters. However, in keeping with the recognition that the line between futures and securities is often difficult to draw,<sup>107</sup> the Reparations Program could be a model for broader financial regulation.<sup>108</sup> Thus both of these programs could apply across the board. Alternatively, one could adopt the divisions among financial regulators suggested by the Treasury's *Blueprint*. Under this approach, the CBRA (in charge of regulating financial professionals, whether involved in futures or securities) might administer a Reparations Program, for instance, whereas the corporate finance regulator (regulating issuers) might administer a Fair Fund program.

Although the programs could coexist, the agencies' limited resources are likely to force choices.<sup>109</sup> The comparison between the SEC's Fair Fund counsel role and the CFTC's Reparations Program judicial role lends some support to continuing a program similar to the Reparations Program. One rationale is that the agencies have more expertise in their judicial role. To the extent that agencies are assigned roles and given powers because of their expertise, a program that builds on an existing structure might make more sense. So, in more concrete terms, both agencies already have a structure of ALJs who hear and resolve administrative cases; a forum for customers may simply be an extension of that developed area. While both agencies also have long had a counsel role in one sense—deciding what cases to pursue, and how—in another sense this role has not involved distribution and identification of injured investors to the extent that the Fair Fund program now imposes. The new distribution function has forced the SEC to allocate resources—creating a new office, for instance, as well as taking individual enforcement lawyers' time.<sup>110</sup> The “expertise” basis for

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adopt these techniques. For instance, legislation might permit the CFTC to create Fair Funds or might create a program akin to the Reparations Program within the SEC.

107. See *supra* Part I.

108. See Smythe, *supra* note 59, at 42–43 (noting the theoretical advantages of the Reparations Program, such as a more flexible structure and neutral and expert adjudicators).

109. See, e.g., John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 DUKE L.J. 641, 651 (describing the SEC's resource constraints, including budgetary and manpower limitations).

110. See SEC. AND EXCH. COMM'N, 2007 PERFORMANCE AND ACCOUNTABILITY REP. 26 (2007), <http://www.sec.gov/about/secpar/secpar2007.pdf> (summarizing the agency's “Improved Management of Disgorgements and Penalties and Fair Funds Distributions”); Press Release, Sec. and Exch. Comm'n, SEC Chairman Cox Announces Creation of New Office,

supporting a judicial role has limits, however, because expertise is not static and can be developed. The Fair Fund provision can be seen as a directive from Congress to the SEC to become expert in investor compensation.

Although the expertise aspect of the judge-lawyer divide provides limited guidance, analyzing the two approaches in these terms can be helpful when related to how each type of actor generates information. This Essay is concerned with two types of information: first, factual information about industry practices and conduct (input); and, second, information about the agency's view of the relevant law (output).

With regard to factual information, when the agency acts as counsel, it must draw on its traditional sources of information to investigate and develop a case. The SEC often looks at market surveillance activities, customer complaints, the financial press, self-regulatory organizations (SROs), and its own inspection offices for information.<sup>111</sup>

Providing a forum and decisionmaker (like the Reparations Program) has the potential to draw out information about industry practices or conduct that would not otherwise be available.<sup>112</sup> The information added by reparations complainants might be analogized to customer complaints, with the advantage that they are supported by evidentiary submissions. In 2007, the SEC received more than 77,000 complaints, questions, and "other contacts" from customers.<sup>113</sup> The most frequent complaint in that period was that the consumer had received spam,<sup>114</sup> which is not a good candidate for adjudication. A reparations program would cover violations different than these informal consumer complaints and would focus on compensable injuries.

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Appointment of Leaders, to Expedite Distribution of Billions to Injured Investors (Feb. 5, 2008), <http://www.sec.gov/news/press/2008/2008-12.htm> (announcing the creation of the Office of Collections and Distributions).

111. Sec. and Exch. Comm'n, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwedo.shtml> (last visited Oct. 25, 2008) (explaining the roles and duties of the Division of Enforcement). The Division of Corporation Finance and the Office of Compliance Inspections and Examinations both refer matters to the Enforcement Division. See Colleen P. Mahoney et al., *The SEC Enforcement Process: Practice and Procedure in Handling an SEC Investigation in the Sarbanes-Oxley Era*, *Corporate Practice Series* (BNA) No. 77-3rd, at A-8 (2007) (noting that referrals to the Division of Enforcement are routine).

112. See Smythe, *supra* note 59, at 84 ("[A] Reparations Program provides a valuable source of information to the agency about the problems in the regulated industry.").

113. Sec. and Exch. Comm'n, *Investor Complaints and Questions, FY 2007 Annual Complaint Data* (2008), <http://www.sec.gov/news/data.htm> (last visited Oct. 25, 2008) ("'Other contacts' includes repeat contacts, contacts with insufficient information to process, and contacts about issues not within the agency's jurisdiction.").

114. *Id.* Following "spam" in the top five complaints were advance fee fraud, manipulation of securities, prices, or markets, and problems with account records and transfers. *Id.*

Complainants in the Reparations Program may be compared to high-profile information sources, such as whistleblowers. Both generate original information: the whistleblowers provide information about internal practices and the investors provide information about harm to consumers or investors. Because complainants are likely to be consumers or clients rather than insiders to the violating company, the type of information that injured investors have differs from that of whistleblowers or *qui tam* plaintiffs.<sup>115</sup> We might value the insiders' information more, and their stories may more readily lend themselves to plots for movies and novels, but these sources could be a complementary part of the information mix.

As to information about the law, the Reparations Program generates written opinions that communicate the agencies' views of futures or securities laws to regulated industry, investors, and the public more generally. Decisions in both the summary and formal reparations proceedings include factual findings supported by references to the record, a legal determination of violation of the CEA or related rules, and the amount of damages.<sup>116</sup> The decision at the initial stages of the reparations process is not binding on the CFTC absent an opinion and an order (not a summary affirmance) from the Commission on appeal.<sup>117</sup> Nonetheless, the Reparations process may generate binding precedent when appealed to the Commission or a federal court. Moreover, a body of written opinions, even if not strictly binding, is likely to serve as guidance for the agency and for those appearing before the agency.<sup>118</sup>

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115. See Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 196 (1997) (noting that "the incentive structure of *qui tam* is tailored to place a premium on the contribution of original information"). See generally Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91 (2007) (proposing a bounty model of rewarding whistleblowers to give them an incentive to come forward with original information).

116. See 17 C.F.R. § 12.210(b) (2008) (establishing the required content of the initial decision in a summary proceeding); *id.* § 12.314(b) (providing the same outline for the initial decision in a formal proceeding). In contrast, the voluntary proceeding results in a much more limited final decision that contains a conclusion as to violation and remedy, unaccompanied by factual findings. See *id.* § 12.106(b).

117. *Id.* § 12.406(b). Section 12.406(b) provides that, [u]nless the Commission expressly indicates otherwise in its order, an order of summary affirmance does not reflect a Commission determination to adopt the initial decision, including any rationale contained therein, as its opinion and order, and neither initial decision nor the Commission's order of summary affirmance shall serve as a Commission precedent in other proceedings. *Id.* (emphasis added). See generally MARKHAM, *supra* note 19, § 20:13 (citing cases about the "precedential effect of ALJ decisions").

118. Cf. Barbara Black & Jill Gross, *The Explained Award of Damocles: Protection or Peril in Securities Arbitration*, 34 SEC. REG. L.J. 17, 21–22, 28 n.53 (2006) (arguing that written opinions would make securities arbitration more like litigation because even nonprecedential opinions would be cited by attorneys and arbitrators).

The next step is to think about how the Reparations Program and the information it generates compares with other types of investor compensation obtained through agency action. The Reparations Program's advantage over Fair Funds in generating factual information is straightforward. Nothing in a program like Fair Funds would change the SEC's responsibility to discover and develop the information or would add to the list of information sources. The process leading up to a Fair Fund distribution is essentially the same as any other SEC matter; the fact that compensation of injured investors may be involved does not elicit any additional information. Even if the ability to distribute money penalties to injured investors changes how the agency chooses to pursue a matter or its choice of remedy, the agency must still identify and investigate a violation in its role as counsel. The Fair Fund provision also does not affect the development of information about the law unless it does so indirectly by affecting whether matters are litigated or resolved through settlement.<sup>119</sup>

Another way the judge-lawyer divide helps us evaluate the two programs is to highlight the problems that arise once a governmental agency "represents" a client. Identifying an agency's client is never straightforward given the different constituencies within an agency (e.g., enforcement lawyers, Commissioners). Even if an agency is treated as a single unit (for instance, the SEC as public class counsel), compensation is only one of the agency's priorities, competing with other goals such as deterrence and developing positions on novel legal issues. Moreover, agencies provide little representation of injured investors in the sense of client voice in whether and how a matter is pursued. For instance, in the Fair Fund context, administrative actions limit the participation of potential claimants to Fair Funds to submission of nonbinding comments.<sup>120</sup> Likewise, in court actions, courts and the SEC have imposed limits on client participation, reasoning that the compensatory function of disgorgement and of Fair Funds is secondary and incidental to the other

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119. The assumption would be that settlements contribute less to development of the law, although the argument made above about the powers of nonbinding written precedent might apply equally in the context of the SEC settlements, information which is readily available on the agency's website. The argument would have to be that the provision allows for increased penalties because compensation either makes corporate penalties more acceptable or because the great degrees of investor harm push the agency to impose higher penalties. Then one would have to speculate about the effects of larger penalties on settlement behavior.

120. Rule 1106 of the SEC's Rules of Practice provides for comments to be submitted as part of the process of approving a Fair Fund distribution plan, but states that "no person shall be granted leave to intervene or to participate or otherwise to appear in any agency proceeding or otherwise to challenge an order of disgorgement or creation of a Fair Fund" or its distribution plan or individual eligibility for disbursements. 17 C.F.R. § 201.1106 (2008).

purposes of disgorgement and civil penalties—preventing unjust enrichment and promoting deterrence, respectively.<sup>121</sup>

There are other reasons that a program like Fair Funds should be limited. The compensatory goal may detract from the agency's focus on deterrence by affecting the cases that the agency chooses to pursue and by diverting resources to the distribution function. This concern might be addressed either by separating the distribution function from the enforcement decisions<sup>122</sup> or by developing guidance for the SEC so that it focuses on the strongest cases for compensation of injured investors and for having the SEC (as opposed to private actors) obtain compensation.<sup>123</sup> Taken with the information advantages of Reparations, these suggest a limited role for Fair Funds in any consolidated agency, despite the high profile of such distributions.

The Reparations Program has both of these information-generating advantages not only over the Fair Fund provision, but to some extent also over the nongovernmental alternatives to these programs. The two main alternatives for an injured investor are to pursue a civil action in court or to arbitrate a claim.<sup>124</sup>

The amount of information generated by private securities lawsuits as currently structured is debatable, although some commentators have suggested that they generate little original information.<sup>125</sup> Complaints are often peppered with colorful quotations from the *Wall Street Journal*, the *New York Times*, and the issuers' own financial restatements. Although understandable, given that plaintiffs and their counsel are acting without discovery at that stage, to the extent that many actions do not progress far before being settled, this reliance on public sources may signal that these suits have limited information benefits.

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121. Official Comm. of Unsecured Creditors of WorldCom v. SEC, 467 F.3d 73, 83 (2d Cir. 2006) ("Deterrence is also the SEC's goal in seeking civil penalties, and the Fair Fund provision does no more than permit civil penalties subsequently to be distributed in the same way as disgorged profits." (citations omitted)); SEC v. WorldCom, Inc., No. 02-4963, 2004 WL 1621185, at \*1–2 (S.D.N.Y. July 20, 2004) (rebuffing attempts made by potential claimants to challenge the way the funds are distributed).

122. See generally Evans, *supra* note 103 (proposing to use Fair Funds as the beginnings of an investor insurance fund).

123. Winship, *supra* note 4, at 1134 (suggesting that such guidelines should focus the SEC on actions that do not duplicate private actions—and thus collection and distribution costs—and that minimize concerns about the circularity of compensation in the secondary market context).

124. See 17 C.F.R. § 166.5(c)(7) (2007) ("Three Forums Exist for the Resolution of Commodity Disputes: Civil Court litigation, reparations at the Commodity Futures Trading Commission (CFTC) and arbitration conducted by a self-regulatory or other private organization.").

125. See Rapp, *supra* note 115, at 136 ("In private securities lawsuits, little new information is typically generated. Instead, class action lawyers use information voluntarily provided by companies or piggy-back on information generated by government investigations in filing their suits.").

As to developing the law, the Reparations Program used to be a particularly important source of law creation in the commodities context when it was unclear whether private rights of action existed under the commodities laws; it has become less urgent as courts have implied private causes of action in the commodities laws. High settlement rates may limit legal development through private actions, however.

In contrast, arbitration may generate information in the same way that the Reparations Program does if the agencies are informed about the conduct that is the subject of private or SRO arbitrations. Whether and when customers use arbitration will also affect whether these claims come to light. The identity of the arbitrator—industry- or government-agency-affiliated—may influence whether investors come forward with complaints. The Reparations Program has been viewed as more consumer-friendly,<sup>126</sup> so it might provide a forum for claims that otherwise would not have been heard, thus generating factual information.

The law-generating aspect of an agency reparations program represents an advantage over arbitration.<sup>127</sup> As described above, the Reparations Program provides written opinions subject to CFTC and judicial review. Of course, the flip side of a program of reasoned precedential opinions subject to judicial review is that, as the procedure becomes more judicial, it becomes less useful as an alternative, informal, and quick forum for dispute resolution. Moreover, as arbitration changes—for instance, if written opinions become an option—the relative benefits of the Reparations Program may decrease, putting more pressure on whether the cost of the Reparations Program is worth having an arbitrator who is a government employee.<sup>128</sup>

This Essay urges policymakers to look at these existing programs and to consider as part of the cost-benefit mix the effects the programs have on the factual information that gets to the financial regulators and the legal information that the programs produce. The Reparations Program is not a fix; throughout its history, it has been unpopular with industry,<sup>129</sup> and the

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126. See Smythe, *supra* note 59, at 83 (“There is a perception that the CFTC’s reparations process has a pro-complainant bias.”).

127. See Jennifer J. Johnson & Edward Brunet, *Critiquing Arbitration of Shareholder Claims*, 36 SEC. REG. L.J., Fall 2008, at 1 (criticizing proposals to arbitrate shareholders’ claims).

128. See Smythe, *supra* note 59, at 83 (suggesting that “the broader utility of such an ADR program for other federal agencies will depend essentially on one question: whether value is ascribed to expert government employees serving as judges of private disputes arising under a federal regulatory program”).

129. Fowler C. West, a former CFTC Commissioner, once noted that he “spent much of [his] ten years at the CFTC defending the Reparations Program because the industry disliked it.” Symposium, *New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry*, 63 FORDHAM L. REV. 1505, 1523 (1995).

CTFC and Congress have struggled to combat a backlog of cases by imposing pragmatic limitations to the Reparations Program's reach. The history of the Reparations Program lends weight to the critique that it could make the CFTC a "huge small claims court for the Commodity industry,"<sup>130</sup> resulting in a slow system that potentially overwhelms resource-constrained agencies. A large backlog of cases was the impetus for rule revisions in 1984 that introduced pragmatic limitations to the scope of the Reparations Program.<sup>131</sup> The revised rules also added the option of a streamlined, quick and unappealable, voluntary process that does not result in binding precedent,<sup>132</sup> and thus does not contribute to generating law in this area.

This difficult history, taken in conjunction with the Reparations Program's potential contributions to information generation, suggests three main avenues of further inquiry. First, the costs of the Reparations Program need to be tracked and evaluated, particularly if it is expanded to reach a new group of cases. These costs cannot be evaluated in a vacuum; whether the Reparations Program is an appropriate and cost-effective alternative to arbitration may change as arbitration systems change. For instance, if arbitration begins to generate written explanations, as the National Association of Securities Dealers (now the Financial Industry Regulatory Authority) suggested in its "explained awards proposal,"<sup>133</sup> some of the relative information advantages of the Reparations Program would be decreased.

Second, any use of the Reparations Program by a consolidated agency must develop pragmatic limitations that go beyond the division between futures and securities, which proposed consolidation is designed to overcome. The design of a new Reparations Program may provide an opportunity to distinguish among types of investors and design a Reparations Program targeted at the most vulnerable and least likely to pursue a complaint in its absence. For example, the Reparations Program might identify and define a class of sophisticated investor who may contract out of the Reparations Program.<sup>134</sup>

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130. Lopez Valdez, *supra* note 14, at 61 (quoting Gary L. Seevers, Comm'r, Commodity Futures Trading Comm'n, Luncheon Address, Regulatory Reform Conference 39, 41 (Sept. 11, 1975)).

131. *See generally* Raisler & Geldermann, *supra* note 65 (describing the perceived problems with the Reparations Program and the responsive rule changes including limiting the eligibility for reparations proceedings).

132. *See id.* at 554.

133. Black & Gross, *supra* note 118, at 21–22, 28 n.53.

134. In the Reparations Program's current structure, even signatories of predispute arbitration agreements have a forty-five day window in which to elect the Reparations forum. The current rule allows predispute agreements with sophisticated investors to include waivers of access to the Reparations forum.



Third, if the benefit of the Reparations Program is information generation, we should investigate how to intensify this aspect. For instance, many of the issues that arise when designing incentives for attorneys and individual investors to bring other actions—such as the appropriateness of punitive damages and the treatment of attorneys’ fees—might fruitfully be examined here.

#### CONCLUSION

Renewed discussion of regulatory consolidation provides an opportunity to revisit and reshape financial regulators’ involvement in investor compensation. The CFTC’s longstanding Reparations Program and the SEC’s relatively recent experience with the Fair Fund provision of Sarbanes–Oxley provide a case study of agency compensatory roles. To the extent that these experiments in investor compensation provide us with data, they lend support to the argument that maintaining regulation by multiple regulators allows experimentation and provides a natural laboratory.

Building on the assumption that compensation by someone of at least some injured investors is appropriate, this Essay makes three arguments: First, the Fair Funds and Reparations Program approaches could exist side by side, but there is no reason to draw the line as it is currently drawn—essentially between futures and securities—based on the jurisdiction of the agencies. Second, although a Fair Funds and Reparations Program could coexist, resource-constrained agencies (or Congress, when deciding what roles to assign these agencies) are likely to have to make allocative choices. The comparison between the counsel and judge approaches may aid this choice. An action in which the agency acts as decisionmaker (as the CFTC does through its Reparations Program) is potentially information-generating in two ways: aggrieved customers who use the forum furnish facts about industry practices and potential violations that may feed the enforcement efforts of the agency, and the decisions that come out of the program develop law in the area. Finally, we should ask whether the agencies—however configured—should take on any role. This requires a comparison of the alternatives to private actions and arbitration. Although more empirical study of the costs and benefits of the Reparations Program is needed and, as arbitration procedures develop, the need for the Reparations Program may change, the Reparations Program’s information-generating role should be weighed heavily on the benefit side.

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# MIDNIGHT REGULATIONS AND REGULATORY REVIEW

JERRY BRITO\*  
VERONIQUE DE RUGY\*\*

## TABLE OF CONTENTS

Introduction .....	163
I. The Midnight Regulations Phenomenon .....	164
A. Evidence of the Phenomenon .....	166
B. Explaining the Midnight Regulations Phenomenon .....	169
C. Midnight Regulations: An Effective Strategy?.....	172
II. The Midnight Regulations Phenomenon Is Problematic .....	173
A. Often-Cited Concerns over Midnight Regulations .....	173
B. Regulatory Review .....	177
C. The Regulatory Review Process.....	177
D. Regulatory Review and Midnight Regulations.....	183
III. Solutions .....	187
A. Rescinding and Postponing Regulations .....	187
B. Congressional Review Act .....	189
C. Our Solution .....	191
Conclusion.....	196

## INTRODUCTION

The term *midnight regulations* describes the dramatic spike of new regulations promulgated at the end of presidential terms, especially during

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transitions to an administration of the opposite party. As commentators have pointed out, this phenomenon is problematic because it is the result of a lack of presidential accountability during the midnight period—the time after the November election and before Inauguration Day. Midnight regulations, however, present another problem that receives little attention. It is the prospect that an increase in the number of regulations promulgated in a given time period could overwhelm the institutional review process that serves to ensure that new regulations have been carefully considered, are based on sound evidence, and can justify their cost.

The regulatory review process that every president since Richard Nixon has used to check his own administration's regulations is now operated by the Office of Information and Regulatory Affairs (OIRA), which is charged with reviewing all newly proposed, significant regulations. The problem is that while the number of regulations proposed spikes during the midnight period, the resources available to OIRA remain constant. Although the problem is perennially highlighted in the press, few satisfactory solutions to the phenomenon have been proposed. Our suggested solution to address the effects of midnight regulation on regulatory review is to cap the number of regulations agencies may submit to OIRA for review during a given time period.

Part I of this Article presents updated evidence of the existence of the midnight regulation phenomenon. It reviews the causes of the phenomenon and asks whether increased regulatory output is an effective strategy on the part of the outgoing administration. Part II discusses the variety of concerns raised by midnight regulations with a special focus on the lack of proper OIRA oversight during the midnight period. Finally, Part III reviews several proposed solutions to the midnight regulations problem and puts forth our own suggestion to address the effects of midnight regulations on regulatory review.

## I. THE MIDNIGHT REGULATIONS PHENOMENON

The ability of a lame-duck president to achieve anything in the last months of his presidency decreases “like a balloon with a slow leak” that is “ineluctably shrinking with each passing week” until it hits the ground.<sup>1</sup> Nonetheless, during his last days in office, President Bill Clinton managed to promulgate an unprecedented number of midnight regulations, including improved water quality rules, lead- and diesel-sulfur-reduction rules, an arsenic in drinking water standard, a significant ergonomics rule, and energy

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1. JAMES P. PFIFFNER, *THE STRATEGIC PRESIDENCY* 5 (1996); *see also* Carl M. Cannon, *The Long Goodbye*, 33 NAT'L J. 274 (2001) (citation omitted) (recanting the final regulatory actions of the Clinton Administration).

efficiency standards for air conditioning, heat pumps, and washing machines.<sup>2</sup>

Virtually every modern president has made some significant regulatory change in the final days of his administration, but it was not until the regulatory outburst in the final days of Jimmy Carter's presidency that the term *midnight regulation* was coined.<sup>3</sup> At the time, the Carter Administration set the record for number of pages printed in the *Federal Register* during the midnight period with 24,531 pages.<sup>4</sup>

Clinton's unprecedented passage of midnight regulations in late 2000 sparked a renewed interest in the use of presidential power in the period between an election and a new administration. During its midnight period, the Clinton Administration published 26,542 pages in the *Federal Register*.<sup>5</sup> According to Susan E. Dudley, the regulatory activity in Clinton's postelection quarter represented a fifty-one percent increase over the average number of pages published during the same quarter of the previous three years of Clinton's second term.<sup>6</sup>

This sudden outburst of regulatory activity is not just a characteristic of Democratic administrations. Late in his presidency, President George H.W. Bush's Administration instituted a regulatory moratorium,<sup>7</sup> but in its waning months it issued a large number of regulations, including a significant proposal loosening the rules on how long truck drivers could stay on the road between breaks.<sup>8</sup>

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2. *A Rush to Regulate—The Congressional Review Act and Recent Federal Regulations: Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the H. Comm. on Government Reform*, 107th Cong. 38, 43 (2001) (statement of Marshall E. Whiteman, Vice President, National Association of Manufacturers).

3. Jack Faris, *Small Business Focus: Watch Out for 'Midnight Regulation,'* NFIB, Aug. 21, 2000, <http://www.nfib.com/object/1609860.html>.

4. Susan E. Dudley, *Reversing Midnight Regulations*, 24 CATO REV. OF BUS. & GOV'T 9 (2001), available at <http://www.cato.org/pubs/regulation/regv24n1/dudley.pdf>; Susan E. Dudley, *Midnight Regulations at All-Time High*, INTELL. AMMUNITION, Mar. 1, 2001, <http://www.heartland.org/Article.cfm?artId=99>.

5. Dudley, *Reversing Midnight Regulations*, *supra* note 4, at 9.

6. *Id.*

7. See GARY L. GALEMORE, CONG. RESEARCH SERV., FEDERAL REGULATORY REFORM 8 (2003), available at [http://www.policyarchive.org/bitstream/handle/10207/1312/RL31207\\_20030129.pdf?sequence=1](http://www.policyarchive.org/bitstream/handle/10207/1312/RL31207_20030129.pdf?sequence=1) (specifying that Bush's moratorium "exempted regulations issued by independent regulatory boards and commissions, as well as those regulations issued in response to emergency situations or statutory or judicial deadlines").

8. See Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 890 (2008) (adding that the proposal was never finalized and was quickly scrapped by the Clinton Administration).

*A. Evidence of the Phenomenon*

In 2001, former Mercatus Center scholar Jay Cochran III examined the number of pages in the *Federal Register* as a proxy for regulatory activity.<sup>9</sup> Cochran went as far back as 1948 and found that when control of the White House switched to the opposite party, the volume of regulation in the outgoing administration's final quarter-year averaged seventeen percent higher than during the same period in nonelection years.<sup>10</sup> These pages of the *Federal Register* include executive orders, proclamations, administrative directives, and regulatory documents (from notices of proposed rulemaking to final rules). According to Cochran's analysis, the sudden outbursts are systemic and cross party lines.<sup>11</sup>

Cochran's explanation for this phenomenon is what he calls the "Cinderella constraint": at the end of an administration, officials hurry to issue last-minute rules before they have to leave their positions.<sup>12</sup> As Cochran explains, "as the clock runs out on the administration's term in office, would-be Cinderellas—including the President, Cabinet officers, and agency heads—work assiduously to promulgate regulations before they turn back into ordinary citizens at the stroke of midnight."<sup>13</sup>

Recent Mercatus research takes a second look at the existence of the midnight regulation phenomenon.<sup>14</sup> It uses an extended data set—from 1948 to 2007—and examines data monthly instead of quarterly. It also measures the extent of regulation differently than Cochran: the number of *Federal Register* pages in the current month is represented as a percentage of total pages during the calendar year as opposed to the number of pages published. This change allows the authors to capture the increase in regulatory activity during the postelection months for a given administration relative to the administration's annual regulatory output.

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9. Jay Cochran III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Mercatus Ctr. at George Mason Univ., Working Paper, 2001), <http://www.mercatus.org/PublicationDetails.aspx?id=17546>.

10. See *id.* at 11 (demonstrating at least some evidence of a tendency toward midnight regulations).

11. *Id.* at 15.

12. *Id.* at 4; see also Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 955–60 (2003) (expanding on the Cinderella constraint).

13. Cochran, *supra* note 9, at 4.

14. Antony Davies & Veronique de Rugy, *Midnight Regulations: An Update* (Mercatus Ctr. at George Mason Univ., Working Paper No. 08-06, 2008), [http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0806\\_RSP\\_Midnight%20Regulations.pdf](http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0806_RSP_Midnight%20Regulations.pdf).

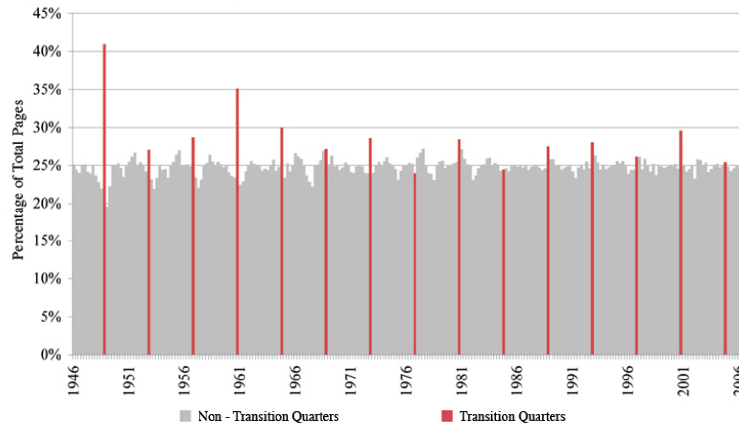


Figure 1: Pages Added to the *Federal Register* in Each Quarter as a Fraction of Pages Added for the Calendar Year.<sup>15</sup>

Our recent research shows that transition periods are accompanied by outbursts in regulatory activity, especially when the presidency switches from one party to the other. Figure 1 shows the number of pages added to the *Federal Register* between 1946 and 2006 during the last three months of a calendar year as a fraction of total pages added for the entire year (the three-month moving average). Figure 1 contrasts growth during nontransition quarters—the quarters in which no presidential election occurs—with the growth during the transition quarters.

The data show that, under normal circumstances, the number of pages added to the *Federal Register* during the course of a year is consistent—spread equally throughout the year. In other words, twenty-five percent of the pages added to the *Federal Register* during a calendar year are added each quarter. However, for quarters in which a presidential election occurs, the number of pages added exceeds the twenty-five-percent baseline thirteen out of fifteen times. The two exceptions correspond to the elections of 1976 (Ford succeeded by Carter) and 1984 (Reagan elected to a second term).

15. The authors based this calculation on the number of pages in the *Federal Register*. *Id.* at 4.

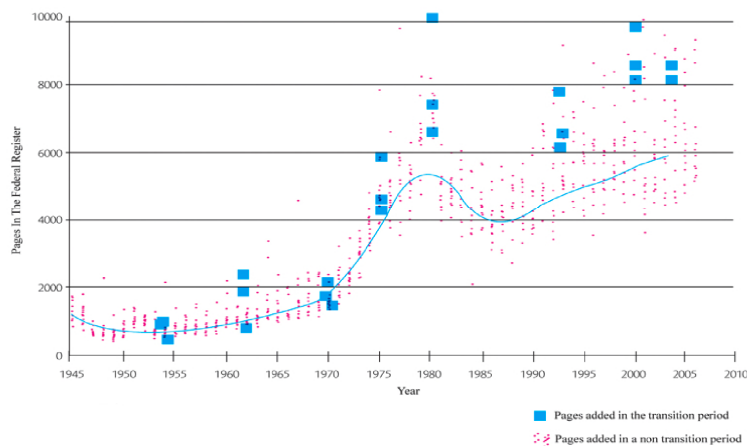


Figure 2: Number of Pages Added to the *Federal Register* from 1946 to 2006.<sup>16</sup>

Figure 2 also illustrates the midnight regulation phenomenon. It shows the number of pages in the *Federal Register* from 1946 to 2006. The dots represent the number of pages added in a given month and the squares highlight the number of pages added during the months of a transition period. The solid line represents underlying trends in the data. Figure 2 shows that the number of pages grew slowly between 1945 and 1970. After 1970, the number of pages started to grow rapidly before it decreased slightly in the 1980s. In the 1990s, it increased again but at a slower pace than in the 1970s.

Pages added to the *Federal Register* during the transition periods are located well above the trendline, lending a first round of support to the theory that outgoing administrations will significantly increase their regulatory activity in the months following a presidential election—especially if parties are changing. As shown, after 1970, the number of pages added to the *Federal Register* increased drastically after an election, especially in 1980, 1992, and 2000, when there was a switch between political parties. There was a smaller increase when the ruling party stayed in power, such as in 1988.

With a few exceptions, these results are quantitatively and qualitatively consistent with Cochran's findings. They confirm a positive relationship

16. *Id.* at 5.



between postelection months and regulatory output.<sup>17</sup> They also show that Congress “is a significant contributor to the existence of midnight regulations.”<sup>18</sup> That is, the more days Congress is in session the month before the start of the midnight period, the more regulations will be promulgated. In addition, the new data

show a positive relationship between the rate of cabinet turnover and regulatory output. The higher the rate of executive branch turnover—for example, when the entire cabinet is about to be replaced because the incumbent president has lost reelection—the more regulations will be issued during the midnight period. As the rate of the executive branch turnover diminishes—such as following a successful reelection—fewer regulations will be issued.<sup>19</sup>

### *B. Explaining the Midnight Regulations Phenomenon*

So what is the cause of this phenomenon? It is commonly believed that as the legislative process slows down at the end of an administration’s term, it becomes more difficult for a president to push through an agenda on his way out.<sup>20</sup> However, according to political scientists William G. Howell and Kenneth R. Mayer, this is not necessarily the case.<sup>21</sup> The slowdown allows a president to take actions using tools at the Executive’s disposal that, during any other period, would likely be checked and halted by the legislature.<sup>22</sup> Howell and Mayer explain that with midnight regulations, executive orders, presidential proclamations, executive agreements, and national security initiatives, “presidents have ample resources to effectuate policy changes that stand little chance of overcoming the collective action problems and multiple veto points that plague the legislative process.”<sup>23</sup>

Additionally, at the end of a term, a president has not only the ability but also an incentive to use these resources to try to push through policy changes. Howell and Mayer explain that midnight regulation occurs when “political uncertainty shifts to political certitude.”<sup>24</sup> During the last one hundred days of his administration, a president knows exactly who will

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17. *Id.* at 3.

18. *Id.* at 3–4.

19. *Id.* at 4.

20. See William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 PRESIDENTIAL STUD. Q. 533, 534 (2005) (citing loss of public prestige and professional reputation as factors contributing to the diminished presidential power).

21. See *id.* (insisting that the President has “important policy options outside of the legislative process” and to ignore these options underestimates the influence and power the President wields during the final months in office).

22. *Id.*

23. *Id.*

24. *Id.* at 533.

succeed him as well as the president-elect's policy positions, legislative priorities, and level of partisan support he will enjoy with the new Congress.<sup>25</sup> An administration has every incentive to promulgate last-minute rules and regulations to deftly extend its influence beyond its last day.<sup>26</sup>

This is particularly true if the sitting president (or his party) lost the election. In that case, the outgoing president not only has an incentive to issue midnight regulations to extend his influence beyond the day he leaves office, but also might want to impose a cost on the incoming administration.<sup>27</sup> According to Susan Dudley, "once a final regulation has been published in the *Federal Register*, the only unilateral way an administration can revise it is through new rulemaking under the Administrative Procedure Act. Agencies cannot change existing regulations arbitrarily; instead, they must first develop a factual record that supports the change in policy."<sup>28</sup> This may make it extremely costly for a new administration to change last-minute regulations issued by the previous administration.<sup>29</sup>

In fact, according to Professor Nina A. Mendelson, some last-minute rules may have such high change and deviation costs that they are close to irreversible.<sup>30</sup> Some changes made by an outgoing administration may also impose serious political costs, "including costs upon the new administration's ability to pursue the president-elect's preferred policy agenda."<sup>31</sup> In other words, an outgoing administration has the opportunity to seriously complicate matters for an incoming administration.

For instance, the Bush Administration's decision to suspend the last-minute (January 22, 2001)<sup>32</sup> Clinton Administration rule setting acceptable levels of arsenic in drinking water at ten parts per billion imposed serious political costs.<sup>33</sup> Even though only one-third of the American public approved of the rule, the suspension led to severe public criticism.<sup>34</sup> The

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25. *Id.*

26. Andrew P. Morriss et al., *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 551, 557 (2003).

27. *See id.* (stating that the outgoing administration has incentive to finish its regulatory business before leaving office).

28. Dudley, *Reversing Midnight Regulations*, *supra* note 4, at 9.

29. *See id.* at 9 (noting that the "new administration's options for overturning midnight regulations are 'constrained'").

30. Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 601 (2003).

31. *Id.* at 602.

32. Howell & Mayer, *supra* note 20, at 544.

33. *See* Mendelson, *supra* note 30, at 602 (citing the Bush suspension of the Clinton arsenic rule as an example of a "booby trap" laid by an outgoing president, leading to acute criticism of President Bush's attitude toward the environment).

34. Howell & Mayer, *supra* note 20, at 544.

Bush Administration's action on the arsenic standard became a symbol of the new administration's "callous attitude toward the environment."<sup>35</sup> Furthermore, as Andrew Morris and his coauthors explain, "by issuing regulations that complicate the life of the succeeding administration, outgoing regulators can earn political capital with their core constituencies, positioning themselves for rewards in post-administration jobs with interest groups or in a future campaign or administration of their own party."<sup>36</sup>

Another explanation of the phenomenon is what Professor Jack M. Beermann calls "waiting."<sup>37</sup> Waiting is the result of a deliberate decision on the part of an administration to wait until after an election before doing something that might be perceived as controversial in order to avoid political consequences.<sup>38</sup> At the end of a term, the political cost of taking action decreases. Because "an outgoing president is unlikely to seek elective office again[, he] may have little need for political support."<sup>39</sup> As a result, the administration is free to pursue actions that it could not have earlier in its term for fear of provoking opposition in Congress.<sup>40</sup>

Of course, another explanation for midnight regulations simply could be that some regulations are under review for years and only end up being issued in the last months before a new president takes office.<sup>41</sup> However, the fact that regulations are regularly delayed for long periods of time does not explain the systematic increase in regulatory activity at the end of presidential terms. A slightly different approach to this explanation is what Beermann calls "delay."<sup>42</sup> Delay is a lag between the moment the regulation is proposed and the moment it is passed. One potential explanation for lag may simply be procrastination.<sup>43</sup> However, delay is more likely due to external forces. For instance, a "[s]tringent judicial review has made the rulemaking process more thorough and time consuming," extending the time it takes for a regulation to gain approval.<sup>44</sup> As a consequence, many new regulations are "naturally push[ed]" further into the President's term.<sup>45</sup> Also, Congress—knowingly or otherwise—

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35. Mendelson, *supra* note 30, at 602.

36. Morriss et al., *supra* note 26, at 558.

37. Beermann, *supra* note 12, at 956.

38. *Id.*

39. *Id.* at 958.

40. *Id.*

41. See Dudley, *Reversing Midnight Regulations*, *supra* note 4, at 9 ("Some of these new regulations may have been developed carefully over many years, and only just now emerged from the procedural pipeline.").

42. Beermann, *supra* note 12, at 956.

43. See *id.* (arguing that while there are many reasons for delay, simple procrastination is "surely one explanation").

44. *Id.* at 956.

45. *Id.* at 956–57.

might cause the delay of a regulation's issuance. In one example, Beermann explains how the Clinton Administration's ergonomics rules, which set new workplace regulations to combat repetitive stress injuries, were significantly delayed by Congress through "repeated appropriations riders prohibiting the Department of Labor from using any of its funds to promulgate a rule on ergonomic injuries."<sup>46</sup>

### C. *Midnight Regulations: An Effective Strategy?*

One would think that an incoming president could easily undo the midnight regulations of his predecessor. As it turns out, however, political and legal obstacles prevent extensive repeal. As detailed in Part III, presidents can issue executive orders, proclamations, and rules to overturn actions taken by their predecessors. They can also block the implementation of the outgoing president's orders. However, more often than not, incoming presidents cannot alter orders set by their predecessors without paying a considerable political price or confronting serious legal obstacles.

As Howell and Mayer explain, "Not only does this require time, but *changing* the status quo may well mean taking on interest groups who are reticent to give up ground that they have just won."<sup>47</sup> As mentioned earlier, President George W. Bush experienced difficulties altering Clinton's January 2001 arsenic regulation.<sup>48</sup> In spite of public outrage at the time the rule was issued,<sup>49</sup> Bush faced considerable opposition when he tried to scrap the rule three months later<sup>50</sup> and ultimately lost the battle.<sup>51</sup>

In fact, a recent empirical study by Jason M. Loring and Liam R. Roth confirms that passing midnight regulations is a winning strategy for an outgoing president who wishes to project his influence into the future.<sup>52</sup> The authors tracked the regulations passed in the midnight period of former

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46. *Id.* at 957.

47. Howell & Mayer, *supra* note 20, at 544.

48. *Id.*

49. *Id.*

50. See Douglas Jehl, *E.P.A. Delays Its Decision on Arsenic*, N.Y. TIMES, Apr. 19, 2001, at A14 (describing the Bush Administration's efforts to suspend President Clinton's ten-parts-per-billion arsenic standard and postpone a decision on acceptable arsenic levels until February, effectively leaving the 1942 standard of fifty-parts-per-billion in place until at least early 2002).

51. See *Bush U-Turn on Arsenic Rule*, CBSNEWS.COM, Oct. 31, 2001, <http://www.cbsnews.com/stories/2001/10/31/politics/main316574.shtml> (reporting that the Bush Administration reversed course and would accept the Clinton Administration's ten-parts-per-billion arsenic rule).

52. Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441 (2005).

Presidents Clinton and George H.W. Bush, as well as the incoming administrations' responses to those regulations. Based on a selected sample, the authors found that only 9% of George H.W. Bush's last-minute regulations were later repealed, and 43% were accepted without any amendment by the Clinton Administration.<sup>53</sup> By the same token, only 3% of President Clinton's midnight regulations were later repealed by the George W. Bush Administration, and a staggering 82% of them were accepted without any changes.<sup>54</sup>

## II. THE MIDNIGHT REGULATIONS PHENOMENON IS PROBLEMATIC

Having established that the midnight regulations phenomenon is real and systemic, we now turn to the question of whether it is problematic and, if so, what can be done. This Part surveys some of the criticisms of midnight regulations and highlights one particular concern: diminished regulatory review. Part III surveys and critiques proposals to curb the effect of midnight regulations and suggests a way to address the particular problem of diminished regulatory review, namely a cap on the number of economically significant regulations OIRA can be expected to review during a given time period.

### A. Often-Cited Concerns over Midnight Regulations

Midnight regulations are the target of perennial criticism.<sup>55</sup> However, unless you believe that regulation of any kind is always problematic, the fact that regulatory activity increases at the end of a presidential term should not by itself be a cause for concern. It is therefore not surprising to

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53. *Id.* at 1456.

54. *Id.*

55. See Edward Cowan, *Administration to Kill or Put Off 36 Carter 'Midnight Regulations'*, N.Y. TIMES, Mar. 26, 1981, at A1 (noting that Vice President Bush announced the government was "killing or indefinitely postponing" numerous midnight regulations imposed by the Carter Administration that had substantial impacts in health care, the environment, and the economy); *Here Come Ronald Reagan's 'Midnight' Regs*, U.S. NEWS & WORLD REP., Nov. 28, 1988, at 11 (characterizing the Reagan Administration's agenda with last-minute regulations as "too hot to handle" and controversial); Robert A. Rosenblatt & Elizabeth Shogren, *Clinton Readies an Avalanche of Regulations*, L.A. TIMES, Nov. 26, 2000, at A1 (suggesting that after a close and bitter election, outgoing President Clinton was determined to leave a lasting impression through midnight regulations on controversial topics that "left some Republican lawmakers fuming"); R. Jeffrey Smith, *A Last Push to Deregulate*, WASH. POST, Oct. 31, 2008, at A1 (noting the White House's efforts to enact a slew of last-minute regulatory activity); Editorial, *Last-Minute Mischief*, N.Y. TIMES, Oct. 18, 2008, at A22 (criticizing in the numerous last-minute environmental rules of the Bush Administration); Emma Schwartz, *The Bush Administration's Midnight Regulations*, ABCNEWS.COM, Oct. 30, 2008, <http://www.abcnews.go.com/print?id=6146929> (surveying President Bush's last-minute rules on the environment, health care, occupation safety, and other areas).

find that objections to midnight regulations do not center simply on the increase in regulations, but on the process of their formulation.

The most common criticism relates to accountability.<sup>56</sup> During the midnight period a lame-duck administration might be impervious to normal checks and balances.<sup>57</sup> In large part, Congress and the electorate provide these checks. The electorate holds the President accountable at the ballot box, while Congress has extensive oversight over agency activity.

In the lingo of game theory, political checks depend on “repeated game[play].”<sup>58</sup> That is, an administration considering a regulation not only will take into account the political costs and benefits of the decision it is making now, but also will consider how that decision will affect future interactions with other players (Congress and the electorate).<sup>59</sup> If there are no such future interactions, an administration will be more likely to “defect” and pursue a regulatory course that might have otherwise invited retaliation.<sup>60</sup>

A president will not face another election if he has served two terms (e.g., Bill Clinton) or has been defeated at the polls (e.g., Jimmy Carter).<sup>61</sup> In either case, there will be an accountability deficit. Because such a president knows that he will not face voters again, that president and his agencies will be less hesitant to pursue a controversial regulatory course. The accountability provided by the threat of congressional retaliation is

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56. See Loring & Roth, *supra* note 52, at 1446 (recognizing that during the midnight period, the outgoing administration no longer is subject to “traditional political constraints” such as voter satisfaction, and thus is unaccountable to the public, giving it “little incentive to avoid costly measures”); Morriss et al., *supra* note 26, at 558 (asserting that accountability is lost because of “political constraints on agency heads such as budgetary concerns, congressional oversight, political appointees’ concern with their reputations, and personal performance measures absent in the period between the election and the new administration”); William S. Morrow, Jr., *Midnight Regulations: Natural Order or Disorderly Governance*, 26 ADMIN. & REG. L. NEWS 3 (2001) (expressing Judge Plager’s view that one of the three major problems with midnight regulation is that it “undermines political accountability”).

57. See Morriss et al., *supra* note 26, at 557–58 (explaining that “Congress is often out of session after the elections” with the exception of a “brief ‘lame duck’ session,” and if political control of Congress “shift[s] with the election,” many committee chairs will change, lessening the opportunity for oversight).

58. *Id.* at 556–57.

59. See *id.* (recognizing that long-term consequences of a decision may lessen the impact of its potential immediate benefit).

60. See *id.* at 557–58 (observing that a change in administration that includes a change in political party minimizes the possibility of future interactions, creating more “incentive to defect”).

61. But see *id.* (explaining that when an administration changes but party control remains the same, agencies and employees can hope for future employment and thus have stronger incentive to cooperate). A two-term president might also be constrained until after the election because a controversial regulatory initiative might affect the campaign of his party’s nominee to succeed him. However, once the election is decided, that constraint is removed.

also weakened once a president knows that there is no “next period” in which he will need Congress’s cooperation on legislative, budgetary, and other matters.<sup>62</sup>

Some argue that this period of unaccountability is in fact salutary because it may be the only opportunity an administration has to take a principled stand on issues that would otherwise face swift retaliation by powerful special interests. On the other hand, the case could be made that this is also the perfect time for an administration to favor a particular special interest without fear that it will be held accountable. For example, consider the controversial last-minute pardons issued by George H.W. Bush, Bill Clinton, and indeed most presidents.<sup>63</sup>

Related to the concern over accountability is the criticism that midnight regulations can be undemocratic. After an election, if the people have chosen a new president with policies opposite to the sitting president, actions by the sitting president aimed at exerting power beyond his term may be seen as undemocratic.<sup>64</sup> One way a lame-duck president can exert power beyond his term is by adopting a procedural rule that constrains the Executive’s own power, but doing so only at the very end of his term so that the constraint affects only his successor.<sup>65</sup> Another way is to force an incoming president to expend political capital reversing his predecessor’s last-minute decisions. During the midnight period, an “outgoing

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62. According to Morriss and his coauthors, the incentive to defect is strongest when the incoming president is of the opposite party because “the outgoing administration has little incentive to leave unfinished business for the incoming administration” whose policies will likely be contrary. *Id.* at 557.

63. See Kelly Wallace, *Former President Bush Granted Last-Minute Pardon to Contributor’s Son*, CNN.COM, Mar. 7, 2001, <http://archives.cnn.com/2001/ALLPOLITICS/03/07/bush.pardon/index.html> (identifying the pardons granted by President Clinton to Marc Rich, a wealthy donor to the Democratic Party and the Clinton campaign, and President Bush to Edwin Cox, Jr., whose family donated generously to the Republican Party and the Bush campaigns). See generally P.S. Ruckman, Jr., “*Last-Minute Pardon Scandals: Fact and Fiction*” (Paper presented at the Annual Meeting of the Midwest Political Science Association, Apr. 15, 2004), <http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf> (comparing the use of pardons by a variety of presidents throughout their administrations to the amount of pardons issued at the end of their administrations).

64. See Mendelson, *supra* note 30, at 599 (noting that the “worst case” scenario concerning midnight regulations is when the regulations by the outgoing administration hinder the president-elect’s ability to implement a new and different policy, and that this abuse of power could be considered as “undermining our democratic regime”).

65. For example, Mendelson explains that the Clinton Department of Justice (DOJ) changed procedural rules that gave former DOJ employees the power to access work documents, but did so in the last few days of the Administration. Mendelson, *supra* note 30, at 600; see also Beermann, *supra* note 12, at 951–52 (concluding that when rules are imposed only at the end of a presidency, especially in the form of procedural constraints, it is evident that the administration had not found these rules necessary during its term and thus the only reasonable explanation for the promulgation was to “tie the hands of the successor”).

administration may impose rules in a politically charged area” that it knows its successors will surely reverse.<sup>66</sup> That late “timing suggests that there was no hope that the rules would actually be implemented, but rather were passed in an attempt to embarrass the new administration by forcing it to revise or repeal the rules.”<sup>67</sup>

Yet another criticism of midnight regulations is the inefficiency and wastefulness inherent in trying to exert influence beyond one’s own administration. Putting aside concerns about democracy, enacting regulations contrary to the next president’s policy agenda likely wastes the government’s time and resources.<sup>68</sup>

Finally, there are criticisms based on principle. “In addition to purely legal questions, the problem of ‘midnight regulations’ raises interesting normative questions concerning what constitutes appropriate behavior for an outgoing President and administration.”<sup>69</sup> Senior Federal Circuit Judge S. Jay Plager, debating Clinton Office of Management and Budget (OMB) Acting Deputy Director Sally Katzen on the question of whether midnight regulations should be curbed, has said that “he believes public virtue suffers from the rush to publish.”<sup>70</sup> Judge Plager criticized the rush to regulate at the end of an administration as “unseemly” and argued that “the haste with which midnight regulations are pushed out the door results in ‘a certain amount of sloppiness’ and ‘makes control of the regulatory apparatus appear to be a Washington game.’”<sup>71</sup> Professor Nina A. Mendelson echoes Judge Plager, writing that “[s]omething about this activity strikes us as unseemly.”<sup>72</sup>

The concerns over the accountability and democracy deficits during the midnight period, as well as the perceived inefficiency and unseemliness of a rash of last-minute regulations, are very serious concerns—frequently cited as the main problems with midnight regulations. However, this Article will now focus on the less touted concern that an increase in the

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66. See Beermann, *supra* note 12, at 951 (explaining that this often includes rules issued in areas such as abortion or the environment).

67. *Id.* at 951.

68. See *id.* at 951, 972 (arguing that waste occurs when “the new administration must dig itself out from under the remains of the outgoing administration, especially when the outgoing administration knows that this is inevitable” and that an outgoing president should recognize when the incoming president will have a new agenda and step aside to prevent waste of government funds on an “obviously futile endeavor”). Efficiency and waste are one of three concerns over midnight regulations identified by Judge Plager. See Morrow, *supra* note 56, at 3 (“[Plager] believes the ramming of regulations on the way out and the attempt to neutralize them on the way in amounts to an enormous waste of time and effort for both administrations.”).

69. Beermann, *supra* note 12, at 951.

70. Morrow, *supra* note 56, at 3.

71. *Id.*

72. Mendelson, *supra* note 30, at 564.



number of regulations over a short time period could overwhelm the institutional review process that otherwise serves to ensure that new regulations have been carefully considered.

### *B. Regulatory Review*

For over two decades, a series of executive orders has required executive agencies to perform economic analysis of the effects of proposed regulations.<sup>73</sup> OIRA, within OMB, oversees agencies' regulatory analysis and can delay, and even halt, some regulations if it believes that analysis is inadequate.<sup>74</sup>

Regulatory review is not a partisan policy tool. Every president since Gerald Ford has relied on a formal system to review new regulations before they are issued. The recurring themes evident in these programs are an insistence that regulatory agencies consider possible alternatives to achieving the outcome that is their target, and that they estimate the cost of these alternatives in order to find the most efficient course of action. By its nature, this type of reasoned economic oversight of proposed regulations requires both time and careful consideration. Therefore, the effectiveness of the process can be overpowered by a flood of rulemaking activity at the end of an administration.<sup>75</sup>

Below, we will look first at the history and purposes of the regulatory review process and then explore how the midnight regulations phenomenon affects this process.

### *C. The Regulatory Review Process*

Regulatory review has its origins in President Nixon's so-called Quality of Life Review process.<sup>76</sup> Soon after the establishment of the

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73. See generally Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), amended by Exec. Order No. 13,258, 67 Fed. Reg. 9385 (Feb. 28, 2002) and Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (requiring agencies to perform a cost-benefit analysis, including both quantitative and qualitative measures of available regulatory alternatives and the option of no regulation); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS (2003), <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf> (providing guidance for regulatory analysis, including a standardization for measuring and reporting costs and benefits).

74. See Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1273-74 (2006) ("At the end of the review period, OIRA either returns the draft rule to the agency 'for reconsideration' or OIRA concludes that the rule is consistent with the executive order.").

75. See Morrow, *supra* note 56, at 3 ("[Judge Plager] also believes presidential oversight tends to get lost in the process.").

76. See GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? 46 (1984) ("Many of the procedures and institutional arrangements that would later be employed by Presidents Ford, Carter, and Reagan trace their origins to decisions made in 1971 by the Nixon

Environmental Protection Agency (EPA) in 1970, the White House took notice of the cost—both to society and the treasury—of the new regulation spawned by the Clean Water Act and other newly minted environmental laws.<sup>77</sup> Alarmed by a multimillion-dollar supplementary budget request by the EPA in December 1970, the OMB concluded that the effects of EPA's regulation on the budget and the private sector were going unchecked.<sup>78</sup>

If agencies' regulations were to be checked (at least for budgetary reasons), they had to be reviewed before they were promulgated—something the White House had not previously done. OMB Director George Schultz sent a letter to EPA Administrator William Ruckelshaus in 1971 “assert[ing] authority to review *and clear* EPA's regulations.”<sup>79</sup> At the same time, the White House established a Quality of Life committee composed of Cabinet members, the EPA Administrator, and senior White House staff.<sup>80</sup> Its purpose was to formulate a regulatory review process for significant regulations in order to ensure that the costs of alternatives had been considered.<sup>81</sup>

The resulting review process was established in a memorandum from OMB Director George Schultz dated October 5, 1971.<sup>82</sup> First, it required the covered agencies to submit to OMB “a schedule . . . covering the ensuing year showing estimated dates of future announcements of all proposed and final regulations, standards, guidelines or similar matters”<sup>83</sup> that were “significant”<sup>84</sup> in nature. More notably, it also required agencies to submit significant proposed rules to OMB at least thirty days before their

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administration.”); Murray Weidenbaum, *Regulatory Process Reform: From Ford to Clinton*, REG., Winter 1997, at 20 (noting that Nixon's reforms, which required agencies to consider regulatory alternatives and their costs, were the “precursor of all modern reform efforts”).

77. See EADS & FIX, *supra* note 76, at 46–47 (explaining that when the EPA was created, it began to “spew forth” new regulations so quickly and in such large numbers that implementing the regulations led to serious budgetary and policy consequences).

78. *Id.* at 47.

79. *Id.* at 48.

80. *Id.*

81. See *id.* (noting the development of the Quality of Life Review process).

82. See Memorandum from George P. Schultz, Director, Office of Mgmt. and Budget, to Heads of Departments and Agencies (Oct. 5, 1971) [hereinafter Schultz Memo], <http://www.thecre.com/ombpapers/QualityofLife1.htm> (ordering agencies to submit proposed regulations to the Office of Management and Budget (OMB) for review before the regulations are formally announced).

83. *Id.*

84. A “significant” rule was defined as a rule that would have a significant impact on the policies, programs, and procedures of other agencies; or impose significant costs on, or negative benefits to, non-Federal sectors; or increase the demand for Federal funds for programs of Federal agencies which are beyond the funding levels provided for in the most recent budget requests submitted to the Congress.

*Id.*

publication, accompanied by “the principal objectives of the regulations, standard, guidelines, etc.; alternatives to the proposed actions that have been considered; a comparison of the expected benefits or accomplishments and the costs (federal and nonfederal) associated with the alternatives considered; and the reasons for selecting the alternative that is proposed.”<sup>85</sup> OMB then began to circulate proposed rules and its explanations to other agencies for comment, forwarding the feedback to the issuing agency.<sup>86</sup>

For political reasons, a mechanism by which conflicts among agencies would be resolved was intentionally left out of this interagency review process.<sup>87</sup> In practice, the White House often played arbiter.<sup>88</sup> If nothing else, the Quality of Life Review process, by forcing agencies such as the EPA to answer certain questions, curbed reflexive rulemaking and made regulators consider alternatives, taking into account the cost of the rules they were proposing.

While the Quality of Life Review process continued through 1977,<sup>89</sup> President Gerald Ford expanded regulatory review to address concerns about the effect of regulation on inflation, then a major national concern.<sup>90</sup> Ford sought and received legislation establishing the Council on Wage and Price Stability (CWPS or Council) in August 1974.<sup>91</sup> Among other things, the Council was charged with reviewing regulations to ascertain their impact on the economy.<sup>92</sup> Three months after establishing the CWPS, President Ford issued Executive Order 11,821 establishing procedures for preparing Inflation Impact Statements, which addressed the economic effect of proposed rules on productivity and competition.<sup>93</sup> The CWPS reviewed the statements, which were prepared by executive branch agencies, and then filed comments on the public record with those agencies.<sup>94</sup>

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85. *Id.*

86. *See id.* (establishing a process for circulating proposed regulations for agency comment); *see also* EADS & FIX, *supra* note 76, at 48 (describing OMB’s role in soliciting comments on proposed regulations).

87. *See* EADS & FIX, *supra* note 76, at 49 (discussing the interaction between agencies during the Quality of Life Review process).

88. *See id.* (noting the White House’s involvement in the regulatory review process).

89. *See generally id.* at 54 (discussing the Carter Administration’s approach to regulatory review).

90. *See* Weidenbaum, *supra* note 76, at 20 (noting that concerns about inflation affected President Ford’s regulatory reforms).

91. EADS & FIX, *supra* note 76, at 51; *see also* Weidenbaum, *supra* note 76, at 20 (describing the founding of the Council on Wage and Price Stability (CWPS) and its role in the regulatory review process).

92. *See* Weidenbaum, *supra* note 76, at 20.

93. *Id.*

94. *See* EADS & FIX, *supra* note 76, at 51–52 (discussing the development of formal analysis of the economic effects of proposed regulations); Weidenbaum, *supra* note 76, at

President Jimmy Carter continued to formalize the regulatory review process begun in the Ford Administration. In 1978, Carter established the Cabinet-level Regulatory Analysis Review Group (RARG), which had the authority to review major proposed rules.<sup>95</sup> He also issued Executive Order 12,044 in March 1978, which replaced Ford's Inflation Impact Statements with the "Regulatory Analysis."<sup>96</sup> The Executive Order was remarkably similar to the Nixon and Ford efforts.<sup>97</sup> It required proposed rules with an effect on the economy of \$100 million or more to be reviewed before they were published in the *Federal Register*, and required the agencies' analysis to

contain a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others.<sup>98</sup>

Also, much like the 1971 Schultz memo, Executive Order 12,044 required agencies to prepare and publish a semiannual agenda "of significant regulations under development or review."<sup>99</sup> This obligation was later codified into law during the last year of the Carter Administration by the Regulatory Flexibility Act.<sup>100</sup>

It was under the Administration of President Ronald Reagan, however, that we saw the crystallization of the regulatory review process as we know it today. The stage was set during the last year of the Carter Administration with the passage of the Paperwork Reduction Act.<sup>101</sup> That Act created OIRA within OMB.<sup>102</sup> Its primary purpose was to enforce the Act's limits on the amount of reporting that agencies could require from the private sector.<sup>103</sup> President Reagan, however, expanded the role of OIRA.

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20 (noting that CPWS reviewed proposed regulations to determine their effect on competition and productivity).

95. EADS & FIX, *supra* note 76, at 55–56; Weidenbaum, *supra* note 76, at 20.

96. See Exec. Order No. 12,044, 3 C.F.R. 152, 154 (1979) (directing that regulations be as simple and clear as possible and not impose unnecessary burdens on the economy or individuals).

97. Compare Exec. Order No. 12,044, 3 C.F.R. 152 (1979), with Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 29, 1974), and Schultz Memo, *supra* note 82.

98. Exec. Order No. 12,044, 3 C.F.R. 152, 154 (1979).

99. *Id.*

100. See 5 U.S.C. § 602 (2006) (requiring agencies to publish a semiannual regulatory flexibility agenda); Weidenbaum, *supra* note 76, at 21 (describing the role of the Regulatory Council in preparing semiannual reviews).

101. See 44 U.S.C. § 3501 (2000) (minimizing the paperwork burden on groups that are required to submit information to the federal government).

102. 44 U.S.C. § 3503 (2000).

103. See 44 U.S.C. § 3504 (2000) (outlining the authority of the Director of OMB to take steps to improve the efficiency of the collection of information from and the dissemination of information to the public).

One month into his presidency, Reagan signed Executive Order 12,291, titled “Federal Regulation,” mandating that “[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society.”<sup>104</sup> The Executive Order required agencies to prepare regulatory impact analyses for proposed “major rules.”<sup>105</sup> What constituted a major rule was left largely to the discretion of OMB.<sup>106</sup> Although the Executive Order did not mention OIRA specifically (and only OMB generally), the review of regulatory impact analyses fell on OIRA.<sup>107</sup> As a result, “[a] federal agency could not publish a notice of proposed rulemaking until an OIRA review was complete and its concerns had been addressed.”<sup>108</sup>

At the same time, President Reagan established the Presidential Task Force on Regulatory Relief, headed by Vice President George H.W. Bush, which gave direction to OIRA.<sup>109</sup> Unlike the Nixon, Ford, and Carter programs of regulatory review, none of which addressed how an impasse between an agency and its reviewing authority would be settled,<sup>110</sup> the Reagan system placed the power to hold back regulations in the hands of OIRA. As a result, “[t]he Task Force on Regulatory Relief often acted as a court of appeals for issues on which [] OIRA and the regulatory agencies could not agree.”<sup>111</sup>

The regulatory review process established in Executive Order 12,291 and carried out by OIRA went largely unchanged through the presidency of George H.W. Bush.<sup>112</sup> The only major break was that the Task Force on

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104. Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982).

105. See *id.* at 128–30 (outlining the Regulatory Impact Analysis requirements).

106. Although “major rule” was defined in § 1(b) as a rule having an annual impact on the economy of \$100 million or more, in § 3(b) the Director is given authority, subject to the direction of the taskforce, to treat other rules as major rules as well. *Id.* at 127–28.

107. See *id.* at 128 (giving the Director of OMB the authority to develop standards for preparing a Regulatory Impact Analysis, develop procedures for evaluating agency estimates, and monitor agency compliance); CURTIS W. COPELAND, CONG. RESEARCH SERV., *FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS* 4 (2004) (describing how OIRA became involved in the regulatory review process).

108. Weidenbaum, *supra* note 76, at 22.

109. See COPELAND, *supra* note 107, at 3 (listing responsibilities of the newly created taskforce including “(1) monitoring the establishment of OMB’s responsibility to coordinate and review new rules, (2) the development of legislative changes to regulatory statutes, and (3) the revision of existing regulations”).

110. EADS & FIX, *supra* note 76, at 48–50. The White House staff and the President were often the mediators. On at least one occasion, administration officials who took different sides of a proposed regulation lobbied President Carter himself. The initial result was confusion because after their respective meetings each side thought they had persuaded the President. *Id.* at 58–59.

111. Weidenbaum, *supra* note 76, at 22.

112. See generally COPELAND, *supra* note 107, at 9–10 (discussing OIRA and the George H.W. Bush Administration); Weidenbaum, *supra* note 76, at 23.

Regulatory Relief was replaced by the Council on Competitiveness, also headed by the Vice President (in this case Dan Quayle) and supported by OIRA.<sup>113</sup> It was President Bill Clinton who made significant changes to the regulatory review process by abolishing the Council on Competitiveness and rescinding President Reagan's Executive Order 12,291.<sup>114</sup>

President Clinton issued Executive Order 12,866 in September 1993, articulating a new regulatory review process that was less of a radical departure and more an evolution consistent with past programs.<sup>115</sup> The most significant change was the removal of OMB's authority to treat any rule it deemed appropriate as if it were a major rule.<sup>116</sup> The focus of OIRA review was shifted to those proposed regulations that might "[h]ave an annual effect on the economy of \$100 million or more."<sup>117</sup> Predictably, this caused the number of rules reviewed by OIRA to drop markedly.<sup>118</sup>

Although it changed the process of regulatory review, the Clinton Executive Order kept the substance of regulatory analysis that had developed since the Nixon Quality of Life Reviews. The framework maintained the emphasis on identifying all practical alternatives to regulation and selecting the most cost-effective option:

□ Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

.....

□ When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective.

.....

□ Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

.....

□ Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.<sup>119</sup>

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113. COPELAND, *supra* note 107, at 10; Weidenbaum, *supra* note 76, at 23.

114. Weidenbaum, *supra* note 76, at 24.

115. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

116. *See id.* at 51,742 (mandating that "OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions").

117. *Id.* at 51,738.

118. *See* COPELAND, *supra* note 107, at 12 (charting the significant drop in rules reviewed under Executive Order 12,866 and noting that the number of rules that OIRA examined fell from about 2,000–3,000 per year under Executive Order 12,291 to about 500–700 rules per year under Executive Order 12,866).

119. Exec. Order No. 12,866, 58 Fed. Reg. 51,736 (Oct. 4, 1993).

Additionally, Executive Order 12,866 embodied the evolution of modern regulatory analysis by adding a new first step to the regulatory analysis framework. It ordered the following: “Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.”<sup>120</sup>

In 2003, President George W. Bush issued Executive Order 13,422, amending Executive Order 12,866 and underlining the importance of identifying a problem to be addressed by regulation.<sup>121</sup> The new Executive Order requires agencies to “identify *in writing* the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions).”<sup>122</sup> This requirement highlights the insight, first expressed in Clinton Executive Order 12,866, that cost-benefit analysis is not the only criterion used to assess whether a regulation is necessary: a market failure or some other systemic problem must also be identified.

#### *D. Regulatory Review and Midnight Regulations*

Every administration since President Nixon has come to view regulatory analysis as a useful tool to ensure the effectiveness of regulation. To the extent we believe that regulatory review is beneficial, midnight regulations are problematic because they undercut the benefits of the review process.

The logic is simple. As we have seen, at the end of each administration, especially between administrations of opposing parties, there is a dramatic spike in regulatory activity. However, there is no corresponding increase in the resources available to OIRA during those times of increased activity. If the number of regulations OIRA must review goes up significantly and the man-hours and resources available to it remain constant, we can expect the quality of review to suffer.<sup>123</sup>

Since it was invested with regulatory review authority in 1981, OIRA’s budget has grown only modestly, from \$4.3 million in 1981 to \$7 million in 2007.<sup>124</sup> The high mark was \$8 million in 2004 and 2006.<sup>125</sup> However, in

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120. *Id.* at 51,735.

121. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007); *see also* COPELAND, *supra* note 107, at 3–4 (outlining changes made by Executive Order 13,422).

122. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (emphasis added).

123. To conclusively prove this would require judging every OIRA-produced regulatory review issued during each period from November 8th to January 20th of the last twenty-seven years against objective criteria—a massive undertaking. We instead opt to make the case through circumstantial evidence and deductive reasoning.

124. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1983, at I-C7 (1982) (listing OIRA’s actual 1981 budget as \$4,332,000); OFFICE OF MGMT. & BUDGET, EXEC.

real terms, OIRA's budget has decreased since its inception.<sup>126</sup> Staffing at OIRA has also decreased consistently and dramatically—from ninety full-time equivalent employees in 1981 to just fifty today.<sup>127</sup>

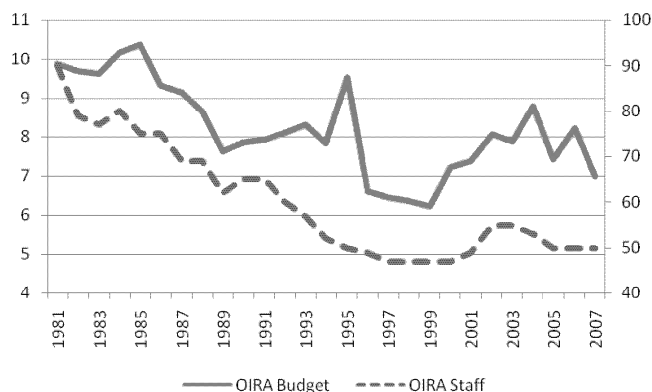


Figure 3: OIRA Annual Budget (in Millions of 2007 Dollars—Left Axis) and Staff (in Number of FTEs—Right Axis).<sup>128</sup>

OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, at 1058 (2008) (listing OIRA's actual 2007 budget as \$7 million).

125. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006, at 982 (2005) (listing OIRA's actual 2004 budget as \$8 million); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2008, at 966 (2007) (listing OIRA's actual 2006 budget as \$8 million).

126. Adjusted for inflation, \$7 million is equivalent to \$2.9 million in 1981 dollars. Bureau of Labor Statistics Inflation Calculator, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited Oct. 17, 2008).

127. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STIMULATING SMARTER REGULATION: 2002 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 30–31 (2002), [http://www.whitehouse.gov/omb/inforeg/2002\\_report\\_to\\_congress.pdf](http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf) (reporting staffing figures for OIRA from 1981 through 2003); E-mail from John F. Morrall III, Branch Chief for Health, Transp., and Gen. Gov't in the Office of Info. and Regulatory Affairs of the Office of Mgmt. and Budget (July 3, 2008, 12:23:21 EDT) (providing OIRA staffing data for the 2004–2008 period).

128. This graph was compiled using the Appendices to the Budgets of the United States Government. See, e.g., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1983 (1982); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009 (2008) (providing OIRA's actual budget from 1981 to 2007).



At the same time, we see spikes in the number of economically significant regulations OIRA must review during the last quarters of presidential terms.

As Figure 3 shows, during midnight periods the same number of staff, with the same resources, must review an increased number of regulations. During the midnight periods of the George H.W. Bush and Clinton presidencies, when the transition was to a president of the opposing party, we see the number of economically significant regulations that OIRA was asked to review more than double from the same period in the immediately preceding years. However, there is no concurrent increase in the resources available to OIRA.

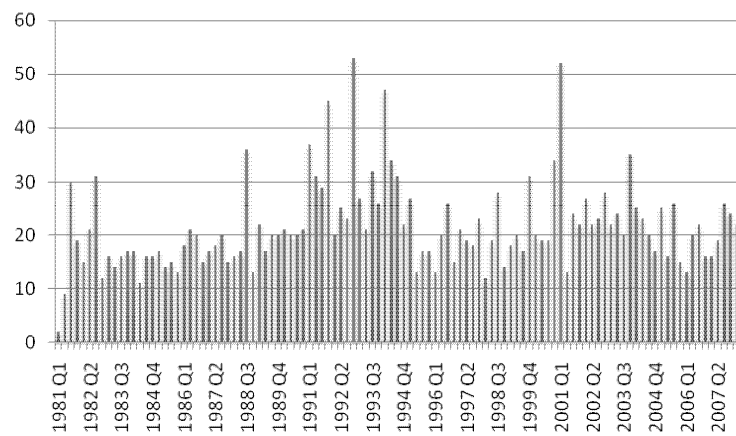


Figure 4: Economically Significant Regulations Reviewed by OIRA (by Quarter; Presidential Transitions Highlighted).<sup>129</sup>

129. Quarterly figures generated using OIRA's online "review counts" database. See RegInfo.gov, Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Jan. 21, 2009).

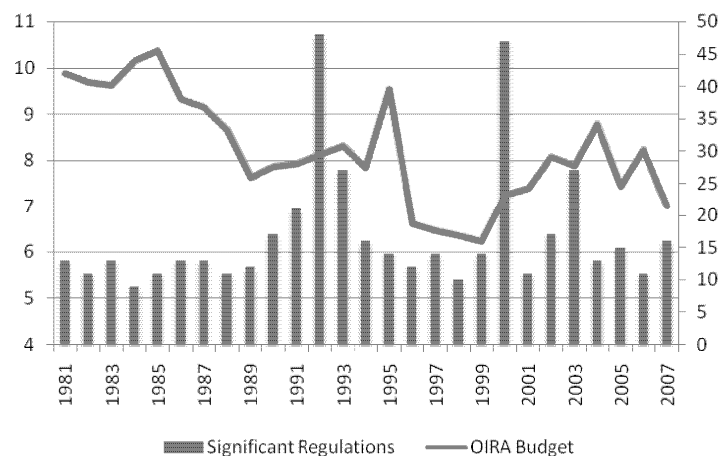


Figure 5: OIRA Budget (in Millions of 2007 Dollars—Left Axis) Superimposed over Number of Economically Significant Regulations Reviewed by OIRA Nov. 8–Jan. 20 of Each Fiscal Year (Right Axis).<sup>130</sup>

As a consequence, we can expect the amount of time and attention OIRA devoted to each regulation reviewed to be considerably less during midnight periods. One possible proxy for time and attention is the number of days OIRA takes to review a proposed regulation. OIRA publishes both when it receives a regulation for review and when it completes its review.<sup>131</sup> New Mercatus Center research by Patrick A. McLaughlin examines whether increases in regulatory activity, such as those that occur during midnight periods, cause average review time to decrease.<sup>132</sup> He calculates the monthly average review time (i.e., how many days pass between when each rule is received and when the review is finished) and

130. Number of yearly significant regulations derived from OIRA's online "review counts" database. *Id.* The OIRA budget derived from Appendices to the Budgets of the United States for Fiscal Years 1983 through 2009. *See, e.g.,* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1983 (1982); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009 (2008).

131. *See* RegInfo.gov, Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Jan. 21, 2009) (allowing users to enter specific dates and determine OIRA reviewing statistics).

132. *See generally* Patrick A. McLaughlin, *Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time* (Mercatus Ctr. at George Mason Univ., Working Paper No. 08-40, 2008), available at <http://www.mercatus.org/PublicationDetails.aspx?id=22854>.

tests whether the number of regulations submitted to OIRA each month for review affects review time.<sup>133</sup>

While controlling for differences in administrations, McLaughlin finds that during the midnight period of the Clinton Administration, review time decreased significantly.<sup>134</sup> Relative to the mean review time between 1994 and 2007 (all full years of data available since the passage of Executive Order 12,866), the Clinton midnight period witnessed a decrease in mean review time of twenty-five days—a drop of fifty percent.<sup>135</sup> Because there is only one midnight period in the time frame examined, McLaughlin investigates a possible underlying cause of the decreased review time: an increased workload for OIRA.

While OIRA is charged with reviewing all proposed significant regulations, the most important are those considered “economically significant”—regulations expected to have an annual effect on the economy of \$100 million or more. McLaughlin finds that the proportion of economically significant rules to all rules OIRA reviewed spikes dramatically during midnight periods in general.<sup>136</sup> He further finds that an increase in this proportion negatively affects the review time for all regulations, in and out of the midnight period.<sup>137</sup> Holding constant the number of regulations reviewed that are not economically significant, one additional economically significant rule submitted to OIRA in a given month decreases the average review time for all regulations by half a day.<sup>138</sup> This suggests a diminished level of scrutiny that undermines the benefits of regulatory review.

### III. SOLUTIONS

Several solutions to the midnight regulations problem have been proposed and tried. They have largely addressed the democracy deficit caused by midnight regulations. In this Part, we examine some of these proposals and make our own suggestion to address the effects of midnight regulations on regulatory review.

#### *A. Rescinding and Postponing Regulations*

The most common way presidents have dealt with their predecessors’ last-minute regulatory activity has been to delay the effects of new rules

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133. *Id.* at 25–26.

134. *Id.* at 25.

135. *Id.* at 21–22, 25.

136. *Id.* at 31–32.

137. *Id.* at 14.

138. *Id.* at 21, 25.

and to rescind unpublished rules.

A new regulation cannot gain the force of law until it is published in the *Federal Register*.<sup>139</sup> Even then, once a regulation is published it will not become effective until a later date, allowing regulated parties to come into compliance.<sup>140</sup> The minimum time in which a new rule can become effective after publication is thirty days, although agencies often set effective dates sixty days or more in the future.<sup>141</sup> At any point before a regulation is published in the *Federal Register*, the agency may rescind the rule at will.<sup>142</sup> Once a regulation is published, however, an agency must engage in the same type of lengthy notice-and-comment rulemaking process it undertook to create the regulation in order to repeal it.<sup>143</sup>

With these constraints in mind, we see that the most direct course for a new president to address his predecessor's midnight activity is to "stop the presses" at the *Federal Register* until the new administration can review unpublished rules and decide which to keep and which to rescind. As for regulations that have recently been published but have not yet become effective, the president can direct agencies to delay their effective dates but the regulations cannot be postponed indefinitely.<sup>144</sup>

This is what President Reagan did in Executive Order 12,291 less than a month after he took office.<sup>145</sup> As explained in Part II.B.1, Reagan's Executive Order created the formal regulatory review process we know today. It also suspended the effective dates of recently published rules "to permit reconsideration in accordance with [the] Order"<sup>146</sup> and directed agencies to refrain from publishing any new major rules until they had

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139. 5 U.S.C. § 552(a)(1)(D) (2006).

140. *Id.* § 553(d).

141. *Id.*

142. See generally William M. Jack, *Taking Care that Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1488–97 (2002) (using as an example *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996)).

143. Beermann, *supra* note 12, at 982–83.

144. See Jack, *supra* note 142, at 1503–11 (explaining, inter alia, that while the effective dates of rules may be delayed for good cause, they cannot be delayed indefinitely, and that courts will likely be skeptical of a simultaneous across-the-board claim of good cause by a large number of agencies). See generally Peter D. Holmes, *Paradise Postponed: Suspensions of Agency Rules*, 65 N.C. L. REV. 645 (1987) (outlining the history of suspension of agency regulations). Whether delay of effective dates is legally problematic or not, the fact remains that Presidents Reagan and George W. Bush (each one a president who took over from the opposite party) have ordered the preceding administration's rules delayed as a first order of business. Jack, *supra* note 142, at 1482–83 & n.11.

145. See Exec. Order No. 12,291, 3 C.F.R. 127, 131–32 (1982) ("[A]gencies shall . . . suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective . . .").

146. *Id.* at 131.

undergone regulatory review.<sup>147</sup>

Since Reagan, every president taking over from a president of the opposing political party has ordered a similar regulatory moratorium. For example, two days after taking office, President Clinton issued a directive to all agencies ordering them to “withdraw . . . all regulations that have not yet been published in the *Federal Register*.”<sup>148</sup> George W. Bush issued a similar directive the day he took office, ordering agencies to halt rules from being published in the *Federal Register* and “temporarily postpone the effective date of the [published] regulations for 60 days.”<sup>149</sup> President Barack Obama’s Chief of Staff Rahm Emanuel also issued a memo withdrawing rules not yet published in the *Federal Register*.<sup>150</sup>

### B. Congressional Review Act

The Congressional Review Act of 1996 (CRA) presents another tool to address the problem of midnight regulations.<sup>151</sup> It creates an expedited process for Congress to repeal any regulation by a simple majority vote in each house.<sup>152</sup>

The CRA requires agencies to submit to Congress all rules before they become effective.<sup>153</sup> In order for the CRA’s expedited repeal procedures to control, a joint resolution of disapproval must be introduced in Congress within sixty days of continuous session after a rule has been submitted to Congress or published in the *Federal Register*, whichever is later.<sup>154</sup> If a resolution of disapproval passes both houses of Congress and the President signs it, then the regulation is repealed and “is treated as though the rule never took effect.”<sup>155</sup> Additionally, the agency may not issue another rule that is “substantially the same” unless later “specifically authorized” by

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147. *Id.* at 132.

148. Regulatory Review, 58 Fed. Reg. 6074 (Jan. 25, 1993).

149. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001).

150. Memorandum from Rahm Emanuel, White House Chief of Staff, to Heads of Executive Departments and Agencies (Jan. 20, 2009), *available at* <http://media.washingtonpost.com/wp-srv/politics/documents/emanuel-regulatory-review.pdf>.

151. See 5 U.S.C. § 801 (2006) (outlining a process by which federal agencies must submit copies of proposed rules to each chamber of Congress, as well as cost-benefit analyses to the Comptroller General, before rules become effective).

152. See Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 100–01 (1997) (explaining the expediting nature of the Act).

153. 5 U.S.C. § 801(a)(1)(A) (2006).

154. *Id.* § 802(a).

155. Cohen & Strauss, *supra* note 152, at 102; see also 5 U.S.C. § 801(f) (“Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.”).

subsequent legislation.<sup>156</sup>

Therefore, to the extent Congress is concerned that regulations issued during the midnight period suffer from a lack of accountability or regulatory review, it could quickly act to overturn them. However, the CRA will only be an effective check on midnight regulations if the incoming president and the Congress are of the same party.<sup>157</sup> If not, there is little reason to expect that the Congress will use its authority under the CRA to repeal midnight regulations. Conversely, if the president is of the same party as his predecessor and the Congress is of the opposite party, it is likely that the new president will veto a congressional attempt to overturn his predecessor's last-minute rules.

It should therefore not be surprising that the CRA has only been used once to successfully repeal a regulation. The target was a controversial Occupational Safety and Health Administration (OSHA) ergonomics regulation promulgated in the last few months of the Clinton Administration.<sup>158</sup> It was disapproved by joint resolution of a Republican-controlled Congress and signed by President Bush.<sup>159</sup>

Despite its practical constraints, congressional action to check midnight regulatory activity may yet be a useful tool. First, it should be noted that Congress has the inherent power to repeal federal regulations at any time and the CRA exists only to facilitate and expedite the process of congressional regulatory review and disapproval.<sup>160</sup> With this in mind, one approach a new president could take is to conduct a review of rules promulgated during his predecessor's midnight period, identify any rules that are worthy candidates for repeal, and submit them to Congress as a package. The package approach can make it easier for Congress to take action on midnight regulations by focusing its attention on just one resolution. A package might also help overcome the influence that special interests opposed to repeal would otherwise exert if the regulations were considered individually.<sup>161</sup>

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156. 5 U.S.C. § 801(b)(2).

157. See Julie A. Parks, Comment, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187, 199 (2003) (arguing that the repeal of the Clinton Occupational Safety and Health Administration (OSHA) ergonomics standard—the only time the Congressional Review Act (CRA) has been used—could only have occurred because the new President and Congress were of the same party).

158. See *id.* at 192–94 (detailing the action taken by Congress regarding the contentious OSHA ergonomics regulation).

159. See *id.* at 197–99 (outlining the strategy for using CRA to fight the ergonomics standard).

160. See Cohen & Strauss, *supra* note 151, at 99 (describing procedures established under 5 U.S.C. § 802).

161. See Morriss et al., *supra* note 26, at 594–95 (“[W]hen a rule’s impacts are concentrated in a particular region or on a particular industry, there may not be sufficient political support to change the rule.”). A package approach would be similar to strategies

### C. Our Solution

The most common solutions to the midnight regulations problem suggest steps that an incoming president can take to undo his predecessor's last-minute actions. Another approach would be to try to prevent the midnight regulation phenomenon or at least to mitigate its negative effects.

Professor Andrew P. Morriss and his coauthors have argued that the root cause of the midnight regulations problem is bad incentives: "Regulators in the lame duck period are not only freed from political fallout from their actions but have positive incentives to cause problems for the incoming administration."<sup>162</sup> They suggest changing those incentives by giving presidents the authority to easily repeal any regulations promulgated during their predecessor's midnight period "simply by issuing a notice in the *Federal Register*."<sup>163</sup> (Judge Plager has even suggested a moratorium during the midnight period that would prohibit new regulations altogether.)<sup>164</sup> This would certainly address the concern over accountability. Last-minute regulations that a president wants to ensure will not be subject to easy repeal would have to be promulgated before the midnight period, while political accountability still exists. However, to the extent regulatory activity continues to spike at the end of an administration—albeit sooner than has previously been the case—the strain placed on the regulatory review process will remain.

The Bush Administration made such an attempt to "resist the historical tendency of administrations to increase regulatory activity in their final months."<sup>165</sup> On May 9, 2008, White House Chief of Staff Joshua B. Bolten

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employed by Congress to shut down military bases. While Congress can recognize a glut of bases (and the need to close some), individual state delegations will oppose closing the military base in their area. To address this collective action problem, Congress enacted the Base Closure and Realignment Act:

Under this act, a federal advisory committee, known as the Base Closure Commission, was required to develop a recommended list of bases to be closed or realigned. This list would then be submitted as a package to Congress for review. The act required Congress to consider the Commission's list as a single package; Congress could not alter or delete specific recommendations, but could only enact a joint resolution disapproving the Commission's entire list within forty-five days. If Congress failed to disapprove the entire list, the Secretary had to implement the recommended closures and realignments within six years.

Benjamin L. Ginsberg et al., *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L.J. 169, 172 (1994) (citation omitted).

162. Morriss et al., *supra* note 26, at 597.

163. *Id.*

164. See Morrow, *supra* note 56, at 18 ("[Judge Plager] suggested a more effective measure would be to have Congress pass a law prohibiting submission of final regulations during the interregnum.").

165. See Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Executive Departments and Agencies (May 9, 2008), *available at* <http://www.ombwatch.org/regs/PDFs/BoltenMemo050908.pdf>.

sent a memo to all executive agency heads instructing them to abstain from regulation in the last months of the administration except in extraordinary circumstances.<sup>166</sup> According to the memo, new regulations were to be proposed no later than June 1 and issued as final no later than November 1.<sup>167</sup> If the memo had had its intended effect, we would not have seen a spike during the midnight period. Unfortunately, the memo was not successful.

In the first seven years of the Bush Administration, the average number of significant regulations reviewed by OIRA was 7 per month.<sup>168</sup> Over the last three months of the term, however, that number doubled to 14.<sup>169</sup> Despite the Bolten memo, OIRA reviewed 42 significant regulations in the period between Election Day and Inauguration Day.<sup>170</sup> This is little different from the 48 significant regulations Clinton's OIRA reviewed during its midnight period.<sup>171</sup>

While one could argue that there might have been a greater spike but for the Bolten memo, the data suggest the memo's June 1 deadline for agencies to wrap up their regulations merely pushed back the beginning of the midnight period. During the period of June 1 to November 1 at the end of their respective terms, Bill Clinton's OIRA reviewed 36 significant regulations, while George H.W. Bush's OIRA reviewed 43.<sup>172</sup> During the June–November 2008 period covered by the Bolten memo, however, that number grew to 58 significant regulations reviewed.<sup>173</sup>

The Bolten memo created an incentive for agencies to issue regulations before the election, while the Administration was still technically politically accountable. That is a laudable achievement. However, it seems as if the toll exerted on OIRA was just as strong during the June–November period as during the midnight period proper.

Another way of changing the incentives of regulators touched on by Morriss and his coauthors is to increase the costs to bureaucracies of regulating during the midnight period. They suggest only allowing emergency regulations to be put forth during the midnight period, or limiting the size or number of regulations allowed during the midnight period.<sup>174</sup> They argue, "If agencies faced a 'budget' of regulations, they

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166. *Id.*

167. *Id.*

168. Monthly figures generated using OIRA's online "review counts" database. See RegInfo.gov, Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Aug. 15, 2008).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Morriss et al., *supra* note 26, at 597.



would have to make choices on which subjects to ‘spend’ their budget.”<sup>175</sup> This approach certainly would help to make regulators more accountable—especially if promulgating significant regulations could be banned altogether during the midnight period. However, a limit on the size or number of regulations during the midnight period does nothing to prevent spikes in regulation. As we have seen, while addressing concerns over accountability, limits on midnight activity might simply result in regulatory spikes before the midnight period.

If what we wish to accomplish is to prevent spikes in regulation that exceed OIRA’s capacity to conduct proper regulatory reviews, then limits must exist at all times. By having permanent caps, we could ensure that at no time—before or after the midnight period—will the pace of regulatory activity outstrip the resources available to OIRA.

One way to cap regulations mentioned by Morriss and his coauthors is to limit the size of regulations.<sup>176</sup> However, simply setting a maximum cost cap for individual regulations will likely have little effect on regulatory spikes. One could still see a dramatic increase in regulations that individually fall short of the cap. Additionally, the approach is rigid. A proposed regulation that exceeds the cap may nevertheless be beneficial yet impossible to enact.

An alternative approach is to cap the total costs of regulation an agency may impose in a single year. This approach is known as a “regulatory budget,” and it allows agencies to pursue its regulatory priorities, regardless of the cost of each individual regulation, so long as the agency’s total activity for the year stays under the cap.<sup>177</sup> Senator Lloyd Bentsen, who twice introduced legislation to create a regulatory budget, explained:

[A] regulatory budget would put an annual cap on the compliance costs each agency could impose on the private sector through its rules and regulations. The process for establishing the annual regulatory budget would resemble the process currently used to set the fiscal budget—we would have a proposed budget from the President and annual budget resolutions from the budget committees. This would make it possible to coordinate the regulatory and fiscal budgets.

We need a regulatory budget in order to reduce the impact of unnecessary, excessive and conflicting Government regulations.<sup>178</sup>

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175. *Id.*

176. Morriss et al., *supra* note 26, at 597.

177. See generally CLYDE WAYNE CREWS, JR., COMPETITIVE ENTERPRISE INSTITUTE, PROMISE AND PERIL: IMPLEMENTING A REGULATORY BUDGET (1996), <http://cei.org/pdf/1549.pdf>; Robert W. Hahn, *Achieving Real Regulatory Reform*, 1997 U. CHI. LEGAL F. 143, 152–53 (advocating use of a regulatory budget).

178. 125 CONG. REC. 3817 (Mar. 5, 1979) (quoting Sen. Lloyd Bentsen), as quoted by Julius W. Allen, CONG. RESEARCH SERV., THE PROPOSAL FOR A FEDERAL REGULATORY BUDGET—AN OVERVIEW 8–9 (1979); CREWS, *supra* note 177, at 3.

A regulatory budget is an idea that could work to keep in check the costs imposed on society by regulation. Additionally, regulatory budget caps might help address the midnight regulations problem by moderating the sort of steep regulatory spikes we see at the end of presidential terms. However, a regulatory budget approach “proves too much” for our purposes. As noted earlier, our concern in this Article is not the reduction of regulation *per se*, but that regulations receive the adequate amount of time and attention during the regulatory review process.

In theory, an agency should be allowed to regulate as much as it needs to so long as there is good economic analysis to justify that need. The OIRA review process is the check that helps ensure sound economic analysis of significant regulations. Therefore, a less restrictive and more politically feasible solution to the midnight regulations problem is to cap the *number* of regulations an agency is allowed to submit to OIRA during a given time period.

Because OIRA has up to ninety days to review significant regulations,<sup>179</sup> a rolling ninety-day window might be an appropriate time period. That is, an agency would be allowed to submit no more than *X* number of significant regulations for review in any ninety-day period. The number *X* would be based on the resources—budget and staff—available to OIRA. The number should be well above the “normal” levels of regulatory activity we see during non-midnight periods; the cap should only be approached during the periods of dramatic spikes seen at the end of presidential terms.

A flexible number cap is also a practical approach. Unlike a regulatory budget, which has previously proven politically unfeasible, there would be no limit to the total cost of an agency’s regulations. The OIRA regulatory review process will simply work as it presently does—to check that benefits justify costs and that alternative approaches to regulation have been considered. An agency, therefore, would be able to regulate as it sees fit with the only limitation being that it cannot exceed OIRA’s capacity to adequately check its work. In practice, this simply means that an agency will not be able to promulgate an abnormally large number of significant regulations in a short period of time. Unlike a regulatory budget, when an agency approaches the cap, it must not decide which regulations to forgo completely but must merely prioritize its proposed regulations.

Capping the number of regulations an agency can submit in a given time period rather than the total cost also makes sense because there are fixed costs for reviewing each rule. When a regulation is submitted to OIRA, a desk officer that is specialized in regulations from a particular set of

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179. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,742 (Oct. 4, 1993).

agencies conducts the review.<sup>180</sup> A spike in the number of reviews a particular desk officer must complete would seem to affect the quality of her work more than the total cost of the regulations. Additionally, if the desk officer charged with reviewing Department of Education regulations is flooded with proposed regulations from that agency, for example, the work cannot simply be shifted to the Homeland Security desk officer. It therefore makes sense to cap the number of regulations that can be submitted to OIRA by agency rather than by total.

Finally, because the number cap would exist only to ensure quality review, not to limit the amount of regulation, it should be based on the resources available to OIRA—especially the desk officers and other regulatory review staff.<sup>181</sup> Therefore, the ceiling on the number of regulations that can be processed by OIRA in a given time period can be raised by increasing the resources available to it.<sup>182</sup> In this way, Congress and the President can always choose to allow for regulatory spikes while preserving quality review.<sup>183</sup>

A cap could be implemented by presidential directive or by statute. The regulatory review process is completely a creature of executive order, the constitutionality of which has largely been recognized.<sup>184</sup> If the President has

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180. See Copeland, *supra* note 74, at 1273–74, 1277 (outlining OIRA’s formal review process and elaborating on the specific function of the desk officer).

181. Curtis W. Copeland explains the staff resources available to OIRA:

When OIRA was created in fiscal year 1981, the office had a “full-time equivalent” (FTE) ceiling of ninety staff members. By 1997, OIRA’s FTE allocation had declined to forty-seven—a nearly fifty percent reduction. Although Executive Order 12,866 (issued in late 1993) permitted OIRA to focus its resources on “significant” rules, this decline in OIRA staffing also occurred during a period in which regulatory agencies’ staffing and budgetary levels were increasing and OIRA was given a number of new statutory responsibilities.

Starting in 2001, OIRA’s staffing authorization began to increase somewhat, and by 2003 it stood at fifty-five FTEs. Between 2001 and 2003, OIRA hired five new staff members in such fields as epidemiology, risk assessment, engineering, and health economics. OIRA representatives indicated that these new hires reflected the increasing importance of science-based regulation in federal agencies, and would enable OIRA to ask penetrating technical questions about agency proposals.

*Id.* at 1293 (citation omitted).

182. In fact, some have argued that OIRA’s resources at present are inadequate and should be increased. See Robert Hahn & Robert E. Litan, *Why Congress Should Increase Funding for OMB Review of Regulations*, BROOKINGS INSTITUTION, Oct. 2003, [http://www.brookings.edu/opinions/2003/10\\_ombregulation\\_litan.aspx](http://www.brookings.edu/opinions/2003/10_ombregulation_litan.aspx) (observing that OIRA’s lean staff of fifty-four professionals reviews over three-hundred regulations with “an annual economic impact that typically exceeds \$100 million”).

183. According to Copeland, “OIRA does not have a specific line item in the budget, so its funding is part of OMB’s appropriation. Similarly, OIRA’s staffing levels are allocated from OMB’s totals.” Copeland, *supra* note 74, at 1307. This means that either Congress could increase OIRA’s budget by creating a line item or the President could increase the budget by prioritizing the distribution of OMB’s budget differently.

184. See *id.* at 1304 (“Although some argued early in OIRA’s history that the office’s regulatory review role was unconstitutional, few observers continue to hold that view.”).

the authority to devise and enforce a system that checks his administration's regulatory decisionmaking, it follows that he should be able to outline procedural rules to ensure that system's quality. Congress has also previously flirted with the idea of codifying the OIRA regulatory review process into law,<sup>185</sup> and if it ever did, it would be able to include our proposed safeguards.

### CONCLUSION

The midnight regulation phenomenon is a well-documented one. The reasons behind it range from the desire of the outgoing administration to extend its influence into the future as well as the opportunity to impose costs on the incoming administration. In fact, the high political costs faced by a new administration to overturn these last-minute rules makes it an effective strategy for the outgoing administration to project its influence beyond its term.

Midnight regulations are problematic. In particular, if we accept that regulatory review is beneficial, then midnight regulations raise serious concerns. All things being equal, and taking into consideration the decreasing number of regulatory review staff available to OIRA, the sudden increase in regulations requiring review during the midnight period leads to a diminished review process and weakened oversight.

Until now, the most common solutions to the midnight regulations problem have suggested steps that an incoming president can take to undo his predecessor's last-minute actions. Our solution tries to mitigate the negative effects of midnight regulations by changing the incentives for the outgoing administration. We suggest placing a cap on the number of economically significant regulations OIRA can be expected to review during a given time period.

Doing so would help prevent OIRA's oversight of new regulations from being diluted. A flexible cap would afford OIRA time and resources to carefully consider new rules while preserving Congress and the President's prerogative to increase the cap by allocating more resources to OIRA. To the extent more resources are not allocated and end-of-term regulatory spikes are eliminated, a cap would also have the effect of addressing some of the other concerns raised by midnight regulations, including a lack of accountability and democratic legitimacy.

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185. See, e.g., *id.* at 1306–07 (explaining that the 106th Congress considered legislation that would have required the president to establish a review process for agency regulatory actions).

# COMMENT

## THANK YOU FOR REGULATING: WHY PHILIP MORRIS'S EMBRACE OF FDA REGULATION HELPS THE COMPANY BUT HARMS THE AGENCY

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### TABLE OF CONTENTS

Introduction .....	198
I. The Industry Capture Model.....	202
A. A Brief History of Industry Capture .....	202
B. Fitting Within the Historical Model .....	204
C. Exceeding the Historical Model .....	207
II. A Helped Philip Morris: Mitigating Regulation's Potential Pitfalls .....	208
A. H.R. 1108's Problematic Tobacco Product Standards.....	209
B. Reduced-Risk Tobacco Products.....	213
C. Reduced-Exposure Tobacco Products .....	216
III. A Harmed Food and Drug Administration .....	217
A. A Structurally Overwhelmed FDA.....	217
B. Undermining FDA's Mission of Protecting the Public .....	221
Recommendations .....	222

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## INTRODUCTION

In February 2000, Philip Morris USA made a dramatic shift in policy: the company that had taken its war against Food and Drug Administration (FDA) supervision of the tobacco industry all the way to the Supreme Court<sup>1</sup> decided to pursue regulation from the agency.<sup>2</sup> The shift in policy has surprised and confused both supporters and opponents of FDA tobacco regulation,<sup>3</sup> with some public-health advocates opining that Philip Morris has changed its mind about regulation for legitimate reasons,<sup>4</sup> while cynics assert the company is merely acting out of self-interest.<sup>5</sup> The debate has been reignited by the Family Smoking Prevention and Tobacco Control Act (H.R. 1108), the most recent failed legislative attempt to give FDA

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1. Philip Morris and other major tobacco companies filed suit in 1997 against the Food and Drug Administration (FDA), claiming that the agency lacked jurisdiction to regulate tobacco products because cigarette manufacturers did not attach therapeutic-benefit claims to their products. The federal district court ruled in FDA's favor, but the Fourth Circuit reversed. The Supreme Court granted certiorari and affirmed the Fourth Circuit decision. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 129–31, 161 (2000) (holding that Congress had not given FDA the authority to regulate tobacco products).

2. Patricia A. McDaniel & R.E. Malone, *Understanding Philip Morris's Pursuit of U.S. Government Regulation of Tobacco*, 14 TOBACCO CONTROL 193, 193 (2005) (asserting that Philip Morris has been "aggressively pursuing" FDA regulation since 2000); see also Legacy Tobacco Documents Library, Privileged & Confidential Annual Meeting 2000—Draft Litigation Points 3 (Feb. 23, 2000) [hereinafter Legacy Tobacco Documents Library], <http://legacy.library.ucsf.edu/tid/pxg77a00/pdf> (tobacco industry insider memo stating that, although the industry had opposed past FDA regulatory efforts because the agency had treated tobacco like a "medical product," it supported "sensible regulation" that, inter alia, respected adult consumers' right to smoke and guided the industry toward the development of "less risky" products). Soon after the internal decision, the company publicly declared its position. See Barry Meier, *Executive Says Philip Morris Is Open to Some Regulation*, N.Y. TIMES, Feb. 29, 2000, at A12 (reporting that Philip Morris is open to "some" government regulation).

3. Samuel Loewenberg, *Smoke Screen: Why Is Philip Morris Supporting FDA Regulation of Cigarettes?*, SLATE, July 25, 2002, <http://www.slate.com/id/2068476/> (A veteran tobacco lobbyist for a competitor of Philip Morris stated, "They are impenetrable to me. Their strategy is impenetrable, their positions are impenetrable . . . I find their positions to be nuts."). One journalist wrote a lengthy magazine article devoted to figuring out why Philip Morris supported regulation, exploring whether a measure could benefit both Philip Morris and the general public. Joe Nocera, *If It's Good for Philip Morris, Can It Also Be Good for Public Health?*, N.Y. TIMES MAG., June 18, 2006, available at <http://www.nytimes.com/2006/06/18/magazine/18tobacco.html>.

4. See, e.g., Loewenberg, *supra* note 3 (reporting that the American Lung Association chief lobbyist, Paul Billings, was initially "cynical," but now believes the company has legitimately altered its policy aims).

5. A longtime tobacco health expert remarked that H.R. 1108 could be renamed the "Marlboro Protection Act." See *The Need for FDA Regulation of Tobacco: Examining S. 625, To Protect the Public Health by Providing the FDA with Certain Authority to Regulate Tobacco Products: Hearing on H.R. 1108 Before the S. Comm. on Health, Educ., Labor, and Pensions*, 110th Cong. 57 (2007) [hereinafter *Senate Hearing*] (statement of Alan Blum, M.D., Director, University of Alabama Center for the Study of Tobacco and Society).

regulatory authority over the tobacco industry.<sup>6</sup> Although H.R. 1108 did not become valid law, identical or near-identical legislation is likely to appear in a future session of Congress.<sup>7</sup> Thus, the bill provides a relevant means of examining big business's pursuit and advocacy of regulation.

Big business's clamoring for federal regulation is by no means a recent phenomenon.<sup>8</sup> In the late nineteenth century, due to intense public pressure, Congress considered regulating railroads.<sup>9</sup> At first the railroad industry resisted regulation,<sup>10</sup> but after realizing that it was inevitable, the industry worked fiercely to capture regulation by maximizing benefits and mitigating harms.<sup>11</sup> The plan worked. Congress passed regulatory legislation that actually helped the railroads, while simultaneously satiating the public's appetite for a reined-in industry.<sup>12</sup>

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6. H.R. 1108, 110th Cong. (as introduced in the House of Representatives, Feb. 15, 2007). *See generally* C. STEPHEN REDHEAD & VANESSA BURROWS, CONG. RESEARCH SERV., FDA REGULATION OF TOBACCO PRODUCTS: A POLICY AND LEGAL ANALYSIS (2007), available at <http://www.nationalaglawcenter.org/assets/crs/RL32619.pdf> (detailing the litany of tobacco-industry regulation bills proposed since 2000).

7. The 110th Congress's H.R. 1108 was simply a reintroduction of bills introduced in previous Congresses; the legislation was first introduced in the 108th Congress. REDHEAD & BURROWS, *supra* note 6, summary. Further, the FDA tobacco bills that have been introduced since the 107th Congress—and gained legislative momentum—have been either identical or very similar in content to each other and H.R. 1108. *Id.* at 19–20. Even though a future bill may well be a carbon copy of H.R. 1108, bills are assigned a different number if reintroduced in a different session of Congress. *See* GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h110-1108> (last visited Feb. 20, 2009) (explaining that congressional members often reintroduce old legislation, which is renumbered for the new congressional session).

8. Nineteenth-century railroad executives, for example, were instrumental in Congress's passage of legislation authorizing federal regulation of the industry. *See generally* GABRIEL KOLKO, RAILROADS AND REGULATION: 1877–1916 (1965). Contemporary examples of the big-business push for regulation include the Alliance of Automobile Manufacturers' advocacy of government-raised fuel efficiency standards and the Mortgage Bankers Association's advocacy of federal control over predatory lending. *See* Eric Lipton & Gardiner Harris, *In Turnaround, Industries Seek U.S. Regulations*, NYTIMES.COM, Sept. 16, 2007, <http://www.nytimes.com/2007/09/16/washington/16regulate.html> (observing the phenomenon of the push for regulation by “some of the nation's biggest industries” and expounding the self-interests dictating this advocacy).

9. *See* RICHARD D. STONE, THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY: A HISTORY OF REGULATORY POLICY 4 (1991) (noting that united Populist farmers led the initial push to regulate railroads).

10. *See* KOLKO, *supra* note 8, at 17–20 (revealing that after many failed attempts at “self-regulation,” industry executives increasingly favored federal regulation).

11. *See id.* at 232–33 (characterizing railroad executives as preempting the public's demand for action by hiding behind railroad-friendly federal regulation and as “relying on the [Interstate Commerce] Commission [(ICC)] as a means of attaining their own ends”).

12. *See id.* at 44 (concluding that while the ICC bill was “conservative,” the public saw it as “radical”).

The railroad case informs the present debate: Philip Morris, a long time opponent of FDA regulation,<sup>13</sup> has acquiesced to federal oversight but only after working closely with Congress for years on the specifics of tobacco-industry regulation.<sup>14</sup> H.R. 1108 appears to be a comprehensive, FDA-empowering bill that revolutionizes the nation's tobacco policy. Upon closer look, however, the legislation contains crucial industry-lobbied compromises<sup>15</sup> that would give Philip Morris the benefits of regulation, while allowing the company to mitigate disadvantages.<sup>16</sup>

H.R. 1108 grants FDA "certain authority" to regulate the tobacco industry.<sup>17</sup> Of particular importance, the bill provides the following: (1) it gives FDA the authority to regulate the composition of cigarettes,<sup>18</sup> but reserves to Congress the right to ban cigarettes or to eliminate nicotine as a cigarette constituent;<sup>19</sup> (2) it provides for "modified" tobacco products,<sup>20</sup>

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13. For the full procedural history of the challenges to FDA regulation of tobacco products, see *Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374 (M.D.N.C. 1997), *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155 (4th Cir. 1998), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

14. For example, a 2000 draft of the bill eliminated federal preemption of potential state tort claim damages, which was one of Philip Morris's "requirements" for supporting FDA regulation. John Scruggs, Philip Morris's chief lobbyist at the time, manifested his stiff opposition to such a provision. In reporting to his Philip Morris colleagues, Scruggs said, "I took the opportunity to 'fall on my sword' and made it very clear [to congressional staff members] that we would do everything in our power to kill this bill and any other bill that contain[ed] such a provision." McDaniel & Malone, *supra* note 2, at 194–95.

15. As two congressional analysts note, "H.R. 1108 . . . represents an attempt to balance the competing interests of Philip Morris and leading anti-tobacco groups." REDHEAD & BURROWS, *supra* note 6, at 20. Philip Morris has intensely lobbied Congress concerning FDA regulation for years, and some of the compromises in H.R. 1108 might have been drafted by the industry. *Id.* at 194. Representatives from Philip Morris in the past have "worked with legislators, meeting with staff to explain [Philip Morris]'s views, helping to write legislation, and lobbying on behalf of [FDA regulatory] legislation [Philip Morris] supported." *Id.* at 195. When Republicans proved difficult to win over because of their ideological opposition to increased government regulation, Philip Morris representatives used polls showing that suburban swing voters—whose support was key to maintaining a Republican majority in Congress—favored FDA regulation of tobacco. Philip Morris even tried to hide its support for two early FDA regulation bills—publicly criticizing the legislation while privately rallying support—in order to "avoid the impression that it was dictating terms to Congress." *Id.* at 194–95.

16. See *Regarding "H.R. 1108, Family Smoking Prevention and Tobacco Control Act": Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 110th Cong. 7 (2007) (submission of Alan Blum, M.D., Director, The University of Alabama Center for the Study of Tobacco and Society), available at [http://energycommerce.house.gov/cmte\\_mtgs/110-he-hrg.100307.HR\\_1108.Tobacco.shtml](http://energycommerce.house.gov/cmte_mtgs/110-he-hrg.100307.HR_1108.Tobacco.shtml) (follow Alan Blum, M.D. hyperlink) (declaring that "[t]his bill is a godsend for Philip Morris").

17. See H.R. 1108, 110th Cong. (as introduced in the House of Representatives, Feb. 15, 2007).

18. See *id.* § 907(a) (establishing general tobacco product standards).

19. *Id.* § 907(d)(3)(A)–(B).

20. H.R. 1108 and the tobacco industry use *modified* rather than *reduced*. Since *modified risk* must mean either reduced or increased risk (and the bill certainly does not



mandating that FDA promulgate standards for reduced-risk cigarettes within two years<sup>21</sup> and allowing FDA to sanction cigarettes as having a “reduced exposure” to one or more cigarette substances;<sup>22</sup> (3) it gives FDA the power to limit tobacco-product advertising to the extent permitted by the First Amendment;<sup>23</sup> (4) it requires FDA to ban artificial flavorings from cigarettes within three months but explicitly exempts menthol;<sup>24</sup> and (5) it prevents FDA from raising the cigarette-buying age above eighteen.<sup>25</sup>

While H.R. 1108’s public-health benefits are unclear,<sup>26</sup> what is more disturbing is that the bill’s provisions might wreck an already-embattled FDA.<sup>27</sup> H.R. 1108 would logistically burden the agency<sup>28</sup> and potentially

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contemplate increased-risk cigarettes), this is a semantical distinction that is potentially confusing for the reader. Accordingly, I will use *reduced* rather than *modified*. H.R. 1108 concedes this point in the bill’s definitions. *Id.* § 911(b)(1).

21. *Id.* § 911(l).

22. *Id.* § 911(g)(2).

23. *Id.* § 906(d)(1).

24. *Id.* § 907(a)(1)(A). A cottage industry of criticism has developed around the bill’s exemption of menthol from an otherwise exhaustive list of banned flavorings. Studies have suggested (but have not proved) that menthol may increase incidents of disease and makes quitting more difficult. Additionally, African-American smokers overwhelmingly choose menthol cigarettes. See Stephanie Saul, *Cigarette Bill Treats Menthol with Leniency*, N.Y. TIMES, May 13, 2008, at A15, available at <http://www.nytimes.com/2008/05/13/business/13menthol.html>.

25. H.R. 1108 § 906(d)(3)(A)(ii). If the buying age were raised to nineteen, then almost no high-school students could purchase cigarettes; a tobacco researcher explains that it is generally understood that raising the permissible buying age is important for “getting cigarettes out of high schools.” *Senate Hearing, supra* note 5, at 158 (prepared statement of Anne Landman, Tobacco Document Research and Consulting).

26. Compare *Senate Hearing, supra* note 5, at 163 (prepared statement of Michael Siegel, M.D., M.P.H., Professor, Social and Behavioral Sciences Department, Boston University School of Public Health) (“The one thing you will never hear the supporters of this legislation do is estimate the number of lives they think this legislation will save. All they can do is talk about ‘countless’ lives being saved. And they are *quite correct*. The lives are countless. You cannot count them because they do not exist.”), and Statement of FDA Commissioner Andrew C. von Eschenbach, M.D., Oct. 3, 2007, <http://www.fda.gov/ola/2007/tobacco100307.html> (warning that H.R. 1108 might cause the public to believe that cigarettes are safe and may encourage smoking), with *Senate Hearing, supra* note 5, at 105 (letter from David A. Kessler, M.D., former FDA Commissioner) (endorsing H.R. 1108 without discussing specific provisions and stating that it “is a strong bill and would significantly advance the public health”).

27. FDA currently faces accusations of industry capture. For example, a 2007 Institute of Medicine report criticized FDA’s focus on the *speed* of drug approval (which favors the pharmaceutical industry), finding that FDA was not concerned enough with drug *safety* (which protects the public). See BOARD ON POPULATION HEALTH AND PUBLIC HEALTH PRACTICE, THE FUTURE OF DRUG SAFETY: PROMOTING AND PROTECTING THE HEALTH OF THE PUBLIC 97–98 (2007), available at [http://books.nap.edu/openbook.php?record\\_id=11750&page=97](http://books.nap.edu/openbook.php?record_id=11750&page=97) (describing the undesirable effects of the Prescription Drug User Fee Act on FDA).

28. Commissioner von Eschenbach writes,

Were H.R. 1108 enacted, FDA would need to create an entirely new “tobacco center” to implement the detailed program created by the bill.

By far, the most important and daunting challenge would be to develop the expertise

render FDA an unwilling participant in Philip Morris's public-relations move.<sup>29</sup>

This Comment argues that H.R. 1108 is the latest example of big business capturing regulation. Part I describes the history of industry capture<sup>30</sup> and explains why Philip Morris's embrace of FDA regulation both fits within the historical model and potentially exceeds precedent by giving the company a relative advantage over its competitors. Part II analyzes key compromises in H.R. 1108 that would enable Philip Morris to mitigate the disadvantages of federal regulation. This Part evaluates the bill's tobacco-product standards, which would allow Philip Morris to frustrate FDA regulatory efforts,<sup>31</sup> and the reduced-risk and reduced-exposure cigarette provisions, which could revolutionize the American tobacco industry.<sup>32</sup> Part III argues that compromise-laden legislation would structurally burden FDA and undermine its mission of protecting the public health. Ultimately, this Comment advises Congress to refrain from authorizing tobacco-industry regulation—at least until it can pass legislation without heavy industry influence—and adopt more direct, effective means of curtailing tobacco consumption.

## I. THE INDUSTRY CAPTURE MODEL

### A. *A Brief History of Industry Capture*

The popular assumption is that industry always opposes government regulation.<sup>33</sup> Such a conceptualization imagines government regulatory

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necessary to carry out the functions called for by this bill. FDA does not have expertise regarding customarily marketed tobacco products and, therefore, would have to establish an entirely new program and hire new experts. Creating the appropriate organizational structure and hiring experts in the field of tobacco control and related sciences and other experts needed to staff the program at every level is considerably more challenging than simply filling identified vacancies in an existing program.

Von Eschenbach, *supra* note 26. See generally Peter Barton Hutt, *The State of Science at the Food and Drug Administration*, 60 ADMIN. L. REV. 431 (2008) (detailing how FDA is currently scientifically and structurally overwhelmed).

29. See McDaniel & Malone, *supra* note 2, at 197 (positing that Philip Morris views FDA regulation as a means to improve the company's "unfavorable" public image).

30. Industry capture describes both authorizing legislation that favors big business (addressed in this Comment) and the favorable implementation of regulation. For a technical, theoretical discussion of both phenomena, see BARRY M. MITNICK, *THE POLITICAL ECONOMY OF REGULATION: CREATING, DESIGNING, AND REMOVING REGULATORY FORMS* 206–42 (1980).

31. See generally H.R. 1108, 110th Cong. § 907 (as introduced in the House of Representatives, Feb. 15, 2007) (stating the tobacco-product standards); *id.* § 912 (establishing the judicial review provision).

32. See generally *id.* § 911 (regulating "modified risk tobacco products").

33. See KOLKO, *supra* note 8, at 6 (arguing, in the context of the railroad industry, that

bodies as manifestations of public outrage, constraining the avaricious business practices of regulation-leery corporations.<sup>34</sup> History, however, disproves this assumption.<sup>35</sup>

The modern regulatory state was ushered in by the creation of the Interstate Commerce Commission (ICC) in 1887.<sup>36</sup> Nineteenth-century farmers and shippers were angry at inconsistent and seemingly arbitrary railroad freight charges;<sup>37</sup> Congress responded by authorizing ICC to regulate the industry and homogenize inequitable freight prices.<sup>38</sup> For decades misguided historians depicted the chartering of ICC as a public victory, accomplished despite industry opposition.<sup>39</sup>

In reality, railroad barons had supported regulation for years, always agreeing to the general principle of regulation, despite disagreeing on legislative details.<sup>40</sup> The industry realized that regulation was inevitable,<sup>41</sup> as political pressure was too acute for Congress to remain inactive.<sup>42</sup> Further, railroad leaders slowly understood that federal regulation might have benefits.<sup>43</sup> They believed that ICC regulation would signal an intra-

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scholars have reflexively concluded that industry opposes regulation).

34. See *id.* at 2 (explaining that many historians imagined a federal government “redirect[ing] the balance of economic power on behalf of the public”).

35. See GEORGE J. STIGLER, *The Theory of Economic Regulation*, in *THE CITIZEN AND THE STATE* 114 (1975) (claiming that as a rule, *industry* acquires the regulation which then chiefly benefits the industry).

36. See STONE, *supra* note 9, at 6 (describing the creation of ICC to oversee the Act to Regulate Commerce).

37. *Id.* at 3–4.

38. *Id.* at 6.

39. See KOLKO, *supra* note 8, at 6 (describing this historical depiction and noting the role the railroad industry played in the movement for federal regulation). Kolko’s thesis that railroads were instrumental in achieving regulation and that the ICC in turn benefitted the industry, while controversial and provocative when published, has gained critical acceptance. See, e.g., George W. Hilton, *The Consistency of the Interstate Commerce Act*, 9 J.L. & ECON. 87, 105 (1966) (praising Kolko’s work); see also George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 17 (1971) (“So many economists . . . have denounced the ICC for its pro-railroad policies that this has become a cliché of the literature.”); cf. STONE, *supra* note 9, at 5–6 (“There is some indication that Kolko may be correct in that some, if not all, of the railroads thought that regulation would be beneficial to them in controlling competition by eliminating rate differences among railroads.”).

40. KOLKO, *supra* note 8, at 3.

41. See *id.* at 232 (asserting that the industry’s push was a means of preempting less-friendly regulation and describing federal regulation as a “safe shield”); see also STONE, *supra* note 9, at 5 (“[F]ederal regulation of the railroads was in the offing, as many groups in the country were pushing for it.”).

42. See Hilton, *supra* note 39, at 87 (explaining that ICC’s formation was in response to “widespread dissatisfaction” with the railroad industry).

43. Railroads tried many times to self-organize and establish rules to protect their collective interests, including attempts to collude on prices and to pool incomes in order to defuse price wars. *Id.* at 87–90. Since each attempt failed, executives increasingly believed that only the federal government could structure the industry in a manner that was not self-defeating. See KOLKO, *supra* note 8, at 10–11, 14, 18–19 (describing failed pooling efforts

industry ceasefire in the profit-crippling rate wars, alleviate public distrust of the railroad brand, and—most importantly—that the politically-connected industry would be able to stifle ICC measures that harmed railroad interests.<sup>44</sup> Indeed, one railroad company's president only partially exaggerated when he asserted that the enabling legislation itself was irrelevant: what truly counted was how it worked in practice.<sup>45</sup>

### B. *Fitting Within the Historical Model*

Public opinion of tobacco companies fell sharply in the 1990s.<sup>46</sup> In 1994, tobacco executives swore before Congress that cigarettes were not addictive and would not admit that cigarettes caused lung cancer.<sup>47</sup> That same year Mississippi filed a \$940 million lawsuit against the major cigarette companies.<sup>48</sup> In 1996, FDA tried to regulate cigarettes as drug-delivery devices, claiming that tobacco companies manipulated the way cigarettes delivered nicotine, resulting in higher nicotine yields which caused smokers to become more addicted.<sup>49</sup> In 1998, the four major

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which led the industry to turn to the government for “salvation”).

44. See KOLKO, *supra* note 8, at 15, 37 (describing the industry's hope of limiting harmful regulation, while leading the public to think much had been accomplished); cf. THOM HARTMANN, *UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* 161–62 (2002) (quoting disenchanted Reagan-era regulators as saying that the supreme industry feat would be to attain new regulation that is perceived as meaningful, but in fact applied by a captive agency).

45. KOLKO, *supra* note 8, at 37 (quoting railroad president Charles Adams, Jr., “In the hands of the right men, any bill would produce the desired results”).

46. Compare Sarah Smith, *America's Most Admired Corporations*, FORTUNE, Jan. 29, 1990, at 58 (ranking Philip Morris as the second most admired corporation), with Edward A. Robinson, *America's Most Admired Companies*, FORTUNE, Mar. 3, 1997, at 68 (dropping Philip Morris to 147th on that year's list).

47. See, e.g., *Oversight Hearing on Tobacco Products, Before the Subcomm. on Health and the Env't of the H. Comm. on Energy and Commerce*, 103d Cong. 66, 68 (1994), available at <http://tobaccodocuments.org/pm/2031195199-5455.html> (William Campbell, then-president of Philip Morris USA, stated in response to the question of whether cigarette smoking caused lung cancer, “We don't know what causes cancer right now.” Jim Johnston, then-Chairman and CEO of R.J. Reynolds, stated in response to the same question, “It may.”). In the same hearing, six major tobacco companies' executives denied that nicotine was addictive. *Id.* at 78–79. A Philip Morris spokesman concedes that such miscalculations were largely responsible for the public's increasingly negative appraisal of Big Tobacco. For a candid discussion of industry mistakes, see Steven C. Parrish, *Bridging the Divide: A Shared Interest in a Coherent National Tobacco Policy*, 3 YALE J. HEALTH POL'Y L. & ETHICS 109, 109–12 (2002).

48. The suit settled in 1997 for more than \$3 billion. *Tobacco Industry Settles Mississippi Lawsuit: Florida Also Makes Settlement Offer*, CNN.COM, July 3, 1997, <http://www.cnn.com/US/9707/03/tobacco/index.html>. For a behind-the-scenes look at the lawsuit, see Peter J. Boyer, *The Bribe: How the Mississippi Lawyer Who Brought Down Big Tobacco Overstepped*, NEW YORKER, May 19, 2008, at 44, available at [http://www.newyorker.com/reporting/2008/05/19/080519fa\\_fact\\_boyer](http://www.newyorker.com/reporting/2008/05/19/080519fa_fact_boyer).

49. See David A. Kessler et al., *The Food and Drug Administration's Regulation of Tobacco Products*, 335 NEW ENG. J. MED. 988, 988–89 (1996) (justifying FDA's regulatory

tobacco companies executed the Master Settlement Agreement (MSA) with forty-six states and six U.S. territories for \$206 billion.<sup>50</sup> The otherwise disastrous decade for the industry culminated with a victory, as the major cigarette manufacturers jointly contested FDA's assumption of regulatory authority.<sup>51</sup> After years of litigation, the Supreme Court ruled that the agency had exceeded its statutory limits, as Congress had previously considered and rejected giving FDA the authority to regulate tobacco.<sup>52</sup>

In response to mounting public disapproval<sup>53</sup> and falling stock prices,<sup>54</sup> Philip Morris sought to recover from the decade of negative publicity and reclaim its place as a respected American company.<sup>55</sup> Philip Morris USA rebranded itself under the corporate conglomerate name "Altria Group."<sup>56</sup> The company also began airing antismoking television commercials,<sup>57</sup> while admitting that cigarettes were addictive and caused cancer.<sup>58</sup> And even before the Supreme Court ruled that FDA had overstepped its statutory bounds, Philip Morris decided to support "sensible" regulation from the agency.<sup>59</sup> In fact, just as federal oversight of the railroad industry

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assumption under this theory); see also PETER BARTON HUTT, RICHARD A. MERRILL & LEWIS A. GROSSMAN, *FOOD AND DRUG LAW* 80 (3d ed. 2007) (affirming that documents released in 1990s litigation suggested the industry's intentional manipulation of nicotine to "satisfy" customers' addictions).

50. See generally Alison Frankel, *After the Smoke Cleared: The Inside Story of Big Tobacco's \$206 Billion Settlement*, AM. LAW., Jan.-Feb. 1999, at 48 (describing the agreement between states that had not previously reached settlement agreements with the tobacco companies). The Master Settlement Agreement (MSA), initially assumed to be a windfall for public health, has padded state coffers more than it has curbed smoking rates. See *Senate Hearing*, *supra* note 5, at 80 (testimony of Alan Blum, M.D.) (claiming that state officials "squandered" MSA money); see also McDaniel & Malone, *supra* note 2, at 198 (arguing that the MSA created "perverse incentives" for states, since state income from the MSA depends on continued tobacco sales).

51. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120, 161 (2000) (rejecting FDA authority to regulate tobacco products in light of the Federal Food, Drug, and Cosmetic Act (FDCA) and other tobacco-specific legislation).

52. *Id.* at 161.

53. See *supra* note 46 and accompanying text (tracking Phillip Morris's declining reputation).

54. See John A. Byrne, *Philip Morris: Inside America's Most Reviled Company*, BUSINESSWEEK.COM, Nov. 29, 1999, [http://www.businessweek.com/1999/99\\_48/b3657003.htm](http://www.businessweek.com/1999/99_48/b3657003.htm) (noting that the company's stock value fell \$83.2 billion in 1998-1999 alone).

55. See McDaniel & Malone, *supra* note 2, at 194 (noting that seeking regulation was part of a larger plan to be viewed as a "normal" and "legitimate" corporation to assure "continued success").

56. See *id.* (describing the name change as an "[i]mage enhancement").

57. Although required by the MSA, antismoking efforts have boosted Philip Morris's corporate reputation. See *Senate Hearing*, *supra* note 5, at 87-88 (testimony of Alan Blum, M.D.) (relating that Philip Morris has attracted college talent because students believe the company helps people quit smoking).

58. See Parrish, *supra* note 47, at 114 (indicating that Philip Morris adopted a policy to clarify these effects of cigarette smoking).

59. The first evidence of the company's support for regulation appeared in February

was not possible without industry support,<sup>60</sup> legislation authorizing FDA to regulate tobacco would be implausible without Philip Morris's backing.<sup>61</sup>

Moreover, like their railroad predecessors who only favored regulation after an incensed public demanded it,<sup>62</sup> Philip Morris executives only realized the potential benefits of FDA oversight after opposing it for four years.<sup>63</sup> After the 1990s, the disillusioned public no longer trusted tobacco companies; Philip Morris believed that FDA regulation would mollify critics and usher in a new era of respectability and legitimization in which the public understood the health risks of smoking but still respected the right of adults to smoke and the right of companies to sell and market cigarettes.<sup>64</sup>

FDA regulation, in addition to boosting Philip Morris's corporate image and deflated stock price,<sup>65</sup> would supplant patchwork state and local regulations,<sup>66</sup> defuse costly lawsuits,<sup>67</sup> divert resources away from more-effective tobacco-control efforts,<sup>68</sup> prevent new companies from entering the cigarette market,<sup>69</sup> and potentially stave off future, more damaging regulatory measures.<sup>70</sup> Indeed, just as nineteenth-century railroad men

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2000, Legacy Tobacco Documents Library, *supra* note 2, while *FDA v. Brown & Williamson Tobacco Corp.* was decided on March 21, 2000. 529 U.S. 120, 120 (2000).

60. KOLKO, *supra* note 8, at 238.

61. See Saul, *supra* note 24 (suggesting that Philip Morris's lobbying efforts as an industry leader could derail FDA regulatory legislation).

62. See *supra* notes 42–43 and accompanying text.

63. Compare *supra* note 1, and *supra* note 13 and accompanying text (describing Philip Morris's prior lawsuits arguing against regulation), with Meier, *supra* note 2, at A12 (revealing Philip Morris's February 2000 shift in policy).

64. For an extended discussion on Philip Morris's vision of an improved industry atmosphere under FDA regulation, see generally McDaniel & Malone, *supra* note 2.

65. Based on financial performance alone, Altria Group stock is undervalued, Nocera, *supra* note 3, but amateur investors balk at buying stock in what they term an "evil" industry. E.A. Smith & R.E. Malone, *Thinking the "Unthinkable": Why Philip Morris Considered Quitting*, 12 TOBACCO CONTROL 208, 209 (2003), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=3232&context=postprints>.

66. See, e.g., H.R. 1108, 110th Cong. § 917(a)(2) (as introduced in the House of Representatives, Feb. 15, 2007) (preempting certain state and local requirements with limited exceptions).

67. Philip Morris has advanced the prospect of "avoiding litigation" as a business benefit of FDA regulation. McDaniel & Malone, *supra* note 2, at 194. See also *Senate Hearing*, *supra* note 5, at 59 (prepared statement of Alan Blum, M.D.) (claiming the bill removes the risk of fraud litigation).

68. See *Senate Hearing*, *supra* note 5, at 58 (prepared statement of Alan Blum, M.D.) (arguing that federal funds would be better invested in a mass antismoking campaign than in FDA regulation).

69. When a company seeks regulation, one of the benefits it invariably pursues is restricting market entry. STIGLER, *supra* note 35, at 118. Tighter operational standards, easily handled by Philip Morris, would make it difficult for new competitors to break into the market.

70. See Meier, *supra* note 2, at A12 (quoting an anti-tobacco advocate as commenting that Philip Morris might be trying to foreclose more severe government action).

realized the danger of government regulation undertaken without industry input, Philip Morris understands that ex parte enabling legislation could have devastating consequences<sup>71</sup> for the proud company whose logo and cigarette packages once proclaimed “Veni, Vidi, Vici.”<sup>72</sup>

### C. Exceeding the Historical Model

While the nineteenth-century railroad industry collectively supported ICC’s formation,<sup>73</sup> the modern-day tobacco industry is split over H.R. 1108.<sup>74</sup> R.J. Reynolds and Lorillard explain their opposition to the bill by claiming it would result in a competitive disadvantage.<sup>75</sup> Analysts speculate that FDA regulation would mean restricted advertising, which would solidify Philip Morris’s dominant cigarette market share.<sup>76</sup> If H.R. 1108 restricts advertising, cigarette sales for brands with less name recognition than Philip Morris’s Marlboro line might falter.<sup>77</sup>

Even if the companies opposing the bill are correct in thinking that decreased advertising would increase Philip Morris’s share of the cigarette market, they do not account for the fact that less advertising would probably shrink the cigarette market as a whole.<sup>78</sup> Thus, while giving

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71. See McDaniel & Malone, *supra* note 2, at 194 (explaining that Philip Morris regarded regulation as “inevitable” and thought it “better to act now [under a Republican-controlled Congress] than to risk more onerous regulations” under any future Democrat-controlled Congress).

72. See Stuart Elliott, *Uncle Sam Is No Match for the Marlboro Man*, N.Y. TIMES, Aug. 27, 1995, § 3, at 11, available at <http://query.nytimes.com/gst/fullpage.html?res=990CEFDE163AF934A1575BC0A963958260> (describing Marlboro’s former branding, developed in the 1950s, which incorporated the Latin phrase for “I came, I saw, I conquered,” attributed to Julius Caesar).

73. See KOLKO, *supra* note 8, at 41 (quoting 1880s railroad expert William P. Shinn months before the ICC’s passage as saying, “The leading railroad companies . . . are now almost without an exception in [favor of the ICC]”).

74. See Stephanie Saul, *Reynolds Ads Say Tobacco Oversight Is Burden F.D.A. Doesn’t Need*, N.Y. TIMES, Apr. 2, 2008, at C7, available at <http://www.nytimes.com/2008/04/02/business/media/02reynolds.html> (reporting that Reynolds opposes the bill); see also Statement from Lorillard Tobacco on FDA-Tobacco Regulation Legislation (Apr. 3, 2008) [hereinafter Lorillard Statement], <http://www.reuters.com/article/pressRelease/idUS209594+03-Apr-2008+PRN20080403> (explaining that while Lorillard supports “reasonable federal regulation of the tobacco industry,” it opposes H.R. 1108 because the bill has “fundamental problems”).

75. See Saul, *supra* note 74 (indicating that tighter advertising restrictions could make it harder for Reynolds to market its Camel cigarettes); see also Lorillard Statement, *supra* note 74 (asserting that H.R. 1108 would provide a “competitive advantage to [Lorillard’s] larger rivals”).

76. See Saul, *supra* note 74 (indicating “the bill could benefit Philip Morris over its smaller competitors” by “imposing tighter restrictions on advertising”).

77. *Id.*

78. See Ugur Yucelt & Erdener Kaynak, *A Study of Measuring Influence of Advertising and Forecasting Cigarette Sales*, 5 MANAGERIAL & DECISION ECON. 213, 217 (1984) (finding evidence that “increased spending on advertising . . . increases cigarette-

Philip Morris a *relative* advantage, advertising restrictions could reduce the company's overall sales.

Further, current MSA advertising restrictions have already left the tobacco industry with scant marketing outlets.<sup>79</sup> For example, Massachusetts's attempt to surpass the MSA's suffocating advertising terms by banning point-of-sale advertising was ruled unconstitutional by the Supreme Court.<sup>80</sup> Indeed, H.R. 1108 explicitly acknowledges that the First Amendment would limit FDA marketing restrictions,<sup>81</sup> which raises the question of how much the agency's restrictions could change the status quo without violating the Constitution. That Philip Morris anticipates regulatory scenarios years in advance,<sup>82</sup> and therefore might be more confident than its competitors in thriving under FDA oversight, may partially explain the industry divide. Alternatively, Philip Morris might believe that relative gains in market share would offset any decline in the overall cigarette market—or the other companies' fears might be unfounded. Ultimately, the industry discord remains a mystery.

## II. A HELPED PHILIP MORRIS: MITIGATING REGULATION'S POTENTIAL PITFALLS

There is no smoking gun in H.R. 1108. Just as the railroad industry needed to align with shippers to make legislation politically palatable,<sup>83</sup> Philip Morris needs support from anti-tobacco groups to get an FDA-enabling bill passed.<sup>84</sup> Thus, legislation that gives Philip Morris a windfall is not politically feasible, as the company realized after initially promoting sham bills that outraged public-health advocates,<sup>85</sup> sharply reducing chances of legislative success. Indeed, while Philip Morris executives now

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consumption”).

79. See generally MASTER SETTLEMENT AGREEMENT, available at [http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724\\_1032468605\\_cigma.pdf](http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigma.pdf).

80. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 589–90 (2001) (holding that state bans on point-of-sale advertising violated the First Amendment).

81. H.R. 1108, 110th Cong. § 906(d) (as introduced in the House of Representatives, Feb. 15, 2007).

82. See *Senate Hearing*, *supra* note 5, at 157 (prepared statement of Anne Landman) (noting that Philip Morris had MSA drafts prepared in 1991 “in anticipation” of cigarette advertising legislation).

83. KOLKO, *supra* note 8, at 6.

84. Even with the anti-tobacco lobby's support, several recent FDA tobacco bills have failed in Congress. See REDHEAD & BURROWS, *supra* note 6, at 13, 19–20 (describing failed bills and attributing some of the failures to lack of support from both the industry and the public-health community).

85. See Statement by Matthew Myers, former President, Campaign for Tobacco-Free Kids, *Rep. Davis' Sham FDA Bill Protects the Tobacco Industry, Not the Public Health*, June 14, 2001, <http://www.tobaccofreekids.org/Script/DisplayPressRelease.php3?Display=368> (naming Philip Morris as “the main proponent of sham FDA legislation”).



call for “tough but reasonable” regulation,<sup>86</sup> the original company byline advocated “some” regulation.<sup>87</sup>

The current bill is not sham legislation, and much of the public-health community backs H.R. 1108,<sup>88</sup> despite many dissenters.<sup>89</sup> Instead of blatantly benefitting Philip Morris, the bill has subtle compromises that allow the company to mitigate disadvantages.<sup>90</sup> In fact, Philip Morris must foresee a net gain: supporting a bill that achieves the antismoking ends advanced by some public-health advocates<sup>91</sup> would make the company a de facto proponent of reduced profits, and even company spokesman Steve Parrish admits that *making* profits is a driving force behind the company’s support of the bill.<sup>92</sup>

#### A. H.R. 1108’s Problematic Tobacco Product Standards

When FDA assumed regulatory control over the tobacco industry in 1996, it did so without explicit congressional authorization.<sup>93</sup> Thus, the agency was not bound by tobacco-specific legislative regulatory parameters, and it would have enjoyed a great deal of discretion, guided by its other regulatory endeavors.<sup>94</sup> Regulating tobacco, however, would be a fundamentally different task than regulating other products, as tobacco is already known to cause serious illness and disease.<sup>95</sup> If FDA regulated

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86. Philip Morris USA Government Affairs, FDA & Tobacco (2008) [hereinafter 2008 Philip Morris Policy Statement], [http://www.philipmorrisusa.com/en/cms/Responsibility/Government\\_Relations/Legislative\\_Issues/pdfs/fda\\_and\\_tobacco.pdf.aspx](http://www.philipmorrisusa.com/en/cms/Responsibility/Government_Relations/Legislative_Issues/pdfs/fda_and_tobacco.pdf.aspx).

87. See Meier, *supra* note 2 (stating Philip Morris’s February 2000 policy stance).

88. See, e.g., *Senate Hearing, supra* note 5, at 33 (statement of Jack E. Henningfield, Ph.D., Vice President, Research and Health Policy, Pinney and Associates, Bethesda, MD and Professor of Behavioral Biology at Johns Hopkins University School of Medicine, Baltimore, MD) (asserting that regulation is necessary because FDA authority could lead to less harmful, less addictive tobacco products and could reduce deception); see *id.* at 72–73 (testimony of Matthew L. Myers, former President, Campaign for Tobacco-Free Kids) (defending H.R. 1108’s merits).

89. See *Senate Hearing, supra* note 5, at 127, 157–58, 162, for examples of public-health figures who have issued statements opposing H.R. 1108.

90. E.g., H.R. 1108, 110th Cong. §§ 907(a), 911(f) (as introduced in the House of Representatives, Feb. 15, 2007); see *infra* Part II.A (discussing H.R. 1108’s compromises).

91. See, e.g., *Senate Hearing, supra* note 5, at 11 (statement of Matthew L. Myers) (claiming the bill might save millions of lives).

92. Parrish, *supra* note 47, at 110.

93. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 129–31, 161 (2000) (holding that Congress had not given FDA the authority to regulate tobacco products).

94. See *REDHEAD & BURROWS, supra* note 6, at 5–6 (noting that FDA planned to use its drug-device regulatory formula to promulgate tobacco rules).

95. See von Eschenbach, *supra* note 26 (describing the dire health effects, including a litany of diseases, caused by tobacco use).

tobacco like other products (failing to account for its inherent dangers),<sup>96</sup> regulation would be simple: since cigarettes offer no therapeutic benefits and are a critical factor in more than 400,000 deaths a year in the United States,<sup>97</sup> FDA would have to remove them from the market.<sup>98</sup>

To work around this problem, H.R. 1108 gives FDA unique, tobacco-specific guidelines that require the agency to consider a number of factors when promulgating tobacco product standards.<sup>99</sup> Any tobacco product standard created by FDA would be susceptible to appeals,<sup>100</sup> especially in the modern administrative state, which primarily employs informal rulemaking. This widely used rulemaking form is subject to “searching” judicial review that has made rule promulgation increasingly burdensome.<sup>101</sup> Court challenges should especially concern FDA since, as its reputation has declined, judicial deference to agency rulemaking has followed suit.<sup>102</sup> For FDA to promulgate regulations that disfavor Philip Morris is for FDA to invite litigation with a company that has demonstrated both its willingness to sue and its proficiency in doing so.<sup>103</sup>

96. When the Kessler-led FDA undertook regulation, it altered its usual methods, claiming it could regulate cigarettes as “devices” without violating FDA’s statutory dictate to ban unsafe drugs. HUTT, MERRILL & GROSSMAN, *supra* note 49, at 80.

97. *Senate Hearing*, *supra* note 5, at 1 (opening statement of Sen. Ted Kennedy, Chairman, S. Comm. on Health, Education, Labor, and Pensions). *See also* Centers for Disease Control and Prevention, Smoking and Tobacco Use, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/fast\\_facts/index.htm](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm) (“In the United States, cigarette smoking is responsible for about . . . 438,000 deaths per year.”).

98. *See Brown & Williamson*, 529 U.S. at 121 (citing an FDA declaration—before the agency’s assumption of regulatory control in 1996—that if the agency regulated cigarettes, it would have to remove them from the market because “it would be impossible to prove they were safe for their intended use”); *cf.* Cheryl Heaton, *Keynote Speech on the Application of Harm Reduction to Other Public Health Problems: What Is Similar or Different About the Issue of Tobacco?*, 11 J. HEALTH CARE L. & POL’Y 93, 97 (2008) (asserting that if tobacco were a new product, it would never make it to the market).

99. H.R. 1108, 110th Cong. § 907(a) (as introduced in the House of Representatives, Feb. 15, 2007).

100. *See id.* § 912(a) (“[A]ny person adversely affected by such regulation or denial may file a petition for judicial review of such regulation or denial . . .”).

101. *See* Lars Noah, *The Little Agency That Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901, 904 (2008) (remarking that in order to circumvent the hassles of informal rulemaking, where judicial challenges typically arise *before* rules go into effect, FDA has increasingly resorted to “nonbinding guidelines”).

102. *See* James T. O’Reilly, *Losing Deference in the FDA’s Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939, 940, 973–76 (2008) (arguing that executive branch mismanagement led to the decrease in deference to FDA); *cf.* David C. Vladeck, *The FDA and Deference Lost: A Self-Inflicted Wound or the Product of a Wounded Agency? A Response to Professor O’Reilly*, 93 CORNELL L. REV. 981, 983 (2008) (agreeing that FDA has lost deference, but blaming the loss on FDA’s lack of scientific expertise, underfunding, and overmandating); HUTT, MERRILL & GROSSMAN, *supra* note 49, at 1556 (remarking that while historically FDA successfully fended off litigation, its success has recently declined).

103. *See, e.g., supra* notes 1, 13 and accompanying text (describing Philip Morris’s

H.R. 1108 authorizes FDA to “adopt tobacco product standards” if such standards are “appropriate for the protection of the public health.”<sup>104</sup> Rather than providing only this ambiguous directive—which would leave a gap in the statutory scheme ensuring judicial deference to FDA’s judgment<sup>105</sup>—the bill propagates specific considerations to be undertaken by the agency.<sup>106</sup> FDA must determine tobacco product standards

with respect to the risks and benefits to the population as a whole, including users and nonusers of the tobacco product [while considering] the increased or decreased likelihood that existing users of tobacco products will stop using such products and the increased or decreased likelihood that those who do not use tobacco products will start using such products.<sup>107</sup>

Additionally, FDA must consider “all [other] information submitted in connection with a proposed standard, including information concerning . . . the creation of a significant demand for contraband or other tobacco products.”<sup>108</sup> These directives seem unremarkable until their pragmatic ramifications are considered. In giving FDA specific analytical dictates, H.R. 1108 would allow Philip Morris to vigorously challenge rules that harm the company, as the bill’s specific “considerations” would give

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litigation history); Arnold & Porter LLP, *Light Cigarette Class Action Litigation*, <http://www.arnoldporter.com/experience.cfm?action=view&id=845&owner=practice> (last visited July 20, 2008) (listing the firm’s successful litigation efforts on behalf of Philip Morris). In addition to Philip Morris’s propensity to sue, FDA has generally faced more litigation in recent years. O’Reilly, *supra* note 102, at 942.

104. H.R. 1108 § 907(a)(3).

105. Such a standard would undoubtedly warrant *Chevron* deference. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that if an enabling statute is ambiguous, courts should defer to the agency’s statutory construction so long as it is reasonable). One administrative law scholar elaborates: “The key to *Chevron* is that, when a statute contains either an ambiguity that the Court cannot decipher using its arsenal of interpretive devices, or a ‘gap’ in the statutory scheme, Congress is signaling its intent that the agency, rather than the Court, should supply the missing meaning.” John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 530 (2008) (emphasis added).

106. H.R. 1108 § 907(a)(3). The Federal Food, Drug, and Cosmetic Act (FDCA) requires that valid performance standards for drugs and devices contain “provisions to provide reasonable assurance of [a product’s] safe and effective performance” and “where necessary to provide reasonable assurance of [a product’s] safe and effective performance, include . . . provisions respecting the construction, components, ingredients, and properties [of the product.]” 21 U.S.C. § 360d(a)(2) (2006). In other words, current food and drug law demands that Congress provide specificities for evaluating a product. Although it is arguable whether H.R. 1108’s tobacco-product-standard directives follow logically from the FDCA’s performance-standard guidelines, such a contention ignores the uniqueness of FDA’s regulation of tobacco, given cigarettes’ inherent dangerousness. See von Eschenbach, *supra* note 26 (“Tobacco products . . . are intrinsically injurious to health.”). Since there is no way to reasonably assure that a cigarette is “safe,” the FDCA’s performance-standard provisions are outmoded; different requirements should be used for tobacco, and the traditional performance-standard provisions should be abandoned.

107. H.R. 1108 § 907(a)(3).

108. *Id.* § 907(b)(1)(E).

courts a legitimate avenue to scrutinize FDA's decisions in a judicial atmosphere where the agency receives "declining deference."<sup>109</sup> While such judicial review of agency rulemaking may be desirable to ensure a fair regulatory process,<sup>110</sup> it is problematic to issue specific analytical guidelines that might discourage deference and produce even more contentious FDA rule promulgations.<sup>111</sup> Although many courts may defer to the agency, in the current FDA regulatory climate, deference is no longer guaranteed<sup>112</sup>—a reality that would likely incentivize litigation.

For example, H.R. 1108 authorizes FDA to regulate cigarette nicotine yields.<sup>113</sup> If FDA determined that it would be beneficial for the overall public health to reduce nicotine levels by fifty percent—a drastic cut that Philip Morris would find unacceptable<sup>114</sup>—the company could challenge the ruling in court.<sup>115</sup> Since there are health professionals who think that reducing nicotine levels would harm current smokers,<sup>116</sup> Philip Morris could assert that FDA had incorrectly decided to mandate nicotine reductions. In this scenario, H.R. 1108's directive to determine what promotes the public health by considering current users of tobacco products

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109. See Vladeck, *supra* note 102, at 983 (claiming that courts' "declining deference" to FDA decisions is not just the result of "ill-considered, politically motivated decisions" but also relates to eroding resources and increasing responsibilities).

110. See Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51, 53 (1984) (arguing that judicial review of agency action is a healthy practice which promotes the separation of powers). *But see* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1244 (1999) (arguing that there is no valid justification for judicial review of agency rulemaking).

111. Some analysts argue that tobacco-product standards promulgated under H.R. 1108 would automatically cue *Chevron* deference. *E.g.*, Christopher N. Banthin & Richard A. Daynard, *Room for Two in Tobacco Control: Limits on the Preemptive Scope of the Proposed Legislation Granting FDA Oversight of Tobacco*, 11 J. HEALTH CARE L. & POL'Y 57, 62 (2008). Such an assertion, however, seems predicated on the old FDA model, when the agency was the gold standard for regulatory bodies and courts rarely questioned its scientific bases. The modern FDA does not retain such a privilege, and the agency has lost many cases in the past decade that it would have won under a traditional deference review.

112. See O'Reilly, *supra* note 102, at 973–76 (cataloging examples of judicial decisions that do not defer to FDA).

113. H.R. 1108 § 907(a)(4)(A)(i).

114. One of the company's biggest fears is that cigarettes will be regulated to the point of unpalatability. See Parrish, *supra* note 47, at 115 (noting that Philip Morris supports the removal of harmful components so long as cigarettes remain fit for adult consumption).

115. See H.R. 1108 § 912(a)(1) (stating that "any person adversely affected by such regulation or denial" may file for judicial review).

116. See, *e.g.*, *Senate Hearing*, *supra* note 5, at 59 (prepared statement of Alan Blum, M.D.) (explaining that reducing nicotine levels would cause smokers to ingest more cigarettes to calm cravings). Experts disagree whether reducing nicotine levels would be desirable for the public health. This example merely demonstrates that if FDA *did find* the reduction to be desirable, its findings could be challenged more aggressively than if Congress gave the agency tobacco-product-standard guidelines that are more general.

would give the claim merit.<sup>117</sup> The requirement that FDA consider increases in the demand for contraband tobacco products<sup>118</sup> would further legitimize Philip Morris's claim, since the company could argue that any reduction in nicotine levels would dissuade consumers from buying regulated cigarettes and increase black-market tobacco demand.<sup>119</sup>

Indeed, an FDA regulation that harmed Philip Morris's cigarette business would make litigation likely, unless the company was willing to sacrifice profits.<sup>120</sup> While prevailing in the courtroom would likely be Philip Morris's initial goal, overwhelming FDA with drawn-out appeals processes would discourage future industry-harming regulatory measures and could be almost as effective as winning on appeal.<sup>121</sup>

### B. Reduced-Risk Tobacco Products

As one tobacco-industry observer noted, "It was clear from the behavior of the Philip Morris representatives that their attitude was 'Just tell us what the rules are, and I can beat my competition.'"<sup>122</sup> H.R. 1108 aligns with this mantra by requiring FDA to promulgate rules within two years that establish a minimum threshold for reduced-risk tobacco products.<sup>123</sup> To be considered reduced risk, a cigarette must "significantly reduce harm and the risk of tobacco-related disease to individual tobacco users."<sup>124</sup> Alarming, FDA would rely primarily on "the scientific evidence submitted by the applicant"—i.e., the approval-seeking tobacco

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117. See H.R. 1108 § 907(a)(3)(A)–(B) (directing FDA to consider the risks and benefits to the population as a whole, including current tobacco users).

118. *Id.* § 907(b)(1)(E).

119. See *Senate Hearing*, *supra* note 5, at 176 (memorandum of Joel L. Nitzkin, M.D., M.P.H., D.P.A., Chairman, American Association of Public Health Physicians Tobacco Control Task Force) ("This [contraband] provision stands as an open invitation to tobacco companies to assert in court that any proposed change in the composition of its tobacco products that change the taste, reduce the attraction to nicotine addicts or significantly increase the cost of manufacture could increase the demand for contraband.").

120. *But see* Parrish, *supra* note 47, at 110 (admitting that Philip Morris seeks regulation to make profits).

121. Indeed, given a tobacco product standard directive that invites litigation, FDA might not issue regulations at all or might issue industry-friendly rules. Senator Coburn's remarks are instructive: "The only problem with [assuming FDA will take on the industry] is the Bureaucrats' Law of Washington—never do what is right when you can do what is safe. . . . The FDA is like a balloon. You push in one place, it goes out somewhere else." *Senate Hearing*, *supra* note 5, at 82 (testimony of Sen. Tom Coburn, Member, S. Comm. on Health, Education, Labor, and Pensions); *cf.* Lars Noah & Richard A. Merrill, *Starting from Scratch?: Reinventing the Food Additive Approval Process*, 78 B.U. L. REV. 329, 443 (1998) (asserting that FDA has escaped "unrealistic [congressional] directives" in the past).

122. Nocera, *supra* note 3.

123. H.R. 1108 § 911(j)(1).

124. *Id.* § 911(g)(1)(A).

company—when determining whether tobacco products qualify as reduced risk.<sup>125</sup>

Convincing consumers that cigarettes are less harmful would increase tobacco sales and profits,<sup>126</sup> and may represent the industry's future.<sup>127</sup> Indeed, making implicit lowered-risk health claims has long been part of Big Tobacco's marketing strategy, dating back to the use of "light" and "low tar" descriptions in the 1970s.<sup>128</sup>

Adding to the need for reduced-risk products is the industry's steady regression.<sup>129</sup> Each year Philip Morris USA reduces production, and sales decline as fewer Americans choose to smoke.<sup>130</sup> The reason is fairly clear: smoking cigarettes causes fatal diseases,<sup>131</sup> and as consumers become more aware of smoking's health risks,<sup>132</sup> they are less likely to smoke.<sup>133</sup>

125. *Id.* § 911(g)(3)(A). The tobacco industry has a documented history of knowingly deceiving the public about health risks. See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 852 (D.D.C. 2006) (discussing Philip Morris's persistent attempts to deceive the public by concealing or distorting the health risks of cigarettes). Compare the current proposal with HARTMANN, *supra* note 44, at 162–63 (noting that 1990s legislation gave FDA authority to regulate genetically modified foods, yet problematically required the agency to rely on manufacturers' science).

126. See *Senate Hearing*, *supra* note 5, at 59 (statement of Alan Blum, M.D.) ("[S]moking prevalence is directly proportional to the degree of perceived harm from smoking. . . ."); see also Andrew Steptoe et al., *An International Comparison of Tobacco Smoking, Beliefs and Risk Awareness in University Students from 23 Countries*, 97 ADDICTION 1561, 1569 (2002), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/118957918/PDFSTART> (replicating past studies that had found a "robust association between smoking and beliefs in the importance of not smoking for health").

127. See Nocera, *supra* note 3 (observing Philip Morris's efforts to grow the company in a declining market through development of "reduced harm" tobacco products and noting a \$350 million reduced-risk tobacco product research-and-design facility at company headquarters).

128. In *United States v. Philip Morris USA, Inc.*, the court found that tobacco companies had engaged in a long-term conspiracy to conceal smoking's health risks, noting that the companies had "suppressed research [and] distorted the truth about low tar and light cigarettes." 449 F. Supp. 2d at 852.

129. Altria Group projects that cigarette sales will decline 3.5% this year. This projection, in addition to shareholders' complaints that the company was too focused on cigarettes, in part motivated Altria's recent \$10.3 billion acquisition of United States Tobacco, Inc., the world's largest snuff manufacturer. Chris Burritt, *Altria to Buy UST for \$10.3 Billion, Gaining Skoal (Update2)*, BLOOMBERG.COM, Sept. 8, 2008, <http://www.bloomberg.com/apps/news?pid=20601103&sid=anOAnSGfaSQM>.

130. See Thomas M. Anderson, *Altria Versus Philip Morris International*, KIPLINGER.COM, Apr. 18, 2008, <http://www.kiplinger.com/columns/picks/archive/2008/pick0418.htm> (noting a declining demand for tobacco in the United States, but increased demand in emerging nations).

131. See Parrish, *supra* note 47, at 114 (acknowledging the Philip Morris position that smoking causes lethal health problems).

132. In 1954, 40% of Americans said that smoking causes cancer. In 1969, the number was 70%. In the 1980s, 80% believed in the link. By 1999, 90% of Americans agreed that smoking causes cancer. David W. Moore, *Americans Agree with Philip Morris: Smoking Is Harmful: But Public Blames Smokers More Than Tobacco Companies for Smoking-Related Health Problems*, GALLUP NEWS SERVICE, Oct. 14, 1999,

The development of a tobacco product that could be marketed as reduced risk would be a boon for the industry, as tobacco's perceived health risks and cigarette sales negatively correlate.<sup>134</sup> Requiring FDA to quickly promulgate threshold reduced-risk standards favors the industry,<sup>135</sup> especially Philip Morris, the tobacco company most heavily invested in reduced-risk products.<sup>136</sup>

Currently, however, three factors prevent Philip Morris from marketing a cigarette as a reduced-risk tobacco product: (1) making explicit, unproven health claims in advertising is prohibited by the Federal Trade Commission;<sup>137</sup> (2) making explicit health claims would expose Philip Morris to fraud liability;<sup>138</sup> and (3) consumers are skeptical of Big Tobacco claims.<sup>139</sup>

The high level of public distrust explains why Philip Morris needs FDA regulation as propounded in H.R. 1108 in order to successfully market reduced-risk or reduced-exposure products. By requiring the agency to establish reduced-risk standards within two years, the bill notifies the industry of a reduced-risk threshold.<sup>140</sup> Given an established threshold,

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<http://www.gallup.com/poll/3538/Americans-Agree-Philip-Morris-Smoking-Harmful.aspx>.

133. See *Senate Hearing*, *supra* note 5, at 59 (prepared statement of Alan Blum, M.D.) (noting that increasing perception of smoking's perils decreases consumption).

134. *Id.*

135. The prospect of litigation may incentivize bargained rulemaking by FDA that would be accepted by tobacco companies. See von Eschenbach, *supra* note 26 (reciting H.R. 1108's "perverse incentive effects"); see also *supra* note 121 and accompanying text (describing FDA's response to industry and observing that FDA maneuvers around its conflicts).

136. See Anna Wilde Mathews & Vanessa O'Connell, *Philip Morris Gears Up for FDA Regulation: Using Science, It Tries to Prove Its Products Can Be Lower-Risk*, WALL ST. J., June 21, 2007, available at [http://online.wsj.com/article\\_email/SB118235450194442081-1MyQjAxMDE3ODIyMTMyNTE0Wj.html](http://online.wsj.com/article_email/SB118235450194442081-1MyQjAxMDE3ODIyMTMyNTE0Wj.html) (noting that Philip Morris's reduced-risk investment is larger than that of its peers).

137. See H.R. 1108, 110th Cong. § 2(45) (as introduced in the House of Representatives, Feb. 15, 2007) (incorporating Federal Trade Commission's (FTC) mission to protect consumers and regulate competition).

138. Implicit health claims, such as "light" and "low tar," have created litigation. See, e.g., *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 852 (D.D.C. 2006) (holding Philip Morris liable for fraud for "distort[ing] the truth about low tar and light cigarettes"); *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392-93 (5th Cir. 2007) (holding that state claims of consumer fraud relating to "light" cigarettes were preempted by FTC approval).

139. A recent Canadian study found that 79% of adults and 59% of youths believed that tobacco companies "rarely" or "never" told the truth. Bronwen J. Waller et al., *Youth Attitudes Towards Tobacco Control: A Preliminary Assessment*, 25 CHRONIC DISEASES CANADA 97, 98 tbl.1 (2004), available at [http://www.phac-aspc.gc.ca/publicat/cdic-mcc/25-3/a\\_e.html](http://www.phac-aspc.gc.ca/publicat/cdic-mcc/25-3/a_e.html). Perhaps illustrating this point, Philip Morris's latest attempt at marketing a "safer" cigarette has gone awry. See Vanessa O'Connell, *Altria Drops New Filter Cigarettes in Strategy Setback*, WALL ST. J., June 23, 2008, at B1 (describing the failed attempt to sell the Marlboro Ultra Smooth, a cigarette with a "high-technology" filter).

140. H.R. 1108 § 911(l)(1).

Philip Morris believes it can get its reduced-risk products approved and outperform the competition with a superior reduced-risk cigarette.<sup>141</sup>

This is not to say that Philip Morris would deceive FDA into approving pseudo-reduced-risk Marlboros.<sup>142</sup> However, H.R. 1108 mandates that FDA develop a reduced-risk standard within two years, and this timeframe would allow Philip Morris to tailor its nearly half-billion-dollar,<sup>143</sup> reduced-risk research-and-design operation accordingly.<sup>144</sup> Further, if the public knows that FDA has sanctioned a tobacco product as reduced risk, then suspicions of a Big Tobacco ploy would likely diminish.<sup>145</sup> Industry executives hope that the reduced-risk revolution will sustain an industry that—while currently still thriving—is ever on the decline.<sup>146</sup>

### C. Reduced-Exposure Tobacco Products

In addition to requiring FDA to promulgate a reduced-risk-cigarette threshold within two years,<sup>147</sup> H.R. 1108 allows FDA to sanction cigarettes as “reduced exposure,”<sup>148</sup> a provision that has incensed health advocates.<sup>149</sup>

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141. See Associated Press, *Philip Morris in Quest for Lower-Risk Tobacco Items*, L.A. TIMES, Oct. 29, 2007, at C2 (reporting Citigroup analyst Bonnie Herzog’s claim that Philip Morris’s reduced-risk innovation, which would put the company at “the head of the pack,” prompted Philip Morris to seek FDA regulation).

142. Some public-health advocates applaud the development of reduced-risk tobacco products and argue that the bill, with its long-term epidemiological science requirements, makes it difficult (or as one advocate terms it “actually impossible”) for reduced-risk cigarettes to be approved, and thus will (problematically) allow only for approval of reduced-exposure products. *Senate Hearing, supra* note 5, at 59, 164 (prepared statements of Alan Blum, M.D. and Michael Siegel, M.D.). While these public-health figures favor the development of reduced-risk cigarettes, which would be proven to lower overall disease incidence, they do not take into account H.R. 1108’s two-year deadline for issuing reduced-risk standards.

143. The research-and-design facility itself cost \$350 million, a figure that does not include the collateral expenses of the reduced-risk operation, which encompasses the salaries of an estimated 500 scientists, engineers, and support staff. Michael Felberbaum, *Philip Morris Opens New Research Center*, USATODAY.COM, Oct. 29, 2007, [http://www.usatoday.com/money/economy/2007-10-28-3266642839\\_x.htm](http://www.usatoday.com/money/economy/2007-10-28-3266642839_x.htm).

144. See Parrish, *supra* note 47, at 115 (declaring that FDA oversight is essential to guide manufacturers of reduced-risk and reduced-exposure products).

145. See McDaniel & Malone, *supra* note 2, at 194 (implying that consumers trust Philip Morris more after learning that the company supports FDA regulation; when consumers were informed that Philip Morris favors a federal regulatory regime, public disapproval of the company decreased from 50% to 35%).

146. See Anderson, *supra* note 130 (noting that tobacco use in the “developed world” has “waned for decades”).

147. H.R. 1108, 110th Cong. § 911(l)(1) (as introduced in the House of Representatives, Feb. 15, 2007).

148. *Id.* § 911(g)(1).

149. See *Senate Hearing, supra* note 5, at 56 (statement of Alan Blum, M.D.) (exhibiting Dr. Blum’s skepticism of the bill); see also *id.* at 164 (prepared statement of Michael Siegel, M.D.) (noting that the bill would “allow[] reduced exposure products to essentially be falsely marketed as reduced risk products (thus institutionalizing the very



In order to gain the reduced-risk moniker, H.R. 1108 requires tobacco products to be backed by epidemiological evidence demonstrating a significant reduction in incidents of tobacco-related disease—a fairly substantial evidentiary burden.<sup>150</sup> Alternatively, in order to gain the reduced-exposure moniker, H.R. 1108 only requires a demonstrated reduction in a certain *substance* found in a cigarette—whether the reduction actually decreases long-term disease incidence is irrelevant.<sup>151</sup>

For example, if a cigarette produced less cyanide than the average cigarette,<sup>152</sup> it could be branded as reduced exposure. This would be despite a lack of scientific evidence demonstrating that smokers of the cigarette would be at any less risk for developing disease than smokers of cigarettes with standard cyanide levels.<sup>153</sup> Disturbingly, however, consumers may easily conflate *reduced exposure* with *reduced risk*.<sup>154</sup> Even though there is no scientific proof that filtered cigarettes (which reduce exposure to toxic substances) are less harmful than unfiltered cigarettes, ninety-five percent of filtered-cigarette smokers believe they are ingesting a safer product.<sup>155</sup> Thus, reduced-exposure branding, like reduced-risk branding, may persuade the public that smoking is safer. Yet while empirical data would support the fact that reduced-risk cigarettes produce fewer incidents of disease,<sup>156</sup> reduced-exposure branding would only foster consumers' unscientific, unfounded inferences.<sup>157</sup>

### III. A HARMED FOOD AND DRUG ADMINISTRATION

#### A. A Structurally Overwhelmed FDA

The current status of FDA is less than ideal. According to recent intra-agency assessments, FDA is not fulfilling its regulatory obligations and is

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problem that the health organizations have expressed so much concern about)").

150. H.R. 1108 § 911(g)(1)(A).

151. *Id.* § 911(g)(2)(A)(ii).

152. See *Senate Hearing, supra* note 5, at 56 (statement of Alan Blum, M.D.) (explaining that H.R. 1108 has no mandate to eliminate cyanide gases from cigarettes).

153. *Id.*

154. *Id.* at 59 (statement of Alan Blum, M.D.); see also Richard J. O'Connor et al., *Smoker Awareness of and Beliefs About Supposedly Less-Harmful Tobacco Products*, 29 AM. J. PREVENTATIVE MED. 85, 85, 89 (2005) (finding that 25% of smokers who could name a cigarette brand that claims to reduce exposure to cigarette-smoke constituents believed that the products were less harmful—a belief in conflict with scientific evidence).

155. *Senate Hearing, supra* note 5, at 56 (testimony of Alan Blum, M.D.).

156. See H.R. 1108 § 911(g)(1)(A) (allowing approval of modified risk products if the applicant can demonstrate that the product significantly reduces the harm and risk of tobacco-related disease).

157. See *Senate Hearing, supra* note 5, at 58–59 (prepared statement of Alan Blum, M.D.) (explaining that consumers would believe reduced-exposure cigarettes decrease the risks of getting disease).

falling further behind each year.<sup>158</sup> The current FDA is underfunded, over-mandated, and in many ways ill-performing.<sup>159</sup> Congress has gradually entrusted more responsibilities to FDA since assigning its original duties in 1906.<sup>160</sup> But while the agency's list of administrative tasks has increasingly diversified,<sup>161</sup> expansions in responsibility have often come without a corresponding hike in agency appropriations.<sup>162</sup>

Although H.R. 1108 provides for additional agency funding, and even for user fees from the industry,<sup>163</sup> FDA leaders believe the funding is insufficient,<sup>164</sup> and general critiques of the user-fee system have found it rife with problems.<sup>165</sup> But while underfunding is merely a logistical dollars-and-cents issue solved by increased appropriations, H.R. 1108 would pose organizational challenges for FDA that exceed monetary shortfalls.<sup>166</sup>

While the FDA of the 1990s was willing to endure years of litigation to regulate on its own terms,<sup>167</sup> the present-day FDA does not want to regulate tobacco under H.R. 1108. Notably, Andrew von Eschenbach, FDA's

158. See Hutt, *supra* note 28, at 431 (noting that the author is a member of FDA's Science Review Subcommittee); *id.* at 432 (declaring that FDA is "an agency with expanded responsibilities, stagnant resources, and the consequent inability to implement or enforce its statutory mandates").

159. *Senate Hearing, supra* note 5, at 6 (opening statement of Sen. Enzi, Ranking Member, S. Comm. on Health, Education, Labor, and Pensions).

160. JOHN P. SWANN, HISTORY OF THE FDA, <http://www.fda.gov/oc/history/historyoffda/default.htm>.

161. See Richard A. Merrill, *The Architecture of Government Regulation of Medical Products*, 82 VA. L. REV. 1753, 1767–68 (1996) (noting FDA's expanded duties, placing the agency in a gatekeeping position).

162. See Hutt, *supra* note 28, at 432 ("The FDA has become a paradigmatic example of the 'hollow government' syndrome—an agency with expanded responsibilities, stagnant resources, and the consequent inability to implement or enforce its statutory mandates.").

163. H.R. 1108, 110th Cong. § 920 (as introduced in the House of Representatives, Feb. 15, 2007).

164. See von Eschenbach, *supra* note 26 (indicating that the projected FDA appropriations for 2008–2010 will be insufficient to implement H.R. 1108's complex program).

165. One critic claims the system has worsened FDA's low public confidence numbers and "should be abandoned." For a discussion of the "Destructive Impact of User Fees," see Hutt, *supra* note 28, at 452–54.

166. Commissioner von Eschenbach writes,

By far, the most important and daunting challenge would be to develop the expertise necessary to carry out the functions called for by this bill. FDA does not have expertise regarding customarily marketed tobacco products and, therefore, would have to establish an entirely new program and hire new experts. Creating the appropriate organizational structure and hiring experts in the field of tobacco control and related sciences and other experts needed to staff the program at every level is considerably more challenging than simply filling identified vacancies in an existing program.

Von Eschenbach, *supra* note 26.

167. See *supra* notes 1, 13 and accompanying text (discussing litigation between the tobacco industry and FDA).

current Commissioner, publicly opposes the measure.<sup>168</sup> Although antiregulatory politics under the Bush Administration may have contributed to von Eschenbach's disapproval,<sup>169</sup> his concerns are valid, politics aside.<sup>170</sup>

A minority of the public-health community, skeptical of a historically deceptive company's motives, is fueling opposition to H.R. 1108.<sup>171</sup> One of the bill's most vocal critics claims that Philip Morris will support FDA regulation in principle and then impede substantive regulation in practice.<sup>172</sup> Indeed, a prominent supporter of H.R. 1108 has implied that successful FDA regulation depends on a cooperative tobacco industry.<sup>173</sup> Thus, if the industry behaves belligerently by aggressively challenging unfavorable rules, FDA's regulatory power would exist primarily on paper. Serving in a superficial role does not help FDA, and extended appeals would distract the troubled agency from its existing mandates.

FDA is already riddled with problems, and regulating tobacco would only exacerbate the agency's plight.<sup>174</sup> From criticism of the agency's preemption of state tort claims in the midst of regulatory failure<sup>175</sup> to allegations that FDA favors industry profits over public-health concerns,<sup>176</sup>

168. See von Eschenbach, *supra* note 26 (reasoning that regulating under H.R. 1108 would undermine FDA's public-health role).

169. See Noah, *supra* note 101, at 923–24 (noting that the Administration's preference for minimal regulation caused an “about-face” in FDA philosophy).

170. FDA is overmandated, underfunded, and ill-performing. Hutt, *supra* note 28, at 432. The tobacco industry has successfully “outwitted” government regulatory efforts for decades. *Senate Hearing, supra* note 5, at 87 (statement of Alan Blum, M.D.). H.R. 1108 has crucial compromises that were most likely lobbied-for by the tobacco industry. See *supra* notes 14–15 and accompanying text (describing Philip Morris's extensive lobbying efforts to promote legislation authorizing FDA regulation over the tobacco industry). Given such a confluence of undesirable circumstances, it is understandable that FDA does not want to regulate. Further, one legal scholar argues that FDA's recent spate of regulatory failures more likely resulted from “structural weaknesses and resource limitations” than from an antiregulatory political mindset. Vladeck, *supra* note 102, at 984; see also *id.* at 994–97 (describing FDA's regulatory failures). Thus, agency problems might transcend politics.

171. See, e.g., *Senate Hearing, supra* note 5, at 56–58 (statement and prepared statement of Alan Blum, M.D.) (noting the industry's history of making implicit, untrue lowered-risk claims); cf. *id.* at 176 (memorandum of Joel L. Nitzkin, M.D.) (asserting that the proposed requirements under H.R. 1108 “strongly favor” Philip Morris, thus explaining its support of the bill).

172. See *id.* at 87 (testimony of Alan Blum, M.D.) (“[Philip Morris has] done wonders with any regulation. They have outwitted us.”).

173. See Nocera, *supra* note 3 (relating Matthew Myers's opinion that FDA regulatory success may depend on Philip Morris's not obstructing meaningful rules).

174. See *id.* at 84–85 (testimony of Alan Blum, M.D.) (commenting on the absurdity of giving FDA authority over tobacco given the agency's recent failures). Compare *Senate Hearing, supra* note 5, at 176 (memorandum of Joel Nitzkin, M.D.) (noting that H.R. 1108 invites litigation), with *id.* at 32 (opening statement of Sen. Hatch) (expressing concern about giving the struggling agency more responsibilities with “maybe not enough finances to take care of it”).

175. E.g., Vladeck, *supra* note 102, at 994–97.

176. FDA's critics already cry industry capture, pointing out, for example, that the agency relies on science from experts with relationships with prescription drug

the agency faces attacks from multiple directions. Consumer confidence is at an all-time low, and public distrust of the agency has steadily risen.<sup>177</sup> An underperforming, underfunded FDA with flagging public confidence would not be prepared to battle a deep-pocketed company trying to make its way back to the top of the corporate ladder.<sup>178</sup>

For health advocates, supporting regulatory legislation alongside Philip Morris is a calculated risk.<sup>179</sup> Although initially skeptical of the company's motives, many prominent public-health advocates have resolved to support FDA regulation along with Philip Morris.<sup>180</sup> Their risk-taking is understandable. At worst, if FDA regulation fails, the public would likely commend health advocates for their efforts and blame the misfire on a too-powerful tobacco industry; at best, regulation could succeed if Philip Morris's corporate-speak of "tough but reasonable" regulation is genuine,<sup>181</sup> or if a courageous (and properly funded) FDA took on the industry.<sup>182</sup>

For FDA, though, the risks are more grave.<sup>183</sup> The risks include the headaches of organizational expansion,<sup>184</sup> coupled with the prospect of dealing with a well-funded, historically uncooperative industry<sup>185</sup> whose livelihood depends on selling cigarettes. Should H.R. 1108's regulatory approach fail, public-health advocates would likely change course and develop other tactics for battling the industry. For FDA, however, it could take decades to recover from such a high-profile, large-scale debacle.<sup>186</sup>

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manufacturers. Cristina Rodríguez, *The FDA Preamble: A Backdoor to Federalization of Prescription Warning Labels?*, 41 J. MARSHALL L. REV. 161, 165 (2007).

177. See Hutt, *supra* note 28, at 442–43 (demonstrating that while FDA had a public-confidence rating of 80% in the 1970s, by 2006 it had slipped to 36%).

178. See Burritt, *supra* note 129 (describing Altria Group's marketing strategy); see also McDaniel & Malone, *supra* note 2, at 197 (positing that the tobacco industry supports FDA regulation to boost its public image).

179. See Nocera, *supra* note 3 (Matthew Myers explained that the real test of Philip Morris's commitment to regulation would come only after regulation begins).

180. See *Senate Hearing*, *supra* note 5, at 14 (prepared statement of Matthew Myers) (claiming that the bill has the support of every major public-health organization).

181. 2008 Philip Morris Policy Statement, *supra* note 86, at 32.

182. But see *supra* note 121 and accompanying text (demonstrating Sen. Coburn's doubt that the FDA bureaucracy will take aggressive action).

183. One FDA expert asserts the agency is at a "critical point in its history" and that the picture of FDA's future he gleans from recent assessments is "alarming." Vladeck, *supra* note 102, at 997, 999.

184. See von Eschenbach, *supra* note 26 (noting that "the most important and daunting challenge" would be to develop FDA expertise to implement H.R. 1108).

185. See *Senate Hearing*, *supra* note 5, at 57 (statement of Alan Blum, M.D.) (detailing the tobacco industry's history of circumventing regulation and of consumer deception).

186. When the FTC tried (and failed) to impose restrictions on the industry after the Surgeon General's 1964 warning, it took "decades" for the agency to recover. PBS, *Inside the Tobacco Deal*, FRONTLINE ONLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/settlement/interviews/myers.html> (interview with Matthew Myers) (last visited Oct. 14, 2008). A similar failure for FDA could make an

*B. Undermining FDA's Mission of Protecting the Public*

FDA is responsible for protecting and advancing the public health.<sup>187</sup> The tobacco industry has a well-documented history of deception that has harmed the public health.<sup>188</sup> After public concern over the health hazards of cigarette smoking began to climb in the 1960s and 1970s,<sup>189</sup> cigarette manufacturers responded by marketing “light” and “low tar” cigarettes.<sup>190</sup> These initiatives were supported by massive advertising campaigns that attempted to mislead the public into believing that certain cigarette brands posed fewer health problems.<sup>191</sup>

Despite the industry's history of using lowered-risk health claims to persuade the public that cigarette smoking could be part of a healthy lifestyle, H.R. 1108 provides for the marketing of reduced-risk and reduced-exposure tobacco products.<sup>192</sup> While it is debatable whether a reduced-risk cigarette is possible (skeptics argue that smoking cessation is the only proven way to reduce harm),<sup>193</sup> the public-health community uniformly condemns approval of reduced-exposure cigarettes,<sup>194</sup> which would be unsupported by epidemiological evidence.<sup>195</sup>

Even conceding, *arguendo*, that a cigarette can pose a reduced risk, forcing FDA to issue standards for approving what would still be deadly products creates an ideological crisis.<sup>196</sup> Cigarette companies' survival

already hostile regulatory atmosphere worse, portending a bleak future for the agency. See *supra* note 102 and accompanying text (discussing increased judicial distrust of the agency).

187. Food & Drug Administration, FDA's Mission Statement, <http://www.fda.gov/opacom/morechoices/mission.html> (last visited Oct. 14, 2008); cf. HUTT, MERRILL & GROSSMAN, *supra* note 49, at 5 (declaring that FDA's perpetual assignment has been to ensure the products it regulates are safe).

188. See, e.g., *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 852 (D.D.C. 2006) (discussing Philip Morris's persistent attempts to deceive the public by concealing or distorting the health risks of cigarettes).

189. The Surgeon General issued the epochal warning in 1964 that smoking caused cancer and disease. See Parrish, *supra* note 47, at 111 (regretting that the tobacco industry publicly denied the conclusion and describing the “reservoir of public anger” emanating from the denial).

190. *Senate Hearing*, *supra* note 5, at 58 (prepared statement of Alan Blum, M.D.).

191. *Id.*

192. H.R. 1108, 110th Cong. § 911(h)(5) (as introduced in the House of Representatives, Feb. 15, 2007).

193. See *Statement on the Science of Reduced Risk Tobacco Products Before the H. Comm. on Government Reform* (2003) (statement of Scott J. Leischow, Ph.D., Chief, Dep't of Health & Human Services), available at <http://www.hhs.gov/asl/testify/t030603a.html> (declaring that “all tobacco products are hazardous . . . there is no safe level of tobacco use”).

194. See, e.g., *Senate Hearing*, *supra* note, at 59, 164 (listing health advocates' arguments that FDA should not be allowed to approve reduced-exposure products).

195. See H.R. 1108 § 911(g)(2)(A)(ii)–(iv) (permitting FDA approval of tobacco products without support from long-term epidemiological studies).

196. See von Eschenbach, *supra* note 26 (commenting that the bill makes the public-health-minded FDA regulate a product that causes disease even when “used as intended”).

depends on maintaining smoking rates. The public health depends on reducing smoking rates.<sup>197</sup> Since reduced-risk-branded cigarettes would inform the public that the product had been made safer, it is likely that more people would smoke.<sup>198</sup> If more people smoke because of an FDA rule, then the agency would be complicit with the tobacco companies in harming the public health.<sup>199</sup>

#### RECOMMENDATIONS

Despite passing the House by a 326–102 vote,<sup>200</sup> the Family Smoking Prevention and Tobacco Control Act stalled in the Senate, and did not become valid law.<sup>201</sup> Again, while H.R. 1108 failed to pass, it is likely that nearly identical legislation will be introduced in the future.<sup>202</sup> Additionally, Philip Morris will continue lobbying for FDA regulation despite a changed political landscape—the Democratic assumption of congressional control has not deterred regulatory pursuits<sup>203</sup>—and the company’s support will be

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197. See *Senate Hearing*, *supra* note 5, at 159 (prepared statement of Anne Landman) (declaring “a healthy tobacco trade is antithetical to public health”).

198. H.R. 1108 stipulates that FDA take into account “users and non-users” when approving reduced-risk products; namely, the proposal considers the probability that users would be less likely to quit smoking or that non-users would begin smoking. H.R. 1108 § 907(a)(3)(A)–(B). However, FDA decisions would be based in large part on tobacco-industry scientific data. *Id.* § 911(g)(3)(A). Furthermore, consumer perception of the products’ dangerousness would not be measured until after approval in postmarket surveillance. *Id.* § 911(g)(2)(C)(ii).

199. See *Senate Hearing*, *supra* note 5, at 57 (statement of Alan Blum, M.D.) (opining that while currently only the tobacco companies commit consumer fraud, H.R. 1108 will necessarily implicate FDA in fraudulent behavior).

200. Rob Stein, *House Votes to Let FDA Regulate Tobacco Industry*, WASH. POST, July 31, 2008, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/30/AR2008073002674.html> (“The White House has signaled that President Bush will veto the legislation if it is approved by the Senate, which may not have a veto-proof majority in support of it.”). As illustrated by the vote margin, regulating tobacco is not a purely partisan issue. Persuading Republicans to support regulation that the party generally frowns upon has long been a goal of Philip Morris. See McDaniel & Malone, *supra* note 2, at 194–95 (observing that over a recent ten-year period the company donated \$8.1 million to Republicans and developed lobbying tactics designed to appeal to the party’s members).

201. See Govtrack.us, H.R. 1108 (110th Cong.), <http://www.govtrack.us/congress/bill.xpd?bill=h110-1108> (explaining that the bill as H.R. 1108 is dead, but could be introduced in a future session of Congress under a different bill number).

202. See REDHEAD & BURROWS, *supra* note 6, summary (explaining that the Family Smoking Prevention and Tobacco Control Act was first introduced in the 108th Congress, and that the 110th Congress’s H.R. 1108 was simply a reintroduction of that original bill). The FDA tobacco bills that have been introduced since the 107th Congress—and gained the support of both Philip Morris and the public-health community—have been either identical or very similar in content to each other and H.R. 1108. *Id.* at 19–20.

203. See *id.* at 20 (noting that H.R. 1108, introduced in February 2007 in a Democratic-majority House of Representatives, was “an attempt to balance the competing interests of

politically necessary for regulatory legislation to succeed.<sup>204</sup>

In a controversy with many unknown variables, one thing is certain: Philip Morris will not sign off on a suicide pact.<sup>205</sup> As the last eight years suggest, any bill that is supported by Philip Morris will be influenced by Philip Morris, which will result in compromises that harm FDA and allow the company to impede substantive regulation.<sup>206</sup>

Even without Philip Morris's influence, FDA regulation may not be desirable.<sup>207</sup> Rather than appropriating funds to the agency for tobacco industry regulation, Congress could spend the money on more effective means of reducing tobacco consumption.<sup>208</sup> For instance, California, the state that spends the largest amount of money combating cigarette smoking, has achieved a smoking rate of 13.5%, the second lowest in the country.<sup>209</sup> Federal action mirroring California's efforts could be similarly effective.<sup>210</sup>

Alternatively, as one Senator urges, Congress could directly pass the rules that health advocates hope FDA will promulgate.<sup>211</sup> Instead of

Philip Morris and leading anti-tobacco groups"). Further, Philip Morris issued a policy statement that advocated FDA regulation as of April 2008. 2008 Philip Morris Policy Statement, *supra* note 86. By April 2008, the company must have appreciated the possibility of a Democratic Congress and Democratic President beginning in 2009, as Gallup polls from that month had Barack Obama and John McCain in a statistical dead heat. See Lee Byron, Chris Barnes & Henry Corrigan-Gibbs, *Presidential Polls Over Time*, NYTIMES.COM, Nov. 2, 2008, <http://elections.nytimes.com/2008/president/whos-ahead/polling/index.html>.

204. See Saul, *supra* note 24 (proffering that legislation requires Philip Morris's support).

205. See Parrish, *supra* note 47, at 114 (conceding that any regulation must still allow his company to make profits, as it is an obligation the company has to its shareholders).

206. Senator Coburn offers his H.R. 1108 assessment: "We're going to shuffle this [bill] over and in 10 years, we're going to be back here talking about the same thing because Marlboro will be Marlboro tomorrow." *Senate Hearing, supra* note 5, at 83.

207. See Heaton, *supra* note 98, at 98 (lamenting that "[i]t is very difficult to have enlightened public policy if the majority of our state legislators and federal legislators . . . are receiving tobacco industry donations").

208. Current tobacco-control theory focuses less on regulating the composition of cigarettes and more on reducing the harm to second-hand smoke recipients and "denormalizing" cigarette smoking. *Senate Hearing, supra* note 5, at 158 (prepared statement of Anne Landman).

209. See Heather Knight, *S.F. Pushes Legislation to Promote Good Health*, SFGATE.COM, Aug. 4, 2008, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/04/MNBG122T4F.DTL> (noting that the money is spent on massive statewide advertising, increased cigarette taxes, and limits on permissible smoking areas); Victoria Colliver, *Employers Ponder Tough Tactics to Halt Smoking*, SFGATE.COM, June 17, 2008, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/06/16/BUKG11A2VO.DTL&tsp=1> (indicating that only Utah's smoking rate is lower than that of California).

210. See, e.g., Heaton, *supra* note 98, at 94 (explaining that the national "truth®" mass-media advertising campaign was crucial in slashing youth smoking by 22% in its first two years).

211. See *Senate Hearing, supra* note 5, at 83 (testimony of Sen. Coburn) ("[Health advocates are] going to trust an agency to do what we don't have the courage to do as a

involving the agency in the exacting task of regulating the tobacco industry, subject to the demanding notice-and-comment rulemaking process<sup>212</sup> and “searching” judicial review,<sup>213</sup> along with the attendant transition costs and redirection of FDA’s mission,<sup>214</sup> Congress could make tobacco rules itself through legislation.

However, if FDA regulation is the means chosen to combat cigarette smoking and tobacco-related health problems, Congress must give broad regulatory authority to the agency. The bill cannot have compromises with the industry and certainly cannot contain a tobacco product standard that invites courtroom challenges, nor can it have a deadline that requires FDA to issue rules that might ultimately harm the public health. While reporters, industry competitors, and public-health advocates have tried to understand for years why Philip Morris supports FDA regulation, the answer is somewhat obvious: when legislation provides for tamed regulation, the agency is already captured.

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Congress. . . . We don’t have the courage to do what is really necessary.”).

212. See STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 184, 186–87 (2008) (noting that during the 1995–1996 FDA notice-and-comment rulemaking period concerning tobacco regulation, the agency received “seven hundred thousand pieces of written commentary” and that the tobacco industry submitted a “single ‘comment’ objecting to [FDA’s] proposed rule that consisted of some two thousand pages of written commentary and another forty-seven thousand pages of supporting documents”).

213. See Noah, *supra* note 101, at 904 (noting that the hassles of informal rulemaking, including judicial review, have led FDA to resort to “nonbinding guidelines”).

214. See von Eschenbach, *supra* note 26 (“Associating the Agency with the approval of these inherently dangerous products would undermine the Agency’s mission” and regulating tobacco would require an “entirely new program” from the ground up.).

By far, the most important and daunting challenge would be to develop the expertise necessary to carry out the functions called for by this bill. FDA does not have expertise regarding customarily marketed tobacco products and, therefore, would have to establish an entirely new program and hire new experts. Creating the appropriate organizational structure and hiring experts in the field of tobacco control and related sciences and other experts needed to staff the program at every level is considerably more challenging than simply filling identified vacancies in an existing program.

*Id.*



# RECENT DEVELOPMENTS

## “PREJUDGMENT” REJUDGMENT: THE TRUE STORY OF *ANTONIU V. SEC*

DOUGLAS C. MICHAEL\*

### TABLE OF CONTENTS

Introduction .....	225
I. Factual Background .....	226
II. The Court’s Confusion About the Two Proceedings .....	227
III. The Offer of Settlement .....	230
IV. Proceedings by Delegated Authority: Recusal from What Exactly? .....	231
Epilogue.....	233

### INTRODUCTION

Law students traditionally learn the law from reading cases. In some instances, the cases establish a well-reasoned principle of law. In others, law students are asked to read cases in which a court gave a contrary opinion or more simply got the wrong answer. I believe that one such case (now almost twenty years old, but apparently headed for immortality) is of the latter variety. The court simply got the wrong answer, and law students and lawyers should know that.

In *Antoniou v. SEC*,<sup>1</sup> the Eighth Circuit found that Charles C. Cox, then a member of the Securities and Exchange Commission (SEC or Commission), had “impermissibly tainted” an SEC administrative

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1. 877 F.2d 721 (8th Cir. 1989).

proceeding against Antoniu by a speech Cox gave while the proceeding was pending. In this way, Commissioner Cox is now joined with former Federal Trade Commission (FTC) Chairman Paul Rand Dixon of *Texaco, Inc. v. FTC*<sup>2</sup> and *Cinderella Career & Finishing Schools, Inc. v. FTC*<sup>3</sup> fame as an administrative law casebook poster child for “prejudgment” by an administrative agency.

Because this case is seemingly destined for fame (or infamy) in the casebooks,<sup>4</sup> I believe it is important for readers of the case to know that the truth is very different than the story told therein.<sup>5</sup> Although the court may have recited proper general principles of law, the court’s application of those principles to the facts at hand is demonstrably incorrect.

The court’s decision in *Antoniou v. SEC* is wrong in two major ways. First, Commissioner Cox said and did nothing to violate the well-settled prejudgment doctrine about which the court writes. Second, in an abundance of caution, he did in fact recuse himself from the proceedings after his speech, except to participate in a routine denial of an offer of settlement (with which the court found nothing wrong). I believe the court’s opinion is out of touch with the realities of the administrative process at the SEC and, I suspect, at many or most other agencies as well.

After a brief discussion of the factual background of the case, I will demonstrate first that Cox’s speech was well on the permissible side of the prejudgment line. Second, I will discuss participation by agency members in settlement offers in administrative proceedings. These offers have the potential for abuse, but modern law suggests that this potential is rarely, if ever, realized. I will show that there was no impropriety in this case. Finally, I will discuss the realities of agency action by delegated authority and how such an otherwise reasonable process makes it difficult for the agency to distance itself from action appropriately taken by its delegates.

## I. FACTUAL BACKGROUND

There were two administrative proceedings in question, labeled by the Eighth Circuit as *Antoniou I*<sup>6</sup> and *Antoniou II*.<sup>7</sup> The first proceeding arose

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2. 336 F.2d 754 (D.C. Cir. 1964).

3. 425 F.2d 583 (D.C. Cir. 1970).

4. E.g., JOHN M. ROGERS, MICHAEL P. HEALY & RONALD J. KROTOSZYNSKI, JR., ADMINISTRATIVE LAW 154 (2d ed. 2008).

5. Most of the facts are stated in the Security and Exchange Commission’s (SEC or Commission) Proffer of Evidence in Support of the Commission’s Opposition to Application for Attorney’s Fees, *Antoniou v. SEC*, 877 F.2d 721 (8th Cir. 1989) [hereinafter Proffer of Evidence] (on file with author). For a summary of this attorney’s fees motion filed by Antoniu under the Equal Access to Justice Act, see Paul Gonson, *Selected Judicial Developments*, in THE SEC SPEAKS IN 1993, at 376, 376–77 (1993).

6. Notice by the National Association of Securities Dealers, Inc., Exchange Act Release No. 34-22383 (*Antoniou I*), 33 SEC Docket 1318 (Sept. 3, 1985).

from Antoniu’s criminal conviction in one of the early “misappropriation” insider trading cases.<sup>8</sup> Such a criminal conviction results in a statutory bar from further participation in the securities brokerage industry.<sup>9</sup> Notwithstanding that bar, the National Association of Securities Dealers (NASD) sought to allow Antoniu to become associated with an NASD-member registered broker–dealer firm. The NASD was required to file notice of that action with the SEC,<sup>10</sup> and the SEC was empowered to review that application.<sup>11</sup> The Commission did so and overturned the NASD’s proposed approval for Antoniu’s association with the firm in question. In the second proceeding,<sup>12</sup> the SEC exercised its statutory authority<sup>13</sup> to institute administrative proceedings to determine whether Antoniu should be subject to a permanent bar from association with any registered broker–dealer.

Thereafter, Commissioner Cox was asked to give a speech at a regional enforcement conference.<sup>14</sup> He decided to use the occasion to clarify to the securities industry and securities bar that, in his opinion, the Commission should be tougher on those who violate the securities laws and who believed that some slight time-out should be a sufficient penance. Commissioner Cox referred to the egregious violation of Antoniu and the indifference the NASD had shown (in his opinion) to the severity of Antoniu’s violations.

## II. THE COURT’S CONFUSION ABOUT THE TWO PROCEEDINGS

The court cited Commissioner Cox’s statement from his speech that Antoniu’s “*bar from association with a broker–dealer was made permanent*”<sup>15</sup> as evidence of prejudgment of *Antoniou II*, the second

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7. Antoniu, Exchange Act Release No. 34-22487 (*Antoniou II*), 34 SEC Docket 244 (Sept. 30, 1985).

8. See Richard J. Hunter, Jr. & Philip Frese, *The Genesis of an Ethical Imperative: The SEC in Transition*, 25 GONZ. L. REV. 9, 38 (1989–1990) (“The misappropriation theory . . . had its judicial origin in a 1980 case filed against Adrian Antoniu . . .”).

9. For the details of how this works, see § 3(a)(39) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(39)(F) (2000) (defining a “statutory disqualification” by reference to Securities Exchange Act § 15(b)(4)(D), 15 U.S.C. § 78o(b)(4)(D), based on Antoniu’s criminal conviction).

10. Securities Exchange Act § 15A(g)(2), 15 U.S.C. § 78o-3(g)(2).

11. Securities Exchange Act Rule 19h-1, 17 C.F.R. § 240.19h-1(g) (2008).

12. *Antoniou II*, 34 SEC Docket 244 (Sept. 30, 1985).

13. Securities Exchange Act §§ 15(b)(6), 19(d), 15 U.S.C. §§ 78o(b)(6), 78s(h).

14. Charles C. Cox, Comm’r, Sec. Exch. Comm’n, Making the Punishment Fit the Crime—A Look at SEC Enforcement Remedies, Remarks to Eighteenth Annual Rocky Mountain State–Federal–Provincial Cooperative Securities Conference (Oct. 18, 1985) [hereinafter Cox Speech], available at <http://www.sec.gov/news/speech/1985/101885cox.pdf>.

15. *Antoniou v. SEC*, 877 F.2d 721, 723 (8th Cir. 1989). For the language in context, see *id.* and, more fully, Cox’s speech:

proceeding. On the contrary, that statement was simply the legal effect of the SEC's refusal to accept the NASD's petition to allow Antoniu back into the securities industry in *Antoniou I*.<sup>16</sup> The meaning is clear from the use of the past tense, "was," which referred to a concluded proceeding (*Antoniou I*) rather than a proceeding in which hearings had not yet begun (*Antoniou II*). The further reference to a bar from "a" broker-dealer (the result of *Antoniou I*), as opposed to "any" broker-dealer (the question still to be decided in *Antoniou II*), should also have been clear to the court.

In most such proceedings, which involve a bar from participation in an industry regulated by the Commission, counsel for the respondent asks for permission to reapply for association with a broker-dealer after a certain period of time. Denial of leave to reapply might be interpreted as making a bar "permanent," but in reality, of course, an individual would be free to ask for leave to reapply the next day.<sup>17</sup> Indeed, one of Commissioner Cox's points in his speech was that there should be, in his opinion, a more substantial time-out from the industry for violators than had been previously considered customary.<sup>18</sup>

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One issue that frequently arises with respect to individuals whom I call "indifferent violators" is the length of time that a Commission remedy should remain in effect. . . . In *First Jersey*, for example, the special examiner was to make one report within ninety days, although the injunction is permanent. In the case of Mr. Antoniu, his bar from association with a broker-dealer was made permanent. Cox Speech, *supra* note 14, at 5 (citing SEC v. First Jersey Sec., Inc., Litigation Release No. 10,616, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,848, at 90,231 (Nov. 26, 1984)).

16. See Notice by the Nat'l Ass'n of Sec. Dealers, Inc., Exchange Act Release No. 34-22383, 33 SEC Docket 1318, 1319 (Sept. 3, 1985) (directing the NASD to bar Adrian Antoniu from becoming associated with a member firm).

17. See Jeffrey B. Maletta & Neil S. Lang, *Sanctions and Collateral Consequences*, in THE SECURITIES ENFORCEMENT MANUAL 131, 158-59 (Richard M. Phillips ed., 1997).

[T]he Commission often bars an individual permanently with a right to reapply after stated periods of time . . . . Although a so-called permanent bar with no stated time period is generally regarded as harsher than one which specifies a right to reapply after expiration of a stated time period, theoretically, a barred person can apply for reinstatement at any time.

*Id.* (citation omitted); see also SEC Rule of Practice 193(a)(2), 17 C.F.R. § 201.193(a)(2) (2008) (allowing application for consent to associate where initial bar "contains a proviso that application may be made to the Commission after a specified period of time.").

18. The relevant language from the speech is as follows:

My experience indicates that the word "permanent" may not always mean what it says. It is apparently accepted wisdom that inside every permanent SEC order or injunction—despite its broad, unwavering terms—is a temporary one struggling to get out. . . .

. . . . The Commission is aware that its remedies may impose restraints for what appears to be a very long time. If an individual or firm petitions for relief based not on changed circumstances but on a general belief in the clemency or forgetfulness of the Commissioners and staff, I believe this is a prime indicator that we have an "indifferent violator" on our hands, and that modification of the remedy is not warranted.

Cox Speech, *supra* note 14, at 5-6.

Professor Richard Pierce, in a thoughtful article discussing this case,<sup>19</sup> affirmed the general leniency that courts should afford agency members in their policy statements.<sup>20</sup> Nonetheless, he found the reference in Commissioner Cox's speech "ambiguous," asking rhetorically "[w]as Commissioner Cox's reference to Antoniu an expression of his policy preference that all intentional violators be permanently barred, or was it instead an indication that he had already resolved the contested issues of adjudicative fact necessary to determine an appropriate individualized sanction for Antoniu?"<sup>21</sup> With all due respect to Professor Pierce's question, I believe the answer is clear: It was a policy judgment based on the illustrative facts of *Antoniou I*, and the speech was intended to serve important policy purposes.<sup>22</sup>

The statements in Commissioner Cox's speech about Antoniu's case were precisely the kind of policy judgments—as opposed to “adjudicative facts”—that agency members are entitled to make.<sup>23</sup> The adjudicative facts in *Antoniou II* were (1) the existence of Antoniu's prior criminal conviction (a fact already on record) and (2) whether it would be “in the public interest” to bar Antoniu from association with *any* registered broker dealer.<sup>24</sup> Contrary to how the language of the speech has been interpreted,

19. Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481 (1990).

20. Indeed, Professor Pierce suggests that the lower courts may be out of touch with the Supreme Court cases. *See id.* at 494 (“I suspect . . . that the Supreme Court would be more tolerant of outspoken agency decisionmakers than were the judges in *Cinderella* and *Antoniou*. . . . It is unrealistic to expect either [FTC Chairman Dixon or Commissioner Cox] not to have developed opinions on the case prior to formal action as decisionmaker.”).

21. *Id.* at 494–95.

22. I believe that Professor Pierce answered this question even before he asked it.

The references to specific cases were intended only to illustrate the kind of policies the decisionmaker preferred. As all teachers know, examples help students put meat on the bones of abstractly expressed rules or policies. Moreover, the purpose of the speeches in each case was to further another important goal of the administrative state—that of helping regulatees understand the agency's policies so that they can shape their conduct accordingly.

*See id.* at 494.

23. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 346 nn.9–10 (3d ed. 1991) (citing *NLRB v. Honaker Mills*, 789 F.2d 262 (4th Cir. 1986); *Samuel v. Bd. of Chiropractic Exam'rs*, 712 P.2d 132 (Or. App. 1985); *In re Rollins Envtl. Servs.*, 481 So. 2d 113 (La. 1985); *New York State Inspection, Sec. & Law Enforcement Employees v. Pub. Employment Relations Bd.*, 629 F. Supp. 33 (N.D.N.Y. 1984)).

Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion.

Pierce, *supra* note 19, at 482 n.6 (quoting KENNETH CULP DAVIS, 2 ADMINISTRATIVE LAW TREATISE § 12:3, at 413 (2d ed. 1979)).

24. *See* Securities Exchange Act § 15(b)(6)(A), 15 U.S.C. § 78o(b)(6)(A) (2000) (listing the public interest as a relevant factor in SEC deliberations on whether to grant or

the Commission made no judgment about the “public interest” in the *Antoniou II* proceeding. Indeed, Commissioner Aulana L. Peters restated the policy judgments made in Commissioner Cox’s speech when she spoke to the very same group two years later, which was before the Commission heard the *Antoniou II* appeal.<sup>25</sup> And in any event, Commissioner Cox abided by the requirements of the prejudgment doctrine and, in an abundance of caution, recused himself from the *Antoniou II* proceeding, except for entertaining an offer of settlement as discussed next.

### III. THE OFFER OF SETTLEMENT

The *Antoniou II* proceeding was conducted before an SEC administrative law judge pursuant to delegated authority.<sup>26</sup> The Division of Enforcement, which prosecuted the administrative proceeding, brought Antoniu’s offer of settlement to the Commission. The Commission routinely considers such offers in the midst of an administrative proceeding. The Commission concurred with the staff’s recommendation to reject Antoniu’s offer.<sup>27</sup>

Offers of settlement place *any* agency (and any member of any agency) in a difficult situation. Rejecting an offer of settlement might be construed as prejudgment of the merits of a case that the agency might later be called to adjudicate. This effect occurs regardless of any speeches anyone might have made.<sup>28</sup> However, the law in this area is relatively clear: such combination of functions does not offend the Constitution.

It is . . . very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. *This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.*<sup>29</sup>

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deny applications for association with a broker or dealer). Professor Pierce questions the need for *any* hearing in such cases, where the predicate facts for the agency’s actions have been established as a matter of law. Pierce, *supra* note 19, at 494. However, Congress’s direction to consider the “public interest” in such proceedings makes clear, in my opinion, the need for a further hearing on contumacy or responsibility of the respondent apart from the predicate proceeding.

25. See Aulana L. Peters, Comm’r, Sec. Exch. Comm’n, Remarks to the Twentieth Annual Rocky Mountain State–Federal–Provincial Securities Conference 1 (Oct. 16, 1987), available at <http://www.sec.gov/news/speech/1987/101687peters.pdf> (“In Commissioner Cox’s two appearances at this conference, he addressed the question of what remedies were available to the Commission to deal with securities laws violators. In 1985, Charles suggested that the Commission should be prosecuting vigorously unlawful conduct by ‘indifferent’ and ‘chronic’ violators. I wholeheartedly agree.” (citation omitted)).

26. 17 C.F.R. § 200.30-9 to -10 (2008).

27. See Proffer of Evidence, *supra* note 5, at 3 (rejecting Antoniu’s offer of settlement).

28. Antoniu, indeed, made such a motion to disqualify not only Commissioner Cox, but the Chairman and all the other Commissioners based on this theory; this motion was rejected. See *Antoniou v. SEC*, 877 F.2d 721, 723–24 (8th Cir. 1989).

29. *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1106 (D.C. Cir. 1988) (quoting

Furthermore, respondents in administrative proceedings who wish to make offers of settlement to the Commission are routinely required to execute waivers of prejudgment claims.<sup>30</sup> This waiver is now part of the Commission’s Rules of Practice.<sup>31</sup>

#### IV. PROCEEDINGS BY DELEGATED AUTHORITY: RECUSAL FROM WHAT EXACTLY?

The administrative law judge ultimately ruled against Antoniu on the merits of his case in *Antoniou II*. There were then two other actions taken in the case: a grant of Antoniu’s appeal of this decision to the full Commission and a grant of additional time for the Division of Enforcement to file a reply brief. Both of those decisions were made by delegated authority and never reached the Commission.<sup>32</sup> The proceeding never again appeared before the Commission until the oral argument of Antoniu’s appeal. Commissioner Cox recused himself as soon as anyone was aware that Antoniu’s case was again before the full Commission.

The Eighth Circuit’s conclusion that Commissioner Cox “refused to recuse himself” and “continued to participate in the . . . proceedings”<sup>33</sup> was based on the absence of a formal record of *any* proceeding before the Commission at which *any* Commissioner could have noted his or her recusal “on the record.” It is difficult to recuse oneself from a nonexistent proceeding.<sup>34</sup> Perhaps this is one lesson from the case for agency lawyers.

Commissioner Cox did recuse himself from oral argument and any deliberation on the merits of Antoniu’s appeal. This is clear in the record,<sup>35</sup> but the Eighth Circuit incorrectly characterized his recusal as coming

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Withrow v. Larkin, 421 U.S. 35, 56 (1975) (emphasis added)). In *Blinder*, which was decided shortly before the Eighth Circuit’s decision in *Antoniou*, the court refused the defendant’s petition to disqualify SEC Commissioners from an administrative proceeding who had participated in prior litigation against him. See *Blinder*, 837 F.2d at 1104–05 (noting an Administrative Procedure Act exemption for agency members, e.g., Commissioners, from the prohibition against agency staff combining prosecutorial and adjudicative functions in the same case).

30. No such waiver was ever mentioned in this case by the Commission or the court.

31. 17 C.F.R. § 201.240(c)(5) (2008).

32. See *id.* § 200.30-14(g)(1)(v) (2008) (noting that a decision to grant a petition for review can be delegated); *id.* § 200.30-5(a)(4)(i) (explaining that the decision to grant extensions to file a brief can be delegated); see also Proffer of Evidence, *supra* note 5, at Ex. 1, ¶¶ 6–7 (noting the two actions taken by delegated authority).

33. *Antoniou v. SEC*, 877 F.2d at 723.

34. See Proffer of Evidence, *supra* note 5, at 2 (“There is no ‘document of recusal’ in the administrative record, nor does one exist in other files.”).

35. The Commission noted in its opinion in the *Antoniou II* proceeding that “[w]e need not reach Antoniu’s argument that Commissioner Cox is additionally disqualified because he referred to Antoniu in a speech. Commissioner Cox has recused himself from *all* participation in the decision of this matter.” *In re Antoniu*, 48 S.E.C. 909, 912 n.10 (1987) (emphasis added).

“finally . . . the day the . . . opinion of the Commission was handed down.”<sup>36</sup> It is unfortunate that the court chose to speak on this point as an advocate instead of a finder of facts. There are no facts to support the court’s conclusion that Commissioner Cox “continued to participate” in the proceedings; rather, the facts indicate that Commissioner Cox abided, in an abundance of caution, by the well-understood agency prejudgment principles. The court’s characterization of his conduct as somehow behind the scenes and nefarious cannot not be drawn from the record<sup>37</sup> and reflects a lack of understanding about how administrative agencies operate.

The SEC has, to my knowledge, always scrupulously attended to all these well-known rules and has erred, if at all, on the side of insulating the Commissioners from the staff, which has sometimes resulted in the Commissioners’ having to make decisions “alone at the top” in administrative proceedings. The Commission can be left unable to consult with any members of its staff, other than those dedicated to the consideration of appeals and agency opinions (presumably this is the case in most agencies). In my experience, the Commissioners and staff of the SEC are, were, and always have been scrupulously fair and honest in avoiding the appearance of prejudgment.

It is possible, however, that some sort of institutional bias in favor of the Commission’s legislative and administrative efforts may color its judicial determinations. Former SEC Commissioner Edward H. Fleischman offered an assessment of the mix:

My experience suggests that consistency in SEC quasi-executive and quasi-legislative policymaking has assumed an increasingly self-generative and self-vindicative character, demanding the ratification afforded by the quasi-judicial process with its appearance of disinterestedness. Ultimately, in my view, the more consistency the SEC as a body achieves in application of administrative policies, the more committed the SEC as a body becomes to vindication, in whatever capacity it is acting, of the policies thus consistently applied.<sup>38</sup>

Perhaps this is true, but in this instance Commissioner Cox exercised the well-intentioned judgment to not participate in the judicial “vindication” of the policies he endorsed. That the record failed to reflect this judgment and that a court was therefore able to entertain a wildly fanciful explanation of what might have happened is, in my opinion, most unfortunate.

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36. *Antoniou v. SEC*, 877 F.2d at 723.

37. The sentence of the opinion—which is, in my opinion, the most offensive—states, “The motion [to disqualify the entire Commission based on rejection of the offer of settlement] was denied and specifically, Commissioner Cox *refused to recuse himself*.” *Id.* at 723 (emphasis added). This characterization is wholly unsupported and unwarranted.

38. Edward H. Fleischman, *Toward Neutral Principles: The SEC’s Discharge of Its Tri-Functional Administrative Responsibilities*, 42 CATH. U. L. REV. 251, 254 (1993).



## EPILOGUE

What happened after this debacle? Antoniu’s case was remanded to the Commission following denial of certiorari by the Supreme Court.<sup>39</sup> Pursuant to Antoniu’s offer of settlement, the Commission barred him from the securities industry in 1992 with leave to reapply in six months.<sup>40</sup> Antoniu then changed his name and turned his efforts to other venues. In 2001, he was ordered in an SEC administrative proceeding to pay a civil fine of \$100,000 and barred from association with any broker or dealer.<sup>41</sup> In 2005, he settled a civil lawsuit in which he admitted violating the antifraud provisions of the securities laws and agreed to pay a civil penalty of over \$400,000.<sup>42</sup>

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39. *Antoniou v. SEC*, 877 F.2d 721, *cert. denied*, 494 U.S. 1004 (1990).

40. *Antoniou*, Exchange Act Release No. 34-30624, 51 SEC Docket 485 (Apr. 23, 1992). With regard to the amount of time before reapplication, see *supra* note 17 and accompanying text.

41. *Rooney*, Exchange Act Release No. 34-44414, 75 SEC Docket 415 (June 13, 2001).

42. *SEC v. Alexander*, Litigation Release No. 19,100 (Feb. 25, 2005), *available at* <http://www.sec.gov/litigation/litreleases/lr19100.htm>.

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# IMPROVING THE ADMINISTRATIVE PROCESS: A REPORT TO THE PRESIDENT-ELECT OF THE UNITED STATES (2008)\*

AMERICAN BAR ASSOCIATION  
SECTION OF ADMINISTRATIVE LAW  
AND REGULATORY PRACTICE†

## INTRODUCTION

As the forty-fourth American President, you will face a pressing need to improve the process by which federal agencies make law and affect the lives of millions of Americans. The American Bar Association's Section of Administrative Law and Regulatory Practice has prepared this report for your consideration in the hope that we have identified focused, non-partisan strategies for improvement and reassessment. The Section is composed of specialists in administrative law. Both politically and geographically diverse, they include private practitioners, government attorneys, judges, law professors and member of nonprofit organizations. Officials from all three branches of the federal government sit on its

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\* We are pleased to reprint the original language of this Report as a service to our readers. —EDS.

† The recommendations in the report were endorsed in principle by a vote of the Council of the Section on August 8, 2008. The Council gave final approval to the report on September 29, 2008. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

This report was prepared for the Section by an Ad Hoc Committee on Administrative Law Transition. Members of the Committee: Michael Asimow, Bernard W. Bell, Cary Coglianese, James W. Conrad, Mariano-Florentino Cuellar, Cynthia A. Drew, John Duffy, Fred Emery, Cynthia Farina, H. Russell Frisby, William Funk, Philip J. Harter, Michael Herz, Otto Hetzel, William S. Jordan III, Eleanor D. Kinney, Katy Kunzer, Renee M. Landers, Ronald Levin, Jeffrey Lubbers, William V. Luneburg, Randolph J. May, Richard S. Murphy, Paul R. Noe, James O'Reilly, Richard Parker, Ed Rubin, Sidney Shapiro, Peter Strauss, Thomas Susman, Wendy Wagner, Joe D. Whitley, The Honorable Ann Young, and John Hardin Young.

governing Council. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

In generating this report, the Section sought at every stage to achieve consensus among the broad range of interests represented in our membership. As a result, we believe the recommendations discussed in the report should have wide support and be susceptible of early acceptance.

#### RECOMMENDATIONS

In brief, our report urges you, first, to make prompt appointments of well qualified individuals to serve in your administration. Second, we urge you to join forces with Congress to rationalize and streamline the rulemaking process. More specifically, in overseeing the rulemaking process, you should (a) support the use of sound scientific risk assessment, (b) aggressively advance the use of information and communication technologies, (c) insist that agencies receive the funding they need for excellence in science and technology, and (d) seek to improve the management of the regulatory process. Third, we urge you to ensure that when federal agencies act to preempt state law, they should address these issues in explicit terms and act only after appropriate consultation with affected state officials. Fourth, we urge you to support ABA-sponsored legislation to reform the adjudication provisions of the Administrative Procedure Act. Finally, we urge you to take steps to revive the Administrative Conference of the United States, which Congress has recently reauthorized but not yet funded.

#### *Appointment of Your Administration*

Among your very first decisions will be to choose the appointees who will people your administration. At the highest level, this requires senatorial confirmation; but many appointments are made by you alone or by those whom you appoint to high office with senatorial confirmation. These are political judgments at root, yet we believe law and experience offer perspectives that are appropriate for us to address here.

*First, we exhort both you and the Senate to act promptly.*

Unfilled vacancies imperil effective administration. Nonetheless, past Presidents have not always been prompt in sending nominations forward, and the Senate has not always been prompt in considering nominations

once sent. Your primary control over the administrative apparatus does not reside in your ability to issue orders or to monitor performance, but rather is exercised through your selection of sound administrators to lead those agencies. That counsels deep and urgent attention to the appointment process on all sides.

*Second, effective administration of regulatory and beneficiary programs requires the appointment of persons of high ability to positions of leadership.*

We recognize that Presidents regularly appoint people who have actively participated in the successful presidential campaign, or who are party loyalists, or who are promoted by influential constituency groups. Appointments stemming from these factors can, of course, be appropriate. Nevertheless, we, as practitioners and others involved in the substantive areas that will be directly affected by your appointments, urge you not to allow those factors to overshadow qualities such as competence, leadership ability, and familiarity with the programs that will fall within their charge. Such qualifications in the people you appoint are important to the fulfillment of your own constitutional responsibility to take Care that the Laws be faithfully executed.

A related and equally vital quality for you to seek in your appointees will be a sense of being committed to carrying out the programs that they will respectively be asked to administer. “Faithful execution of the laws” begins with a President and top officials who are committed to fulfilling the objectives charted by statute. Of course, there may be times when a particular statutory requirement tends to undermine the effectiveness of the program as a whole, or conflicts with your appointees’ policy preferences, or your own. When such conflicts arise, efforts by you and your administration to secure legislative revision or repeal of those mandates can be entirely appropriate. Unless and until such change occurs, however, the principle of the rule of law dictates that such statutory provisions must be followed.

*Third, we observe that many time-honored qualifications for presidentially appointed offices are embedded in legislation.*

We know that some argue that virtually any statutory qualifications requirement unconstitutionally infringes upon the President’s appointment powers. Whatever conclusions people might reach on that constitutional issue, our judgment is that many of these statutory requirements have proved over time to be salutary. For example, the requirements that the Solicitor General of the United States be a person “learned in the law” and

that the Surgeon General be appointed from individuals who “have specialized training or significant experience in public health programs” have surely enhanced the stature of their offices, contributing to the respect they have generally enjoyed. The statutory exclusion of active duty personnel from top posts in the Pentagon has surely contributed to the maintenance of the fundamental principle of civilian control over the military.

Statutory qualifications sometimes reflect more political choices. These, too, have generally been salutary. As a means of assuring relative balance in the performance of the multi-member authorities it has created, Congress has often written limitations on party status into the governing statutes so that no more than a bare majority may belong to the same party. In other contexts, it has specified representation of particular interests on these bodies. For example, a statute provides that in making appointments to the Federal Reserve Board, “the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographic divisions of the country.” Compliance with provisions of this kind can help an administration to secure the cooperation of disparate interests essential to the success of the governmental program.

In short, we believe that these sorts of statutory qualification requirements warrant your respect. With regard to new legislative proposals including qualifications requirements, we urge you to engage with Congress during the legislative process if you believe that such requirements unduly constrain the range of your potential appointees in some concrete way.

### *Oversight and Improvement of the Rulemaking Process*

Notice-and-comment rulemaking is a cornerstone of the Administrative Procedure Act (APA), the basic charter of federal agency procedure. This process was intended to provide an efficient and open method of promulgating rules. Today, however, it is neither as efficient nor as open as it could be. In order to promote these values, while also ensuring that administrative rulemaking serves the priorities of the incoming Administration, we recommend that, upon taking office, you undertake the following courses of action:

*First, we urge you to ensure that White House oversight of agency rulemaking is transparent and efficient.*

The system of centralized executive review of agency rulemaking evolved under several administrations and is currently embodied in Executive Order 12866, which has been in place during the past two

presidential administrations, with limited amendments adopted in 2001 and 2007. The practice of White House oversight and coordination it reflects has longstanding bipartisan (and ABA) support as an important element in realizing the aims of efficient, coordinated, yet reasonably open administration in a democratic system.

The current system has two elements: coordination of the overall rulemaking programs of agencies and review of particular rulemaking proposals. Both elements are sound, but in their details may warrant reflective reconsideration. At the initial stage of setting priorities, your administration has important interests in coordination among agencies and in securing the priorities of your administration. Accordingly, we recommend that you make more effective use of the planning mechanism of Executive Order 12866 by convening the agency heads early in your administration to coordinate regulatory priorities. Other issues of possible concern at the initial stage include:

- (i) whether the planning process strikes an effective and appropriate balance among the respective responsibilities of all its participants, including those whom you (with the Senate's blessing) will have made directly responsible for agency administration; and
- (ii) whether additional measures of transparency might be warranted to assure the public's trust that decisions taken are grounded in proper concerns of public policy.

At the following stage, that of reviewing agency efforts in particular rulemakings, the important considerations are those of efficiency, faithfulness to underlying legislative mandate, and, again, political acceptability. At present, review is limited to "significant" regulatory actions and guidance documents (usually those with high economic consequences or important policy implications); we support maintaining this limitation in the interest of efficiency. Assiduous avoidance of delays and continuing respect for openness are also important elements in the process of centralized regulatory review.

*Second, we urge you and Congress to join forces to rationalize and streamline the rulemaking process.*

Over time, both Congress and the executive have laden the process of informal rulemaking with multiple requirements for regulatory analysis. Viewed in isolation, a good case can be made for each of these requirements. Their cumulative effect, however, has been unfortunate. The addition of too many analytical requirements can detract from the seriousness with which any one is taken, deter the initiation of needed rulemaking, and induce agencies to rely on non-regulatory pronouncements that may be issued without public comment procedures but have real-world

effects. In 1992, the ABA House of Delegates highlighted these concerns when, at our Section's urging, it unanimously called upon the President and Congress to "exercise restraint in the overall number of required rulemaking impact analyses" and "assess the usefulness of existing and planned impact analyses."

The Section anticipates that the next four years will be a time of legislative as well as executive interest in rulemaking. In your interactions with Congress on these important issues, you and your Administration should work to replace the current patchwork of analytical requirements found in various statutes and Executive Orders with one coordinated statutory structure. This structure should work to relate rulemaking requirements to the importance of a given proceeding. "Rulemaking" is not an undifferentiated process—some rules have major economic or social consequences, while many others are relatively minor in scope and impact. Thus, detailed requirements should be reserved for rules of greatest importance, and uncomplicated procedures should be used for routine matters of less public significance.

We urge consideration, as part of that process, of the effectiveness of cost-benefit analysis in the regulatory oversight program. Cost-benefit analysis is valuable as a metric for understanding the economic impact of regulation; at the same time, the rulemaking proceedings within which it is conducted must ultimately culminate in a decision that implements the normative values embodied in the agency's enabling legislation. Controversies over the strengths, limitations, and consequences of cost-benefit analysis as it actually operates in practice have given rise to a substantial literature, both academic and popular. The advent of a new presidential administration furnishes a very appropriate occasion for taking stock of that debate. Accordingly, we hope that you and your appointees will be attentive to these varying appraisals of cost-benefit analysis in the course of establishing your own administration's program for regulatory oversight.

*Third, we urge you to support the use of sound scientific risk assessment.*

Many agencies are responsible for regulating risks to health, safety, or the environment. In order for them to implement these missions, they must have adequate expertise in state-of-the-art risk and benefit assessment methods to support optimal risk management. Under the sponsorship of our Section, the ABA has developed a detailed recommendation containing principles for the use of risk assessment in the regulatory process. See <http://www.abanet.org/adminlaw/risk02.pdf>. The recommendation urges, for example, that risk assessments should be based on a careful analysis of



the weight and quality of the scientific evidence, including such site-specific and substance-specific information as may be available, as well as information about the range and likely distribution of risk. It also emphasizes that scientific findings and professional judgment in risk *assessments* should be explicitly distinguished from the policy judgments in risk *management*. In addition, the recommendation provides that the process should be kept as free as possible from political bias, and that risk assessments should explicitly acknowledge and explain the limitations of their methodology, data, and assumptions. As your incoming administration undertakes to familiarize itself with the challenges of risk assessment and risk management, we commend the ABA principles to its attention.

*Fourth, we urge your Administration to aggressively advance the use of information and communication technologies in rulemaking.*

Effective use of such technologies can promote transparency, enhance the breadth and quality of public participation in regulatory decisionmaking, help agencies make better rules more efficiently, and provide (for the first time) readily accessible inter-agency and cross-agency rulemaking data for use in program oversight and evaluation.

Progress in technology-supported rulemaking (“e-rulemaking”) has already begun with the creation, over the last six years, of a government-wide electronic docket and database of rulemaking materials (the Federal Docket Management System, or “FDMS”) and a web portal, regulations.gov, that allows the public to view and comment on proposed rules. To tap the full potential of e-rulemaking, however, much more needs to be done. A national blue-ribbon Committee on the Status and Future of Federal e-Rulemaking, established under the auspices of the Section, has concluded an 18-month study of FDMS and regulations.gov, and you will receive its report and recommendations. Here, we summarize some of its principal conclusions which we commend for your consideration.

- To gain the benefits of strong, centralized leadership, a lead agency should be charged with developing a core system for e-rulemaking to be shared by all agencies. Appropriations should be specifically dedicated to this task.
- To gain the benefits of individual agency initiative and experimentation, this core system should adopt an open architecture that encourages agencies to customize their e-rulemaking efforts in innovative ways designed to serve their particular stakeholders.
- To encourage development of an administrative culture that embraces e-rulemaking, your administration should ensure that agencies have the resources and leadership needed to comply with the E-Government Act of 2002, which, to the degree practicable,

requires agencies to make all materials in their rulemaking dockets promptly available on-line to the public.

- To enhance public understanding of agency policies, agencies should use the on-line electronic libraries they are required to keep under the Electronic Freedom of Information Act to make available, and readily searchable, important yet often hard-to-find items such as general statements of policy and interpretive rules. Agencies that make such materials available in their own e-libraries should also make them available from the centralized FDMS so that both public users and users in other agencies can retrieve materials in either location through a single search request.

Finally, to help realize the goal of easy online access to rulemaking materials government-wide, we urge you to make efforts to bring the independent commissions into the cross-government system.

*Fifth, we urge you to insist that agencies receive the funding they need for excellence in science and technology.*

When regulatory priorities and programs are grounded in robust scientific and technical analysis, the benefits are enormous; conversely, the risks of debilitated, under-performing programs are enormous—indeed, they are increasingly apparent. Over the years, Congressional mandates and regulatory demands on many agencies have grown dramatically, but these demands often have not been matched by adequate funding. The burgeoning growth in scientific techniques and understanding only heightens the hurdles facing the agencies.

Agencies that regulate risks to health, safety and the environment touch the lives, health and well-being of all Americans and have a major impact on the economy and security of our nation. Other countries around the world traditionally have looked to the United States for leadership on scientifically sound, risk-based regulation. Federal agencies will not be able to fulfill their missions if their expertise and organizational structure are weak. Effective regulation and American leadership in the world on regulatory issues surely will not be possible if the agencies cannot even keep pace with scientific advances. Our nation is at risk if the scientific and technical expertise of the agencies is inadequate.

For example, the Food and Drug Administration—and until recently the Consumer Product Safety Commission—have not been adequately funded to address important safety challenges during a time when international trade has dramatically increased and public confidence has fallen. EPA has not been adequately funded to implement chemicals management initiatives even as chemicals management policy is changing around the world.

Consider a recent report by FDA's Science Board raising alarm that FDA cannot fulfill its mission because its scientific base has eroded, its scientific organizational structure is weak, its scientific workforce does not have sufficient capacity and capability, and its information technology infrastructure is inadequate. A crucial part of the problem is the lack of resources during a time of revolutionary change in science and ever-increasing demands on the agency. The result is reactive priority-setting and a fire-fighting regulatory posture instead of a culture of proactive regulatory science.

As FDA's Science Board stated: "Inadequately trained scientists are generally risk-averse, and tend to give no decision, a slow decision or, even worse, the wrong decision on regulatory approval or disapproval." Adequate resources are imperative to bolster the agencies' science capacity and capability, to implement cutting-edge approaches to modeling, risk assessment and data analysis, and to bolster agencies' information infrastructure.

*Sixth, we urge you to ensure that attention be given to improving the management of the regulatory process.*

The development of regulations is a complex task that necessarily draws on a variety of technical disciplines and requires the coordination of multiple levels within an agency and among agencies. Moreover, agencies are expected to work with interested stakeholders in developing and implementing regulatory objectives. The efficient operation of government and the ability of an administration to achieve its policy goals require that this process be managed appropriately. The management of regulation currently enjoys little support in the form of funding, research, technical innovation, and career development from the President, Congress, the public management, and academic communities. But it is essential. It requires, among other things, knowledge, techniques, and experience needed for effective engagement of internal and external stakeholders. Because of the importance of rulemaking, we recommend that you, as the new President, should ensure that management of the regulatory process will occupy a more prominent position in major government-wide management initiatives and programs.

#### *Preemption of State Law by Agency Action*

Since the earliest days of the Republic, there have been conflicts between federal and state regulation of the same matters. In part as a result of congressional ambiguity, federal agency preemption of state law remains a nationally important issue. Of particular concern to many have been

statements by agencies asserting that their regulations preempt state tort law, despite the absence of clear statutory language mandating or authorizing such preemption. It is not our purpose to take a side in these debates. Rather, it is our hope that, whatever policies your administration may pursue, agencies subject to your direction will deal with this issue in a manner that is explicit, transparent, and open to public participation, particularly the participation of those state entities most directly affected by possible preemption. The ABA has long recommended that federal agencies should clearly and explicitly address preemption issues in the course of regulatory decisionmaking.

The ABA has also recommended that when an agency proposes to preempt a state law or regulation, it should attempt to provide affected states notice and an opportunity for appropriate participation in the proceedings. Similar provisions have been incorporated into a series of presidential executive orders culminating in EO 12988 and EO 13132, both issued by President Clinton and continued by President Bush.

It is fair to say that agencies have not faithfully adhered to these principles. We do believe, however, that preemption is important enough that state and local officials should be informed of proposed agency actions that may have preemptive effect and should be offered an opportunity to consult with the agencies about those proposed actions. Moreover, in any proposed or final rule or order, an agency should, where relevant and to the extent feasible, include express language regarding what it believes is the preemptive effect of its action and the source of the authority for such preemptive effect. Such clarity and publicity will aid regulated entities, regulatory beneficiaries, state and local officials, and courts in determining the meaning and effect of federal regulations.

*Enhancing the Legitimacy and Uniformity of Agency Adjudications*

*We urge you to support legislation that would enhance both the legitimacy and uniformity of agency adjudicatory decisions.*

When the Administrative Procedure Act was enacted in 1946, its adjudication provisions set forth a standard package of procedures, including use of independent, impartial hearing examiners, a hearing process, and separation of the functions of investigation, prosecution, and decision. At the time, there was a widespread expectation that when agencies were required by statute to provide hearings in adjudications, the hearings would have to comply with these new provisions, particularly the mandate for an independent, impartial decisionmaker and separation of functions.

The Act also specifies, however, that these procedural protections are required only for adjudications “required by statute to be determined on the record after opportunity for an agency hearing.” Many courts—including the D.C. Circuit—have ceded broad discretion to agencies to determine for themselves whether the language of their organic statutes triggers application of APA formal adjudication requirements. As a result, even when conducting hearings in matters where the decisionmaker is limited by statute to the record created by the parties, many agencies have managed to avoid the APA’s adjudication procedures.

In 2005, the American Bar Association adopted Resolution 114, urging Congress to provide the APA protections of an impartial decisionmaker (not necessarily an Administrative Law Judge), separation of functions, and prohibition on *ex parte* contacts to all non-APA statutory hearings in which the decisions are to be made based upon the evidence compiled in the statutorily required hearing. We urge you to support enactment of legislation embodying these requirements.

#### *Administrative Conference of the United States*

*We urge you to promote the revival of the Administrative Conference of the United States (ACUS), a governmental entity that systematically promoted improvements in the administrative process.*

For over 25 years, ACUS advised the federal government on and coordinated important reforms to the administrative procedural law that is the backbone of federal regulation. ACUS enjoyed strong bipartisan support and assisted all three branches of government from 1964 until it lost its funding during the appropriations process in 1995. Its underlying statutory authority remains, however.

ACUS was a bargain—it employed a very small staff and attracted numerous academic consultants, on an as-needed basis, who received very modest payment for engaging in substantial research tasks. ACUS also leveraged the volunteer efforts of a great many administrative law luminaries—government officials, private lawyers, judges, and academics—who served in a variety of capacities and attended semiannual meetings for no compensation beyond travel reimbursement. The result, as former OMB Director James Miller noted, was a highly productive forum in which experienced persons deliberated with breadth of input, depth of knowledge, and common interest in developing consensus-based recommendations. As explained in a detailed Congressional Research Service (CRS) memo in September 2005, and follow up testimony in 2007, ACUS proved to be an extremely useful and cost-effective agency. Indeed,

federal agencies currently are spending more money to address issues that ACUS could resolve than ACUS's entire proposed budget.

A large proportion of the Administrative Conference's recommendations eventually achieved implementation in whole or part. As a result, the Conference generated significant improvements in the administrative process. For example, it prepared influential studies and recommendations on such subjects as Social Security procedures, Freedom of Information Act reforms, user fees, and procedural aspects of protecting whistle blowers in the health and safety areas. It was at the forefront of encouraging agency use of alternative dispute resolution (ADR) techniques which can save considerable resources. The Conference took a leading role in drafting the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act, and then worked to build agencies' capacities to implement those statutes, offering expertise and training opportunities beyond the scope of what an individual agency could do alone.

In 2004, Congress held hearings on ACUS reauthorization during which all six witnesses—including Supreme Court Justices Stephen Breyer and Antonin Scalia—praised the work and cost-effectiveness of the agency. Following those hearings, Congress unanimously approved bipartisan legislation to reauthorize and resurrect the agency, which President Bush signed into law on October 30, 2004. Regrettably, funds were not appropriated before the reauthorization period expired at the end of FY 2007. Therefore, new legislation was introduced with bipartisan support in September 2007, H.R. 3564, to renew ACUS' reauthorization through FY 2011. The President signed the bill, as amended, into law on July 30, 2008, as Public Law 110-290.

Since ACUS ceased operation, no entity in the executive branch regularly convenes officials from across the government, along with interested private practitioners and academics, to deliberate about how to improve the fairness and effectiveness of administration. Such a forum for collegial self-critique and development of best practices is eminently desirable. In this regard, two points are of critical importance: First, the Conference did not and would not have the authority to implement any of its recommendations; rather, its only role was to provide advice for others to consider and implement when and where they believe it is appropriate. Secondly, ACUS assiduously avoided political issues. Its recommendations addressed only the administrative process and not broader political issues as to whether governmental action should or should not be taken on the basis of broader policy considerations.

An adequately funded ACUS would provide a forum that could craft nonpartisan solutions to a host of pressing administrative law and regulatory controversies. These include the role of science in agency

decisionmaking, electronic rulemaking, possible codification of the process of presidential review of rulemaking, the proper role of the Information Quality Act, refinements to the Congressional Review Act, and many others.

Accordingly, the Section urges the incoming President to support the re-establishment of the Administrative Conference. The agency should continue to be structured to give non-partisan analysis and advice; it should be afforded independence from particular policy-based responsibilities, so that it will maintain its credibility as a detached analyst. To this end, the new President should direct that funds be identified for such an agency in his budget, and should support necessary steps by Congress to provide appropriations for the agency. These steps would make a major contribution to enhancing the government's capacity to improve itself in our era of dynamic change.

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